



Department  
for Business  
Innovation & Skills

EMPLOYMENT RIGHTS ON THE  
TRANSFER OF AN UNDERTAKING

A guide to the 2006 TUPE Regulations (as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014) for employees, employers and representatives

JANUARY 2014

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## Introduction – The revised 2006 TUPE Regulations and the 2014 Regulations

On 6 April 2006, the revised Transfer of Undertakings (Protection of Employment) Regulations (called ‘the TUPE Regulations’ and ‘the Regulations’ in this guidance) came into force<sup>1</sup>.

The TUPE Regulations are amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014<sup>2</sup> (called ‘the 2014 Regulations’ in this guidance), which come into force on 31 January 2014. These amendments do not extend to Northern Ireland. These amendments will not apply in respect of any transfers which take place on or before 30 January 2014.

This guidance covers the TUPE Regulations (and to some extent other similar transfers) as amended by the 2014 Regulations. The box on page 6 summarises the main changes the 2014 Regulations introduce. The previous guidance on the TUPE Regulations at [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/14973/2006-tupe-regulations-guide.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/14973/2006-tupe-regulations-guide.pdf) (dated July 2009) may be of assistance in respect of transfers that took place on or before 30 January 2014, although it has not been updated in light of more recent case law.

The TUPE Regulations provide employment rights to employees when their employer changes as a result of a transfer of an undertaking. They implement the European Union Acquired Rights Directive (originally Directive 77/187/EEC, amended by Directive 98/50 EC and consolidated in Directive 2001/23/EC).

Employees have certain employment rights when their employer changes as a result of a transfer of an undertaking – for example, when employees in a business are moved to work in a new business following a buy-out. Generally, these ensure that employees are not disadvantaged when they move employer. The appropriate rights and obligations are set out in the TUPE Regulations (as amended by the 2014 Regulations). This document provides guidance to employers, employees and their representatives in order to help them understand the TUPE Regulations and to help parties comply with their legal requirements. It gives general guidance only and should not be regarded as a complete or authoritative statement of the law. Only the courts can give an authoritative interpretation of the legislation and the content of this guidance may be affected by subsequent judicial decisions.

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<sup>1</sup> The Regulations are entitled the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006 No 246). They updated the Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/1794), as amended.

<sup>2</sup> The Regulations are entitled The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (SI 2014 No. 16).

Other rights already conferred by existing employment legislation are not affected by the Regulations and are explained in other guidance. This can be found at [www.gov.uk](http://www.gov.uk). If, when you have read this document, you have any questions about the Regulations, you should contact Acas (the Advisory, Conciliation and Arbitration Service) on 08457 47 47 47 or at [www.acas.org.uk](http://www.acas.org.uk).

### **Main changes made in the 2014 TUPE regulations**

The 2014 Regulations amend the 2006 Regulations in their application in Great Britain. The 2014 Regulations introduced:

- A clarification on the face of the Regulations regarding the test for service provision changes, the activities carried out after the change in provider must be fundamentally the same as those carried out by the person who has ceased to carry them out before it.
- Amendments to the provisions which give protection against dismissal and restrict changes to contracts: these protections will apply where the sole or principal reason for the dismissal or variation of employment contract is the transfer. Those protections will not apply in certain circumstances where the sole or principal reason for the dismissal or variation is a economic, technical or organisational reason entailing changes in the workforce.
- Amendments so that a change to the place where employees are employed can be within 'changes in the workforce'. This is relevant to the dismissal protection and the protection against variations of contracts.
- Exceptions to the general restriction on varying contracts of employment
  - so that terms incorporated from collective agreements can be varied when more than a year has passed since the transfer, provided that overall, the contract is no less favourable to the employee and
  - so that employers can make changes permitted by the terms of the contract,but in both cases, this is subject to the rules as to when a contract is effectively varied.
- A provision so that in some circumstances, rights to terms and conditions provided for in collective agreements entered into after the date of the transfer are not transferred.
- A provision allowing micro businesses to inform and consult employees directly when there are existing appropriate representatives.
- The usual deadline by which the old employer must supply the employee liability information to the new employer is increased from not less than 14 days before the transfer to not less than 28 days before the transfer.
- An amendment to the Trade Union and Labour Relations (Consolidation) Act 1992 so that a transferee may elect to consult (or start to consult) representatives of transferring staff about proposed collective redundancies prior to the transfer (to meet the requirements for such consultation under that Act). The transferor must agree to such consultation.

## Part 1 - Overview of the TUPE Regulations

Subject to certain qualifying conditions, the Regulations apply:

- (a) when a business or undertaking, or part of one, is transferred to a new employer; or
- (b) when a 'service provision change' takes place (for example, where a contractor takes on a contract to provide a service for a client from another contractor).

These two circumstances are jointly categorised as 'relevant transfers'.

Broadly speaking, the effect of the Regulations is to preserve the continuity of employment and terms and conditions of those employees who are transferred to a new employer when a relevant transfer takes place. This means that employees employed by the previous employer (the 'transferor') when the transfer takes effect automatically become employees of the new employer (the 'transferee') on the same terms and conditions (except for certain occupational pensions rights). It is as if their contracts of employment had originally been made with the transferee employer. However, the Regulations provide some limited opportunity for the transferee or transferor to vary the terms and conditions of employment contracts in a range of stipulated circumstances even though the sole or principal reason for the variation is the transfer.

The Regulations contain specific provisions to protect employees from dismissal before or after a relevant transfer.

Representatives of affected employees have a right to be informed about a prospective transfer. They must also be consulted about any measures which the transferor or transferee employer envisages taking concerning the affected employees.

The Regulations also place a duty on the transferor employer to provide information about the transferring workforce to the new employer before the transfer occurs.

The Regulations make specific provision for cases where the transferor employer is insolvent by increasing, for example, the ability of the parties in such difficult situations to vary contracts of employment, thereby ensuring that jobs can be preserved because a relevant transfer can go ahead.

The Regulations can apply regardless of the size of the transferred business: so the Regulations equally apply to the transfer of a large business with thousands of employees or of a very small one (such as a shop, pub or

garage). The Regulations also apply equally to public or private sector undertakings – and whether or not the business operates for gain, such as a charity.

## Part 2 – Relevant transfers: Scope of the Regulations

The Regulations apply to ‘relevant transfers’. A ‘relevant transfer’ can occur when –

- a business, undertaking or part of one is transferred from one employer to another as a going concern (a circumstance defined for the purposes of this guidance as a ‘business transfer’). This can include cases where two companies cease to exist and combine to form a third;
- when a client engages a contractor to do work on its behalf, or reassigns such a contract – including bringing the work ‘in-house’ (a circumstance defined as a ‘service provision change’).

These two categories are not mutually exclusive. It is possible – indeed, likely – that some transfers will qualify both as a ‘business transfer’ and a ‘service provision change’. For example, outsourcing of a service will often meet both definitions.

### Business transfers

To qualify as a business transfer, the identity of the employer must change. The Regulations do not therefore apply to transfers by share take-over because, when a company's shares are sold to new shareholders, there is no transfer of a business or undertaking: the same company continues to be the employer. Also, the Regulations do not ordinarily apply where only the transfer of assets, but not employees, is involved. So, the sale of equipment alone would not be covered. However, the fact that employees are not taken on does not prevent TUPE applying in certain circumstances.<sup>3</sup>

To be covered by the Regulations and for affected employees to enjoy the rights under them, a business transfer must involve the transfer of an ‘economic entity which retains its identity’. In turn, an ‘economic entity’ means ‘an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary’.

The precise application of the Regulations to individual business transfers will be a matter for the tribunals or courts to decide, depending on the facts of each case. However, the economic entity test would generally mean that the Regulations apply where there is an identifiable set of resources (which includes employees) assigned to the business or to a part of the business

<sup>3</sup> See, for example, the decision of the Court of Appeal in *RCO Support Services v Unison* [2002] EWCA Civ 464 and *ECM v Cox* [1999] IRLR 559.



which is transferred, and that set of resources retains its identity after the transfer. Where just a part of a business is transferred, the resources do not need to be used exclusively in the transferring part of the business and by no other part. However, where resources are applied in a variable pattern over several parts of a business, then there is less likelihood that a transfer of any individual part of a business would qualify as a business transfer under the Regulations.

### Service provision changes (SPC)

'Service provision changes' concern relationships between contractors and the clients who hire their services. Examples include contracts to provide such labour-intensive services as office cleaning, workplace catering, security guarding, refuse collection and machinery maintenance.

The changes to these contracts can take three principal forms:

- where a service previously undertaken by the client is awarded to a contractor (a process known as 'contracting out' or 'outsourcing');
- where a contract is assigned to a new contractor on subsequent re-tendering; or
- where a contract ends with the service being performed 'in house' by the former client ('contracting in' or 'insourcing').

The Regulations only apply to some changes in service provision, in particular, only those changes which involve 'an organised grouping of employees which has as its principal purpose the carrying out of the activities concerned on behalf of the client'. There are also other points which might prevent TUPE from applying. These are considered below.

#### SPC: The client

This is the person on whose behalf the services are carried out. It is necessary that the client is the same after the change ie. that the services are not being performed for a new client.

#### SPC: Similarity of the activities before and after the change

It is necessary to consider what activities are being performed for the client before the change, and whether those activities are performed for the client after the change in service provider. If the activities are the same, then TUPE will apply, subject to the other conditions and exceptions set out in this section. However, often there might be some differences in the activities, or the way in which they are performed. This gives rise to the question as to whether there is a change in the service or whether it is a new service and so not covered by this test for a transfer. The 2014 Regulations amend the TUPE Regulations

to require that the activities carried out after the change must be fundamentally the same as the activities carried out before the change, in order for it to be a service provision change. This reflects the position taken in the case law (which referred to the activities being “fundamentally or essentially” the same).<sup>4</sup> This means that if the service requirement was changed fundamentally, there would be no service provision change. On the other hand, minor differences between the nature of the tasks would not normally on their own be sufficient to mean that the activities are not fundamentally the same.

Whether or not the activities are fundamentally the same will depend upon all the circumstances of a particular transfer and ultimately, it would be for a tribunal to decide on the evidence before it.

### **SPC: Fragmentation of a service**

A service provision change will often capture situations where an existing service contract is re-tendered by the client and awarded to a new contractor. It would also potentially cover situations where just some of those activities in the original service contract are re-tendered and awarded to a new contractor, or where the original service contract is split up into two or more components, each of which is assigned to a different contractor. In each of these cases, it is necessary to consider whether the activities after the change are fundamentally the same as those carried out before it and then whether there was an organised grouping which had as its principal purpose the carrying out of the activities that are transferred (see below on this). However, the activities might be divided up so much that there is no service provision change. This is often called “fragmentation” of the service, and it will depend upon the circumstances as to whether a service is so fragmented that it is not a service provision change.

### **SPC: Organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities on behalf of the client**

Even if activities are fundamentally the same after a change in service provision, further conditions have to be satisfied (these are set out in regulation 3(3)) for it to be a relevant transfer under the service provision change category.

One of the conditions is that immediately before the service provision change there is ‘an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client’.

This is intended to confine the Regulations’ coverage to cases where the old service provider (ie the transferor) has in place a team of employees to carry

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<sup>4</sup> This amendment applies in respect of transfers which take place on or after 31 January 2014.

out the service activities, and that team is essentially dedicated to carrying out the activities that are to transfer on behalf of the client (though they do not need to work exclusively on those activities, but carrying them out for the client does need to be their principal purpose). It would therefore exclude cases where there was no identifiable grouping of employees or where it just happens in practice that a group of employees works mostly for a particular client. This is because it would be unclear which employees should transfer in the event of a change of contractor, if there was no such grouping. For example, if a contractor was engaged by a client to provide, say, a courier service, but the collections and deliveries were carried out each day by various different couriers on an ad hoc basis, rather than by an identifiable team of employees, there would be no 'service provision change' and the Regulations would not apply.

It should be noted that a 'grouping of employees' can constitute just one person as may happen when the cleaning of a small business premises is undertaken by a single person employed by a contractor.

**SPC: Other exceptions: (i) client intends the activities be carried out in connection with single specific event or task of short-term duration & (ii) supply of goods**

The Regulations do not apply in the following circumstances:

- (i) where a client buys in services from a contractor on a 'one off' basis, rather than the two parties entering into an ongoing relationship for the provision of the service.

The Regulations should not be expected to apply where a client engaged a contractor to organise a single conference on its behalf, even though the contractor had established an organised grouping of staff – eg. a 'project team' – to carry out the activities involved in fulfilling that task. Thus, were the client subsequently to hold a second conference using a different contractor, the members of the first project team would not be required to transfer to the second contractor.

To qualify under this exemption, the one-off service must also be 'of short-term duration'. To illustrate this point, take the example of two hypothetical contracts concerning the security of an Olympic Games or some other major sporting event. The first contract concerns the provision of security advice to the event organisers and covers a period of several years running up to the event; the other concerns the hiring of security staff to protect athletes during the period of the event itself. Both contracts have a one-off character in the sense that they both concern the holding of a specific event. However, the first contract runs for a significantly longer period than the second; therefore, the first would be covered by the TUPE Regulations (if the other qualifying conditions are satisfied) but the second would not.

(ii) where the arrangement between client and contractor is wholly or mainly for the supply of goods for the client's use.

So, the Regulations are not expected to apply where a client engages a contractor to supply, for example, sandwiches and drinks to its canteen every day, for the client to sell on to its own staff. If, on the other hand, the contract was for the contractor to run the client's staff canteen, then this exclusion would not come into play and the Regulations might therefore apply.

### Transfers within public administrations

Both the Acquired Rights Directive and the TUPE Regulations make it clear that an administrative reorganisation of a public administrative authority, or the transfer of administrative functions between public administrative authorities, is not a relevant transfer within the meaning of the legislation. In addition, there needs to be a change of legal employer for the TUPE Regulations to apply, so transfers within central government are not covered. However, such intra-governmental transfers and reorganisations of administrative function/administrative authorities are covered by the Cabinet Office's Statement of Practice *Staff Transfers in the Public Sector*,<sup>5</sup> which provides for TUPE - equivalent protection to be given to transferring employees. In the case of the transfer of administrative functions between public administrative authorities, this protection is often provided in the legislative mechanism by means of which the employees are transferred to the new employer.

Section 38 of the Employment Relations Act 1999<sup>6</sup> provides a regulation-making power to the Secretary of State to apply TUPE-equivalent protections to cases or classes of cases falling outside the scope of the Acquired Rights Directive. The Secretary of State has made several sets of regulations under this power.<sup>7</sup> In addition, protections may be provided for in, or pursuant to, legislation about a particular transfer or category of transfer.

<sup>5</sup> This document may be found online at <http://www.civilservice.gov.uk/about/resources/employment-practice/codes-of-practice>

<sup>6</sup> Section 38 of the Employment Relations Act 1999 empowers the Secretary of State to make provision by statutory instrument, subject to the negative resolution procedure, for employees to be given the same or similar treatment in specified circumstances falling outside the scope of the Acquired Rights Directive as they are given under the UK's legislation implementing that Directive.

<sup>7</sup> As at October 2013, the ones covering specific instances of transfers are the Transfer of Undertakings (Protection of Employment) (Rent Officer Service) Regulations 1999, SI 1999/2511; the Transfer of Undertakings (Protection of Employment) (Transfer to OFCOM) Regulations 2003, SI 2003/2715; Transfer of Undertakings (Protection of Employment) (RCUK Shared Services Centre Limited) Regulations 2012, SI 2012/2413; Transfer of Undertakings (Protection of Employment) (Transfers of Public Health Staff) Regulations 2013, SI 2013/278.

## The treatment of transfers from the public sector to the private sector

These are normally covered by the Regulations in just the same way as transfers between private sector employers. In the event that the Regulations do not apply because the transferring activity consists of the performance of an administrative function (ie. a regulatory or supervisory type function), the Cabinet Office's Statement of Practice '*Staff Transfers in the Public Sector*' will normally apply and will provide for TUPE-equivalent protection to be provided. Local Government is subject to some different considerations. The Secretary of State, Welsh Ministers and Scottish Ministers have powers under sections 101 and 102 of the Local Government Act 2003 to require Best Value Authorities in England, Wales or Scotland, when engaged in contracting-out exercises, to deal with staff matters (including pensions) in accordance with directions.

Directions have been issued. For example, the Best Value Authorities Staff Transfers (Pensions) Direction 2007, issued under section 101, secures a 'broadly comparable' pension, for future service pension provision only, for staff transferring from a Best Value Authority in England and a Police authority in Wales to a service provider. The Direction came into force on 1 October 2007.

### Fair Deal for Staff Pensions

The Fair Deal policy sets out how pension issues should be dealt with where staff are compulsorily transferred out of the public sector. New guidance ('New Fair Deal') was issued by HM Treasury in October 2013 and updates the previous guidance on Fair Deal issued in 1999 and 2004. Pages 19 and 20 cover how pension issues are dealt with under the Fair Deal guidance.

## The effect of the Regulations where employees work outside the UK or GB

The Regulations apply to the transfer of an undertaking situated in the UK immediately before the transfer, and, in the case of a service provision change, where there is an organised grouping of employees situated in Great Britain immediately before the change.

However, the Regulations may still apply notwithstanding that persons employed in the undertaking ordinarily work outside the United Kingdom. For example, if there is a transfer of a UK exporting business, the fact that the sales force spends the majority of its working week outside the UK will not prevent the Regulations applying to the transfer, so long as the undertaking itself (comprising, amongst other things, premises, assets, fixtures & fittings, goodwill as well as employees) is situated in the UK.

In the case of a service provision change, the test is whether there is an organised grouping of employees situated in Great Britain (immediately before the transfer). For example, where a contract to provide website maintenance comes to an end and the client wants someone else to take over the contract, if in the organised grouping of employees that has performed the contract, one of the IT technicians works from home, which is outside the UK, that should not prevent the Regulations applying to the transfer of the business. However if the whole team of IT technicians worked from home which was outside Great Britain, then a transfer of the business for which they work would not fall within the Regulations as there would be no organised grouping of employees situated in Great Britain.

## Part 3 – Contracts of employment

### The employer's position

When a relevant transfer takes place, the position of the previous employer and the new employer in respect of the contracts of the transferred employees is as follows:

The new employer (ie. the transferee) takes over the contracts of employment of all employees who were employed by the transferor and assigned to the 'organised grouping of resources or employees' immediately before the transfer, or who would have been so employed if they had not been dismissed in circumstances where the sole or principal reason for the dismissal was the transfer<sup>8</sup>. The new employer cannot pick and choose which employees to take on. It follows that they cannot terminate contracts and dismiss employees just because the transfer has occurred (see Part 4 below for more detail). However, the new employer does not take over the contracts of any employees who are only temporarily assigned to the 'organised grouping'. Whether an assignment is 'temporary' will depend on a number of factors, such as the length of time the employee has been there, and whether a date has been set by the transferor for his return or re-assignment to another part of the business or undertaking.

The new employer takes over all rights and obligations arising from those contracts of employment, except for criminal liabilities and some benefits under an occupational pension scheme (see below). This means that they will inherit any outstanding liabilities incurred by the transferor employer by his failure to observe the terms of those contracts or for failure to observe employment rights. So, an employee may make a claim to a court or an employment tribunal against the new employer for, say, breach of contract, personal injury or sex discrimination, even though the breach of contract, injury or discrimination occurred before the transfer took place.

The new employer takes over any collective agreements made by or on behalf of the transferor employer in respect of any transferring employees and in force immediately before the transfer.

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<sup>8</sup> This is the position under the 2014 amendments.

Where the transferor employer voluntarily recognised an independent trade union (or unions) in respect of some or all of the transferred employees, then the new employer will also be required to recognise that union (or unions) to the same extent after the transfer takes place. However, this requirement only applies if the organised grouping of transferred employees maintains an identity distinct from the remainder of the new employer's business. If the undertaking does not keep its separate identity, the previous trade union recognition lapses, and it will then be up to the union and the new employer to renegotiate a new recognition arrangement.

**Q. Can the transferor employer select the employees who transfer across?**

A. No. The employer cannot retain individuals who were assigned to the organised grouping immediately before the transfer. However, this does not prevent the transferor from retaining those individuals whom they had permanently re-assigned to other work outside the 'organised grouping' in advance of a transfer.

**Q. Does this mean that the new employer must actually employ a person who was unfairly dismissed before the transfer where they had previously worked in the entity or grouping which then transferred?**

A. No. There is no obligation on the new employer to provide a job to such former employees of the transferor. However, they are responsible for all outstanding liabilities relating to such persons which result from their former employment. So, the new employer would be the respondent should a former employee complain to an employment tribunal that they were unfairly dismissed because of the transfer. The employment tribunal may order reinstatement or re-engagement.

**Q. How can the new employer ensure they do not suffer a loss for a failure of the transferor employer prior to the transfer?**

A. It is common practice for the new employer to require the transferor employer to indemnify them against any losses from such pre-transfer breaches of contracts or employment law. Also, the Regulations require the transferor to inform the new employer in advance of the transfer about such liabilities towards the employees (see Part 5 below).

**Q. Which employees are assigned to the organised grouping of resources or employees?**

A. Whether an employee is assigned to the organised grouping can depend upon a range of factors. There is no exhaustive list of factors and in any particular case, it will depend upon the circumstances. Factors which might be particularly significant in one case, may not be in other circumstances. The case law says that the focus should be on the link between the employee and the work or activities which are performed.

The question is not decided simply by how much time is spent doing the work that is transferring, although that might be a relevant factor. Other relevant factors are likely to include the job role and contractual duties of the employee and the reasons why an employee spends time on particular activities, for example

- an employee in a senior role with responsibilities for the whole of the employer's business might not be assigned to a part of that business which is transferring, even if that part of the business takes up most of that employee's time.
- an employee might be working within the transferring part of a business, but on a temporary basis to cover absences with their role being more linked to another part of the business.

### The employee's position

When a relevant transfer takes place, the position of the employees of the transferor and new employer is as follows:

Employees employed by the transferor and assigned to the 'organised grouping' immediately before the transfer automatically become employees of the new employer. However, an employee has the right to object to the automatic transfer of their contract of employment if they wish, as long as they inform either the transferor or the new employer that they object to the transfer of their contract to the transferee. In that case, the objection terminates the contract of employment and the employee is not treated for any purpose as having been dismissed by either the transferor or the new employer. Moreover, the employee is considered to have resigned and would therefore not be entitled to a redundancy payment. The transferor may re-engage the employee on whatever terms they agree, though the continuity of employment will be broken.

An employee's period of continuous employment is not broken by a transfer and, for the purposes of calculating entitlement to statutory employment rights, the date on which the period of continuous employment started would usually be the date on which the employee started work with the old employer.<sup>9</sup> This should be stated in the employee's written statement of terms and conditions; if it is not, or if there is a dispute over the date on which the period of continuous employment started, the matter can be referred to an employment tribunal. For further details see [www.gov.uk/search?q=employment+tribunals](http://www.gov.uk/search?q=employment+tribunals).

Transferred employees retain all the rights and obligations existing under their contracts of employment with the previous employer and these are transferred to the new employer. This means that their previous terms and conditions of

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<sup>9</sup> It may be earlier, for example, where the employee had been subject to a previous TUPE transfer.



employment carry over to the new employer. The main exception to this rule concerns the treatment of occupational pensions.

### **Effect of transfer on rights in respect of collective agreements as they may be agreed from time to time (for cases to which the 2014 amendments apply<sup>10</sup>)**

Employment contracts may incorporate provisions of collective agreements as may be agreed from time to time. For example, collective agreements between the transferor employer and the recognised union(s), or collective agreements agreed by a national body for the sector on which employers and unions are represented. Terms and conditions in new collective agreements, or changes to existing ones, may then be automatically incorporated into individual contracts of employment.

Under the amendments made by the 2014 Regulations, rights in relation to future collective agreements which have not been agreed at the time of transfer do not transfer if the transferee is not a party to the later collective agreement, nor a party to the collective bargaining for it. If the transferee does participate in that collective bargaining, then the employee does have rights to any terms and conditions which would be incorporated from it.

For transfers which take place before 31 January 2014 the meaning of the TUPE Regulations on this point will depend upon the outcome of litigation. The Court of Justice of the European Union has ruled on the interpretation of the Directive on this point and the Supreme Court has yet to give the final judgment on the meaning of the legislation (as at the end of 2013)<sup>11</sup>.

### **Pension Rights following a TUPE transfer**

Occupational pension rights earned up to the time of the transfer are protected by social security legislation and pension trust arrangements.

An employee's pension position following a TUPE transfer depends not just upon TUPE, but may depend upon other legislation and policy. This section deals with the main matters affecting the position.

### **Rights which transfer under the TUPE Regulations**

Under the TUPE regulations, an employee's rights related to an occupational pension scheme<sup>12</sup> which relate to benefits for old age, invalidity, or survivors do not transfer. This exclusion from transfer is construed narrowly. As a result, rights relating to redundancy and early retirement benefits that are

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<sup>10</sup> These provisions apply in respect of transfers which take place on or after 31 January 2014.

<sup>11</sup> *Alemo-Herron v Parkwood Leisure* C-426/11.

<sup>12</sup> Within the meaning of the Pension Schemes Act 1993.

linked to an occupational pension scheme are likely to transfer under the TUPE Regulations to the new employer. The new employer may need to ask the previous employer for information about such entitlements under an occupational transfer scheme before the transfer to seek to identify what aspects of such a scheme might transfer to it.

## Obligations on the new employer to provide pension arrangements

However, the new employer that has taken over responsibility for the transferred employees must provide employees with a new pension scheme in some circumstances.

## What the new pension scheme must provide

Under the Pensions Act 2004 and the Transfer of Employment (Pension Protection) Regulations 2005 the new employer must provide a new pension scheme when certain employees are transferred. Employees that are eligible for a pension on transfer are those that are:

- a) already in an occupational pension scheme with their current employer;
- b) not in an occupational pension scheme but could join one with their current employer; or
- c) not in an occupational pension scheme but could join one after they had worked for their current employer for a longer period.

The new employer will need to ask the previous employer for this information before the transfer to identify which employees fall within the criteria a-c above and should be offered the right to join a new pension scheme after the transfer.

The two most common types of work place pension are: a defined contribution scheme (also known as money purchase schemes) or a defined benefit scheme (also known as final salary or salary-related scheme). The new employer may also choose to use a stakeholder pension scheme.

If the employer provides a defined benefit scheme it must comply with one of the following requirements. It must:

- satisfy a test (known as the Reference Scheme Test), which ensures that schemes which are contracted out of the State Second Pension meet specified minimum standards; or
- provide benefits the value of which at least equals 6% of the employee's pensionable pay for each year of employment in addition to any employee contributions; or
- provide employer contributions of up to 6% of the employee's basic pay, provided the employee also contributes.

If the employer provides a money purchase or stakeholder scheme it must provide employer contributions of up to 6% of basic pay, provided the employee also contributes.

## Auto enrolment

A new duty on employers to automatically enrol their eligible workers into a workplace pension scheme was introduced in October 2012. Implementation started with the largest employers and will apply to all employers from 1 February 2018. Where the employer uses a money purchase scheme, the incentive for the worker to save is reinforced by a mandatory minimum employer contribution. Minimum contributions are required on a band of earnings, currently 1% employer and 1% worker (including tax relief), rising gradually to 3% employer and 5% worker from October 2018. Automatic enrolment does not affect the TUPE rules. However, where a receiving employer is already subject to the duty to automatically enrol, they will have to automatically enrol all eligible transferring workers.

## Public Sector Transfers (Fair Deal for staff pensions: staff transfer from central government)

Arrangements for staff who are members of, or who are eligible to be members of a public service pension scheme who are compulsorily transferred from the public sector are covered in the HMT guidance: 'Fair Deal for staff pensions: staff transfer from central government' (2013). This policy also covers staff who are members of a public service pension scheme, excluding Local Authority Pension Schemes,<sup>13</sup> who are compulsorily transferred to a public service mutual or to other new models of public service delivery.

Staff who are members of a public service pension scheme, excluding Local Authority Pension Schemes, and who are compulsorily transferred out of the public sector will normally retain the right to participate in the relevant public service pension scheme in their new employment for so long as they continue to provide the outsourced services or function.<sup>14</sup> Eligibility will depend on the pension scheme rules. Also in a retender situation where services were originally compulsorily transferred out under Fair Deal (1999 or 2004) if any remaining eligible employees exist, bidders will usually be required to provide them with access to the appropriate public sector scheme. They will continue to (be eligible to) accrue further pension benefits in that scheme in respect of their new employment and their pensionable service will be treated as though it were continuous.

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<sup>13</sup> Separate arrangements apply to transfers of staff from local government. See page 13.

<sup>14</sup> Only those originally outsourced with the service or function are eligible to participate, subject to the scheme rules.

Both employees and employers will be required to pay contributions to the pension scheme. Employees will be required to pay employee contributions in line with those paid by members of the scheme working in the public sector. These will be determined under the scheme regulations and may change following an actuarial valuation of the scheme. Employer contributions will usually be set at the same level as the employer contribution rate paid by all other employers in the scheme.

Further information for employers taking on staff transferred from central Government can be found in HMT guidance note:

[www.gov.uk/government/publications/fair-deal-guidance](http://www.gov.uk/government/publications/fair-deal-guidance).

## Changes to terms and conditions

The Regulations ensure that employees are not penalised when they are transferred by being placed on inferior terms and conditions. So, not only are their pre-existing terms and conditions transferred across on the first day of their employment with the new employer, but employees may not validly waive their acquired rights. The Regulations therefore impose limitations on the ability of the new employer and employee to agree a variation to terms and conditions thereafter.

## The position for cases to which the amendments made by the 2014 Regulations apply<sup>15</sup>

The general rule is that contracts cannot be varied if the sole or principal reason for the variation is the transfer. If there is such a purported variation, the Regulations render those changes void. This is so even if the employer and employee agreed the variation and it would have been a valid variation had there not been a transfer.

The same restrictions apply to the transferor where he contemplates changing terms and conditions of those employees who will transfer to the new employer in anticipation of the transfer occurring.

However, the employer may vary terms and conditions in any of the following circumstances:

- A. When the reason for variation is unrelated to the transfer. In this case, the sole or principal reason for the variation will not be the transfer and therefore the restriction in the TUPE Regulations does not apply.

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<sup>15</sup> These provisions apply in relation to any purported variation of a contract of employment that is transferred if the transfer takes place on or after 31 January 2014 and that purported variation is agreed on or after 31 January 2014, or in a case where the variation is not agreed, it starts to have effect on or after that date.

B. When the sole or principal reason for variation is “an economic, technical or organisational reason entailing changes in the workforce”, provided that the employer and employee agree that variation. See below for an explanation of the meaning of this term.

C. When the terms of the employment contract permit the employer to make such a variation. However, employees cannot waive their rights under the Regulations. So if an employer seeks to agree a term giving the employer power to make variations in future, if the sole or principal reason for agreeing that power is the transfer, this will be caught by the general restriction on variations of contract and be void.

D. When the contract of employment incorporates terms and conditions from a collective agreement, those terms and conditions may be varied in limited circumstances even though the sole or principal reason for the variation is the transfer. They may be varied from the date which is more than a year after the date of the transfer provided that after that variation, overall, the employee’s contract is no less favourable to the employee than it was immediately before the variation. This means that the employer could seek to agree effective variations to terms and conditions incorporated from a collective agreement, which may result in those particular terms being less favourable to the employee, provided that the employee gets some other more favourable terms, so that overall, the employee is in a no less favourable position after the variation compared to immediately before it. It is only the terms incorporated from a collective agreement which the employer can seek to make less favourable under this exception, although the employer could agree to new individual terms which are entirely beneficial to the employee to offset the less favourable changes. Changes to other terms are not within this exception and the general rule that they cannot be varied if the sole or principal reason is the transfer continues to apply. If the test that overall the changes are no less favourable is not satisfied, then the purported variation is void.

E. When changes are entirely positive from the employee’s perspective. The underlying purpose of the Regulations is to ensure that employees are not penalised when a transfer takes place. Changes to terms and conditions agreed by the parties which are entirely positive are not prevented by the Regulations.

F. In certain insolvency situations (see Part 6).

Apart from the exception for insolvency situations, the general rules as to whether a contract of employment is effectively varied continue to apply. Nothing in TUPE gives the employer any ability to impose variations to contracts. For example, if the employer is seeking to rely upon a term of the contract which purports to give it a power to vary a particular provision (such as a mobility clause), the employer will only be able validly to vary the contract in a particular way if such variation would be given effect by the law in the absence of a TUPE transfer. Any ambiguity in the meaning of such a term is

generally resolved in favour of the employee and other terms of the contract may also limit what the employer can do under it.

These exceptions do not affect the operation of regulation 4(9) of the TUPE Regulations, which is concerned with the situation where a transfer involves a substantial change in working conditions to the material detriment of an employee who is transferring (see page 27). So if an employer sought to vary contracts in reliance upon a term of the contract giving it the power to vary something, an employee might be entitled to treat the contract as having been terminated.

**Q. When is the sole or principal reason for a purported variation of contract the transfer?**

A. Where an employer changes terms and conditions simply because of the transfer and there are no extenuating circumstances linked to the reason for that decision, then the reason for the change is the transfer.

Where there are some extenuating circumstances, then whether or not the sole or principal reason for any purported variation is the transfer is likely to depend upon the circumstances.

If the new employer wishes merely to bring into line the terms and conditions of transferred staff with those of existing staff, then the transfer would be the reason for this change (due to the way in which the Courts have interpreted the Acquired Rights Directive).

Where the 2014 Regulations do not apply, ie for transfers which occurred before 31 January 2014, the applicable test distinguishes between cases where the sole or principal reason for the purported variation is the transfer itself (such variations would be void) and those where it is a reason connected with the transfer (such variations would be void unless the reason was an economic, technical or organisational reason entailing changes in the workforce and the variation was agreed by the employer and employee). The new test introduced by the 2014 Regulations is not the same as the old test of the sole or principal reason being the transfer itself. Under the 2014 amendment, the transfer might be the sole or principal reason even if that reason might previously have been considered to be 'connected with' the transfer, rather than the transfer itself. It will depend upon the circumstances of any particular case.

On the other hand, if the reason for a variation of contract is unrelated to the transfer, it will not be void under the TUPE Regulations. An unrelated reason could include the sudden loss of an expected order by a manufacturing company or a general upturn in demand for a particular service or a change in a key exchange rate.

## Economic, technical or organisational reasons entailing changes in the workforce

As mentioned above, the employer and employee can agree to vary terms and conditions if the sole or principal reason for the variation is an economic, technical or organisational reason entailing changes in the workforce.

### **Q. What is an ‘economic, technical or organisational’ reason?**

A. There is no statutory definition of this term, but it is likely to include:  
(a) a reason relating to the profitability or market performance of the new employer’s business (ie. an economic reason);  
(b) a reason relating to the nature of the equipment or production processes which the new employer operates (ie. a technical reason); or  
(c) a reason relating to the management or organisational structure of the new employer’s business (ie. an organisational reason).

### **Q. What is meant by the phrase ‘entailing changes in the workforce’?**

A. There is no exhaustive statutory definition of the term 'entailing changes in the workforce'. Interpretation by the courts has restricted it to changes in the numbers employed or to changes in the functions performed by employees. A functional change could involve a new requirement on an employee who held a managerial position to enter into a non-managerial role, or to move from a secretarial to a sales position.

The amendments made by the 2014 Regulations have added a further situation covered by the phrase, essentially a change to the place<sup>16</sup> where employees are employed to carry on the business of the employer, or particular work for the employer.

### **Q. Does the scope to vary contracts permit the new employer to harmonise the terms and conditions of the transferred workers to those of the equivalent grades and types of employees they already employ?**

A. No. According to the way the courts have interpreted the Acquired Rights Directive, the desire to achieve ‘harmonisation’ is by reason of the transfer itself. It cannot therefore constitute ‘an economic, technical or organisational reason entailing changes in the workforce’.

### **Q. Is there a time period after the transfer when it is ‘safe’ for the new employer to vary contracts because the sole or principal reason for the change cannot have been the transfer due to the passage of time?**

A. There is likely to come a time when the link with the transfer can be treated as no longer effective. However, this must be assessed in the light of

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<sup>16</sup> The place where employees are employed has the same meaning as in section 139 of the Employment Rights Act 1996 on redundancy.

all the circumstances of the individual case, and will vary from case to case. There is no 'rule of thumb' used by the courts or specified in the Regulations to define a period of time after which it is safe to assume that the transfer did not impact directly or indirectly on the employer's actions.

**Q. How do the Regulations affect annual pay negotiations or annual pay reviews?**

A. These should be little affected, and should continue under the new employer in much the same way as they operated with the transferor employer.

**Q. What is the effect of a relevant transfer on an employee's terms and conditions which are incorporated from a collective agreement <sup>17</sup>?**

A. Terms and conditions provided for in collective agreements would continue to be and are subject to the provision that purported variations to contracts are void if the sole or principal reason for the variation is the transfer. The 2014 Regulations provide that this restriction does not apply to changes to terms and conditions provided for in collective agreements in the following circumstances:

- the variation takes effect more than a year after the transfer; and following the variation the terms and conditions of the employee's contract are no less favourable overall than those which applied immediately before the variation.

**Q. What happens if terms and conditions which were set out in a collective agreement are changed after a year and are overall less favourable?**

If the change is overall less favourable and the sole or principal reason for it is the transfer, then it is void. If an employee feels that this is the case then Acas can be contacted for advice. Acas employs employment relations experts that can advise if there is a dispute. They can be contacted through the Acas helpline 08457 474747 (between 08:00-20:00 Monday to Friday and 09:30-13:00 Saturday).

Guidance on contract disputes is also available on GOV.UK:  
[www.gov.uk/your-employment-contract-how-it-can-be-changed](http://www.gov.uk/your-employment-contract-how-it-can-be-changed).

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<sup>17</sup> A collective agreement is any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of a list of matters (which includes terms and conditions of employment).



## Part 4 – Dismissals and redundancies

The general law on unfair dismissal and redundancies applies in situations where a relevant transfer occurs or is in prospect. It is aimed at protecting employees from being dismissed or made redundant in an unfair way, both in terms of the reason for dismissal and the dismissal procedure, and to ensure employers use fair and consistent procedures when dismissing members of staff.

The Acas Code of Practice on Disciplinary and Grievance procedures establishes the principles of what an employer and employee should do. In relation to following a fair procedure employment tribunals have discretionary powers to adjust awards up or down by 25% if an employer or employee has acted unreasonably in not following the principles in the Acas Code. The Acas Code does not apply to dismissals due to redundancies.

The TUPE Regulations also provide some additional protections which limit the ability of employers to dismiss employees when transfers arise.

### The additional TUPE protections (for cases to which the 2014 amendments apply)<sup>18</sup>

Neither the new employer (the transferee) nor the previous one (the transferor) may fairly dismiss an employee if the sole or principal reason for the dismissal is the transfer. Such dismissals will be automatically unfair for the purposes of unfair dismissal law<sup>19</sup>. Whether the transfer is the sole or principal reason for a dismissal will depend upon the circumstances. For cases to which the 2014 amendments do not apply, the test was whether the sole or principal reason for the dismissal is the transfer itself, or a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce. This new test could cover cases where the sole or principal reason for the dismissal was, under the old test, considered to be connected with the transfer.

On the other hand, the transferee and the transferor may fairly dismiss an employee if the sole or principal reason for the dismissal is an economic, technical or organisational (ETO) reason entailing changes in the workforce. Further detail on the meaning of ETOs is provided in Part 3 on varying contractual terms and conditions. Also, there is case law (relating to the original Transfer of Undertakings (Protection of Employment) Regulations) to the effect that the ETO entailing changes in the workforce must relate to the

<sup>18</sup> These provisions apply to any case where the transfer takes place on or after 31 January 2014 and the date when any notice of termination is given by an employer or an employee in respect of any dismissal is 31 January 2013 or later, or, in a case where no notice is given, the date on which the termination takes effect is 31 January 2014 or later.

<sup>19</sup> The right not to be unfairly dismissed is subject to a qualifying period, which is two years ending with the effective date of termination in any case where the period of continuous employment began on or after 6 April 2012.

future conduct of the dismissing employer's business, which means that the transferor cannot dismiss fairly in reliance upon an ETO entailing changes in the workforce which relates to the transferee's conduct of the business. The 2014 Regulations do not change the wording of the equivalent provisions in the TUPE Regulations which are interpreted to this effect.

If the dismissal is not automatically unfair because the employer's sole or principal reason is an ETO reason entailing changes in the workforce, the dismissal will be fair as long as an employment tribunal decides that:

- the employer acted reasonably in the circumstances in treating that reason as sufficient to justify dismissal; and
- the employer met the other requirements of the general law on unfair dismissal.

Also, if the dismissal occurred for reason of redundancy, then the usual redundancy arrangements will apply, and the dismissed employee could be entitled to a redundancy payment. Further details are provided on page 28 of this guidance. General details are available for employers and employees at [Making staff redundant](#).

The onus lies on the dismissing employer to show that the sole or principal reason for the dismissal is an ETO reason entailing changes in the workforce and therefore not automatically unfair.

Neither the Regulations nor the Acquired Rights Directive define what an ETO reason may be. The courts and tribunals have not generally sought to distinguish between each of the three ETO categories, but rather have treated them as a single concept. (Again, see Part 3 for further detail on ETOs).

To qualify as an ETO defence, an economic, technical or organisational reason must be one 'entailing changes in the workforce.' The courts have held that this means a change in the numbers of people employed or a change in employees' particular functions. The 2014 Regulations now add another situation to the meaning of the phrase 'changes in the workforce', so that it also covers a change to the place where employees are employed to carry on the business of the employer, or particular work for the employer. This means that where a transfer involves the employer changing the location of its business or part of it, dismissals due to that change will not usually be automatically unfair, even if the employer still needs the same number of staff in the new location. This is providing that the sole or principal reason for the dismissal is an ETO reason and the dismissal is for redundancy.

## Constructive dismissal

As described in Part 3, employees can object to a transfer and, by doing so, terminate their contracts. In many cases, those employees will not be able to claim unfair dismissal because they have in effect resigned and therefore

have not been 'dismissed'. However, transferred employees who find that there has been or will be a 'substantial change' for the worse in their working conditions as a result of the transfer have the right to terminate their contract and claim unfair dismissal before an employment tribunal, on the grounds that the actions or proposed actions of the employer had constituted or would constitute a de facto termination of their employment contract. An employee who resigns in reliance on this right cannot make a claim for pay in lieu of a notice period to which they were entitled under their contract.

This statutory right exists independently of an employee's common law right to claim constructive dismissal for an employer's repudiatory breach of contract.

**Q. What might constitute a 'substantial change in working conditions'?**

A. This will be a matter for the courts and the tribunals to determine in the light of the circumstances of each case. What might be a trivial change in one setting might constitute a substantial change in another. However, a major relocation of the workplace which makes it difficult or much more expensive for an employee to transfer, or the withdrawal of a right to a tenured post, is likely to fall within this definition.

**Q. Does this mean it is unlawful for the new employer to make such 'substantial changes in working conditions' and it is automatically unfair when an employee resigns because such a change has taken place?**

A. Not necessarily. The Regulations classify such resignations as 'dismissals'. This can assist the employee if he subsequently complains of unfair dismissal because he does not need to prove he was 'dismissed'. However, the 'dismissal' may be automatically unfair if the sole or principal reason for the dismissal is the transfer and not an ETO reason entailing changes in the workforce. If it is not automatically unfair, to determine whether the dismissal was unfair, the tribunal will still need to satisfy itself that the employer had acted unreasonably, and there is no presumption that it is unreasonable for the employer to make changes.

## TUPE and redundancy

Dismissals on the grounds of redundancy are permitted by TUPE, as they will normally be for an ETO reason (see page 23 for an explanation of this term), although the new employer will need to make sure that the redundancy is fair within other employment legislation: eg. selection for redundancy is fair, and not based simply on the fact that the person is a transferred employee.

Existing protections for employees facing redundancy will continue to apply (guidance on employees rights on redundancy can be found at [www.gov.uk/redundant-your-rights](http://www.gov.uk/redundant-your-rights)) as will protections relating to employer relocation for redundancies arising out of a change in the place where employees are employed [www.gov.uk/employer-relocation-your-rights](http://www.gov.uk/employer-relocation-your-rights).

Dismissed employees may be entitled to a redundancy payment if they have been employed for two years or more. Employers must also ensure that the required period for consultation with employees' representatives is allowed. More details are available at [www.gov.uk/staff-redundant/redundancy-consultations](http://www.gov.uk/staff-redundant/redundancy-consultations) and at [www.gov.uk/browse/employing-people](http://www.gov.uk/browse/employing-people). Entitlement to redundancy payments will not be affected by the failure of any claim which an employee may make for unfair dismissal compensation.

Where there are redundancies and it is unclear whether the Regulations apply, it will also be unclear whether the transferor or new employer is responsible for making redundancy payments. In such cases employees should consider whether to make any claims against both employers at an employment tribunal.

## TUPE and collective redundancy

Where an employer proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer must consult representatives of the employees who may be affected by the proposed dismissals or by measures taken in connection with those dismissals. These requirements to consult on collective redundancies are set out in sections 188 to 198 of the Trade Union and Labour Relations (Consolidation) Act 1992. There is also Acas guidance on this subject: 'How to manage collective redundancies'.<sup>20</sup>

In a situation where there is to be (or is likely to be) a transfer under TUPE<sup>21</sup> the transferee may, before the transfer, propose 20 or more redundancies at one establishment within a period of 90 days or less, which will affect some or all of the transferring workforce. The 2014 Regulations amend the 1992 Act to allow a transferee in these circumstances to elect to consult (or to start to consult) transferring staff about the collective redundancies prior to the transfer. This is called 'pre-transfer consultation'. These amendments come into force on 31 January 2014, so any such election may only be made on or after that date.

## Agreeing with the transferor to consult pre-transfer

The transferee may only make such an election if the transferor agrees to it. This is because the transferor's co-operation and assistance in the consultation with representatives of transferring staff will be necessary for the consultation to be meaningful and it could affect the transferor's conduct of its business. Therefore, when considering whether to make such an election, a

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<sup>20</sup> [www.acas.org.uk/media/pdf/c/n/How-to-manage-collective-redundancies.pdf](http://www.acas.org.uk/media/pdf/c/n/How-to-manage-collective-redundancies.pdf)

<sup>21</sup> The amendments also apply to some situations which are not TUPE transfers, but are similar, namely anything regarded by virtue of an enactment as a relevant transfer for the purposes of TUPE, or where an enactment provides a power to make provision which is the same as or similar to the TUPE Regulations, any other novation of a contract of employment effected in the exercise of that power.

transferee will need to think carefully about whether pre-transfer consultation could be meaningful in the circumstances, and if so, how it would need to be conducted to be meaningful and to comply with the requirements. In particular, the transferee may need to consider what assistance it will require from the transferor and discuss the arrangements with the transferor. The transferee may wish to enter into an agreement with the transferor on the arrangements that will apply.

The transferee must make any such election by written notice to the transferor.

### The effect of an election: how the requirements apply

If the transferee makes such an election, the provisions of sections 188 to 198 generally apply from the time of the election as if the new employer already employed the transferring staff who may be affected by the proposals at the relevant establishment. There are some exceptions to this, set out in the new section 198B, which take account of the fact that the transferee is not the employer of the employees for some or all of the consultation. However, the liability for any failure to comply with the requirements is that of the transferee, not the transferor.

### Conducting the consultation

The transferor may provide information or other assistance to the transferee to help the latter to meet the requirements.

If the transferee makes such an election, the appropriate representatives are:

- if an independent trade union is recognised by the transferor in respect of the transferring staff, representatives of, or anyone authorised by, that trade union;
- for the transferee's existing employees, if an independent trade union is recognised in respect of them, the representatives of that trade union;
- otherwise, whichever of the following the employer thinks is most likely, in the circumstances, to result in a meaningful consultation:
- employee representatives appointed or elected by the affected employees for another purpose, who (having regard to the purposes and method by which they were appointed or elected) have authority from employees to receive information and be consulted about the proposed dismissals on their behalf;
- employee representatives elected by the affected employees for the purposes of the collective redundancy consultation, and in an election satisfying the requirements regarding such elections.

Except for cases where the appropriate representatives are representatives of a trade union (and the trade union has not authorised anyone else to act on their behalf), the appropriate representatives in respect of the transferring staff could be employees of either the transferor or the transferee, provided that they meet the requirements for employee representatives. However, the transferee will need to ensure that the appropriate representatives are allowed access to the affected transferring staff and that appropriate accommodation and other facilities are afforded to the representatives. As access to transferring staff, use of accommodation and other facilities at the workplace of the transferor are within the control of the transferor, the transferee may wish to cover such issues in any agreement entered into with the transferor.

Pre-transfer consultation will be substantially the same as a normal collective redundancy consultation. In particular, the substance of the consultation should be the same. So it must include consideration about ways of avoiding the dismissals, reducing the numbers of employees to be dismissed and mitigating the consequences of the dismissals and should be undertaken by the transferee with a view to reaching agreement with the appropriate representatives.

A pre-transfer consultation should continue after the transfer if it has not been concluded and it may continue with the same appropriate representatives. The requirements regarding collective redundancy consultation, as modified by these amendments, continue to apply to such consultation which continues after the transfer.

### **Cancellation of an election to carry out pre-transfer consultation**

The transferee may choose to cancel an election to carry out pre-transfer consultation. A transferee might consider doing this if it forms a view that the consultation is at risk of not being meaningful, perhaps because the transferor is not providing the necessary co-operation. If the election is cancelled, then

- the relevant sections of the 1992 Act on collective redundancies cease to apply as if the transferee were already the employer of the transferring staff;
- anything done under those sections has no effect in so far as it was done in reliance on the election. This would not affect other decisions or things that might have been done, even if they were done because of the election, if they were not done under those sections in reliance on the election;
- if the transferee notified any appropriate representative, transferring staff or the Secretary of State of the election, the transferee must notify them of the cancellation as soon as reasonably practicable;
- the transferee cannot elect again to do pre-transfer consultation in relation to the proposed dismissals; and
- this does not affect the requirements to carry out collective redundancy consultation, so the transferee may be required

to carry out such consultation once the transfer has taken place in order to comply with obligations under the 1992 Act.

## Pre-transfer collective redundancy consultation and consultation under TUPE

Collective redundancy consultation, although requiring similar information to a TUPE consultation is a separate consultation to the requirements regarding information and consultation under TUPE. The transferee will be responsible for ensuring that the correct appropriate representatives are involved in any pre-transfer consultation. Representatives selected for collective redundancy consultation may not necessarily be the same as those for the purposes of carrying out the information and consultation obligations under TUPE.

If the two consultations run at the same time, then both the transferee and the transferor should be clear about which consultation is being conducted in dealings with appropriate representatives. See Part 5 of this guidance for further information about a TUPE consultation.

## Part 5 – Information and consultation rights under TUPE

This section discusses:

- the requirements in the Regulations for the transferor employer to provide information to the new employer about the transferred employees before the relevant transfer takes place;
- the requirements in the Regulations on both the new and transferor employers to inform and consult representatives of the affected workforce before the relevant transfer takes place; and
- the exception for micro-businesses (employers with fewer than 10 employees), whereby they may inform and consult affected employees directly if there are no existing appropriate representatives.

These requirements are discussed in turn.

### (a) Disclosure of ‘employee liability information’ to the new employer

The transferor employer must provide the new employer with a specified set of information which will assist them to understand the rights, duties and obligations in relation to those employees who will be transferred. This should

help the new employer to prepare for the arrival of the transferred employees. The employees also gain because their new employer is made aware of his inherited obligations towards them. The information in question is:

- the identity of the employees who will transfer;
- the age of those employees;
- information contained in the ‘statements of employment particulars’ for those employees;
- information relating to any collective agreements which apply to those employees;
- instances of any disciplinary action within the preceding two years taken by the transferor in respect of those employees in circumstances where the Acas Code of Practice on discipline and grievance applies;
- instances of any grievances raised by those employees within the preceding two years in circumstances where the Acas Code of Practice on discipline and grievance applies; and
- instances of any legal actions taken by those employees against the transferor in the previous two years, and instances of potential legal actions which may be brought by those employees where the transferor has reasonable grounds to believe such actions might occur.

If any of the specified information changes between the time when it is initially provided to the new employer and the completion of the transfer, then the transferor is required to give the new employer written notification of those changes.

The information must be provided in writing or in other forms which are accessible to the new employer. Therefore it may be possible for the transferor to send the information as computer data files as long as the new employer can access that information, or provide access to the transferor’s data storage. Likewise, in cases where a very small number of employees are transferring and small amounts of information may be involved, it might be acceptable to provide the information by telephone. However, it would be a good practice for the transferor to consult the new employer first to discuss the methods which they can use.

The specified information may be given in several instalments, but all the information must be given. The information may also be provided via a third party. For example, where a client is re-assigning a contract from an existing contractor to a new contractor, that client organisation may act as the third party in passing the information to the new contractor.

This information must be given a certain period before the completion of the transfer. However, if special circumstances make it not reasonably



practicable to comply with that deadline, then the information must be supplied as soon as is reasonably practicable.

The deadline as amended by the 2014 Regulations is not less than 28 days before the relevant transfer. This applies to cases where the transfer takes place on or after 1 May 2014.

For other cases, the deadline is not less than 14 days before the relevant transfer.

The transferor and transferee and any client on whose behalf the transferor may be providing services, may consider whether earlier disclosure of some information should be made. It will often be helpful if the transferor provides the necessary employment liability information at an early stage to the transferee. This may not necessarily be all of the information which will ultimately be required and it may need to be on an anonymised basis, or in a way which complies with other appropriate data protection safeguards (see the Information Commissioner's guidance at [www.ico.gov.uk/upload/documents/library/data\\_protection/practical\\_application/gpn\\_disclosure\\_employee\\_info\\_tupe\\_v1.0.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/gpn_disclosure_employee_info_tupe_v1.0.pdf) ). Some such information can be useful at any tender stage to inform bids for the contract. Businesses contracting for the provision of services may wish to consider entering into contractual provisions to facilitate the disclosure of appropriate information for the purposes of a re-tender. Provision of some information at an earlier stage by the transferor may also assist the transferee in its consideration of whether there could be any measures (which will be relevant to the performance of the information and consultation obligations), and it may assist in practical preparations for the transfer.

**Q. What is the 'statement of employment particulars'?**

A. All employers are under a legal obligation to provide each employee in writing with basic information about their employment. That information is called the 'written statement of employment particulars' – see BIS guidance [www.gov.uk/employment-contracts-and-conditions/written-statement-of-employment-particulars](http://www.gov.uk/employment-contracts-and-conditions/written-statement-of-employment-particulars). Among other things, the written statement must set out the remuneration package, the hours of work and holiday entitlements.

**Q. What are grievances that fall within the Acas Code of Practice on discipline and grievance procedures?**

A. Broadly speaking, these are grievances which could give rise to any subsequent complaint to an employment tribunal about a breach of a statutory entitlement. Guidance on grievances and disciplinary action and a link to the Acas Code of Practice on disciplinary and grievance procedures is available at [www.gov.uk/solve-workplace-dispute/formal-procedures](http://www.gov.uk/solve-workplace-dispute/formal-procedures).

**Q. What is the ‘disciplinary action’ which must be notified to the transferee?**

A. This is action taken under the Acas Code of Practice on discipline and grievance procedures. They do not include oral or written warnings or suspensions on full pay. For guidance and a link to the Code of Practice, see [www.gov.uk/solve-workplace-dispute/formal-procedures](http://www.gov.uk/solve-workplace-dispute/formal-procedures).

**Q. How will the new employer decide whether it is reasonable to believe that a legal action could occur?**

A. This is a matter of judgment and depends on the characteristics of each case. So, where an incident seems trifling – say, where an employee slipped at work but did not take any time off as a result – then there is little reason to suppose that a claim for personal injury damages would result. In contrast, if a fall at work led to hospitalisation over a long period or where a union representative raised the incident as a health and safety concern, then the transferor should inform the transferee accordingly.

**Q. Can the transferor supply some information in the form of staff handbooks, sample contracts or the texts of collective agreements?**

A. It is open to the transferor to provide such documentation if it would assist. Providing information in that form might also be easier for both parties to handle. Again, it would make sense for parties to discuss in advance how information should be provided.

**Q. What are the circumstances where it may not be reasonably practicable to provide the information 28 days (or 14 days in advance for cases not covered by the amendment made by the 2014 Regulations) in advance of the transfer occurring?**

A. These would be various depending on circumstances. But, clearly, it would not be reasonably practicable to provide the information in time, if the transferor did not know the identity of the new employer until very late in the process, as might occur when service contracts are re-assigned from one contractor to another by a client, or, more generally, when the transfer takes place at very short notice.

**Q. Can the transferor and the new employer agree between themselves that this information should not be provided by contracting out of the requirement?**

A. No. There is no entitlement to contract out of the duty to supply employee liability information because that would disadvantage the employees involved.

**(b) Consultations with the affected workforce**

The Regulations place a duty on both the transferor employer and new employer to inform and consult representatives of their employees who may

be affected by the transfer or measures taken in connection with the transfer. Those affected employees might include:

- (a) those individuals who are to be transferred;
- (b) their colleagues in the transferor employer who will not transfer but whose jobs might be affected by the transfer; or
- (c) their new colleagues in employment with the new employer whose jobs might be affected by the transfer.

Long enough before a relevant transfer to enable the employer to consult with the employees' representatives, the employer must inform the representatives:

- that the transfer is going to take place, approximately when, and why;
- the legal, economic and social implications of the transfer for the affected employees;
- whether the employer envisages taking any action (reorganisation for example) in connection with the transfer which will affect the employees, and if so, what action is envisaged;
- where the previous employer is required to give the information, he or she must disclose whether the prospective new employer envisages carrying out any action which will affect the employees, and if so, what. The new employer must give the previous employer the necessary information so that the previous employer is able to meet this requirement;

If the employer uses any agency workers, it must give information as to the number of agency workers working temporarily for and under its supervision and direction, the parts of the undertaking in which those agency workers are the working and the type of work they are carrying out.

If action is envisaged which will affect the employees, the employer must consult the representatives of the employees affected about that action. The consultation must be undertaken with a view to seeking agreement of the employee representatives to the intended measures.

During these consultations the employer must consider and respond to any representations made by the representatives. If the employer rejects these representations he must state the reasons.

If there are special circumstances which make it not reasonably practicable for an employer to fulfil any of the information or consultation requirements, he must take such steps to meet the requirements as are reasonably practicable.

## Who should be consulted about the transfer?

Where employees who may be affected by the transfer are represented by an independent trade union recognised for collective bargaining purposes, the employer must inform and consult an authorised official of that union. This may be a shop steward or a district union official or, if appropriate, a national or regional official. The employer is not required to inform and consult any other employee representatives in such circumstances, but may do so if the trade union is recognised for one group of employees, but not for another.

Where employees who may be affected by the transfer are not represented by a trade union as described above, the employer must inform and consult other appropriate representatives of those employees. The appropriate representatives may be either existing representatives or new ones specially elected for the purpose (there is a limited exception for micro-businesses – see section c below). It is the employer's responsibility to ensure that information and consultation is offered to appropriate representatives. If they are to be existing representatives, their remit and method of election or appointment must give them suitable authority from the employees concerned. It would not, for example, be appropriate to inform and consult a committee specially established to consider the operation of a staff canteen about a transfer affecting, say, sales staff; but it may well be appropriate to inform and consult a fairly elected or appointed committee of employees, such as a works council, that is regularly informed or consulted more generally about the business's financial position and personnel matters.

## Arrangements for elections

If the representatives are to be specially elected ones, certain election conditions must be met:

- the employer shall make such arrangements as are reasonably practical to ensure the election is fair;
- the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all the affected employees, having regard to the number and classes of those employees;
- the employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;
- before the election the employer shall determine the term of office as employee representatives, so that it is of sufficient length to enable relevant information to be given and consultations to be completed;

- the candidates for election as employee representatives are affected employees on the date of the election;
- no affected employee is unreasonably excluded from standing for election; and
- all affected employees on the date of the election are entitled to vote for employee representatives.

The employees entitled to vote may vote for as many candidates as there are representatives to be elected to represent them; or, if there are to be representatives for particular classes of employees, for as many candidates as there are representatives to be elected to represent their particular class of employee.

The election is conducted so as to secure that:

- so far as reasonably practicable, those voting do so in secret; and
- the votes given at the election are accurately counted

Where an employee representative is elected in accordance with these rules but subsequently ceases to act as such and, in consequence, certain employees are no longer represented, another election should be held satisfying the rules set out as above.

The legislation does not specify how many representatives must be elected or the process by which they are to be chosen. An employment tribunal may wish to consider, in determining a claim that the employer has not informed or consulted in accordance with the requirements, whether the arrangements were such that the purpose of the legislation could not be met. An employer will therefore need to consider such matters as whether:

the arrangements adequately cover all the categories of employees who may be affected by the transfer and provide a reasonable balance between the interests of the different groups;

- the employees have sufficient time to nominate and consider candidates;
- the employees (including any who are absent from work for any reason) can freely choose who to vote for;
- there is any normal company custom and practice for similar elections and, if so, whether there are good reasons for departing from it.

If there are to be elections to elect appropriate representatives, then the employer will need to factor in enough time prior to the point when the

information needs to be given to the representatives for those elections to take place.

If, after the employer has invited any affected employees to elect representatives, they fail to do so within a reasonable time, the employer must give to any affected employees the information.

The length of time likely to be reasonable to enable the election of representatives will usually depend upon the particular circumstances. The employer may need to think about various factors, for example allowing sufficient time for employees to make nominations and for employees to consider those nominated. The size and working pattern of the affected employees could affect this. For example, if there are a large number of affected employees working on different days or times of the week, a longer period might be required so as to allow all the staff to be properly involved. Conversely, if the group of affected employees is much smaller and the staff work on the same days, then it might be reasonable to allow a shorter period of time. Other factors may also influence the question of what is a reasonable time for an election, such as whether the period covers a shut-down period or time when many staff are on holiday. Ultimately, the guiding factor should be what is reasonably practicable to ensure that an election is fair.

The same factors will usually be relevant if the employer is considering whether the affected employees have failed to elect representatives within a reasonable time. In this situation, the employer will need to judge that question in light of any relevant events which have happened since the invitation to elect representatives.

### Rights of employee representatives

Representatives and candidates for election have certain rights and protections to enable them to carry out their function properly. The rights and protections of trade union members, including officials, are in some cases contained in separate provisions but are essentially the same as those of elected representatives described below. (For further details see [www.gov.uk/rights-of-trade-union-reps](http://www.gov.uk/rights-of-trade-union-reps)).

The employer must allow access to the affected workforce and to such accommodation and facilities, eg. use of a telephone, as is appropriate. What is 'appropriate' will vary according to circumstances.

The dismissal of an elected representative will be automatically unfair if the reason, or the main reason, related to the employee's status or activities as a representative. An elected representative also has the right not to suffer any detriment short of dismissal on the grounds of their status or activities.

Candidates for election enjoy the same protection. Where an employment tribunal finds that a dismissal was unfair, it may order the employer to reinstate or re-engage the employee or make an appropriate award of compensation. Where an employment tribunal finds that a representative or a

candidate for election has suffered detriment short of dismissal it may order that compensation be paid.

An elected representative also has a right to reasonable time off with pay during normal working hours to carry out representative duties. Representatives should be paid the appropriate hourly rate for the period of absence from work. This is arrived at by dividing the amount of a week's pay by the number of normal working hours in the week. The method of calculation is similar to that used for computing redundancy payments.

### **(c) Micro business exception to the requirement to arrange an election**

If there are no existing appropriate representatives, an employer would have to make arrangements enabling the affected employees to elect representatives. The 2014 Regulations introduce an exception for micro-businesses. This exception applies in respect of transfers which take place on or after 31 July 2014.

Where there is no independent recognised union in respect of the affected employees nor other appropriate employee representatives under, a micro business can either;

- comply with the duties to inform and consult by dealing with each of the affected employees as if they were an appropriate representative or;
- invite the affected employees to elect representatives in which case the employer must allow them to elect representatives and must inform and consult with such elected representatives. If the employer invites the employees to elect representatives but they fail to do so within a reasonable time, the employer can directly inform the employees of the matters relating to the transfer (as mentioned above).

If there are existing appropriate representatives, then the micro-business must inform and consult those appropriate representatives.

A micro business is an employer with fewer than 10 employees at the time when it is required to give the information about the transfer. Prior to that time, a micro-business, should consider whether to invite the employees to elect representatives, or just inform and consult all affected employees directly. It will need to consider whether it will still be a micro-business at the time when it needs to provide the information.

## Part 6 – The position of insolvent businesses

To assist the rescue of failing businesses, the Regulations make special provision where the transferor employer is subject to insolvency proceedings.

First, the Regulations ensure that some of the transferor's pre-existing debts to the employees do not pass to the new employer. Those debts concern any obligations to pay the employees statutory redundancy pay or sums representing various debts to them, such as arrears of pay, payment in lieu of notice, holiday pay or a basic award of compensation for unfair dismissal.<sup>22</sup> In effect, payment of statutory redundancy pay and the other debts will be met by the Secretary of State through the National Insurance Fund. However, any debts over and above those that can be met in this way will pass across to the new employer.

Second, the Regulations provide greater scope in insolvency situations for the new employer to vary terms and conditions after the transfer takes place. As was discussed in Part 3, the Regulations place significant restrictions on new employers when varying contracts. These restrictions are in effect waived, allowing the transferor, the new employer or the insolvency practitioner in the exceptional situation of insolvency to reduce pay and establish other inferior terms and conditions after the transfer. However, in their place, the Regulations impose other conditions on the new employer when varying contracts:

- the transferor, new employer or insolvency practitioner must agree the 'permitted variation'<sup>23</sup> with representatives of the employees. Those representatives are determined in much the same way as the representatives who should be consulted in advance of relevant transfers (see Part 5 for more details);
- the representatives must be union representatives where an independent trade union is recognised for collective bargaining purposes by the employer in respect of any of the affected employees. Those union representatives and the transferor, new employer or insolvency practitioner are then free to agree variations to contracts, though the speed of their negotiations may be faster than usual in view of pressing circumstances associated with insolvency;
- in other cases, non-union representatives are empowered to agree permitted variations with the transferor, new employer or insolvency

<sup>22</sup> The Regulations also provide for the payment of these sums on the date of the transfer even though they may not have actually been dismissed by the transferor on or before that date, as would normally be a requirement for such payments.

<sup>23</sup> The 2014 Regulations made an amendment to the definition of "permitted variation" which applies to cases where the TUPE transfer takes place on or after 31 January 2014 and the permitted variation is agreed on or after that date. This change is related to the amendments on the restrictions on varying contracts.



practitioner. However, where agreements are reached by non-union representatives, two other requirements must be met. First, the agreement which records the permitted variation must be in writing and signed by each of the non-union representatives (or by an authorised person on a representative's behalf where it is not reasonably practicable for that representative to sign). Second, before the agreement is signed, the employer must provide all the affected employees with a copy of the agreement and any guidance which the employees would reasonably need in order to understand it;

- the new terms and conditions agreed in a 'permitted variation' must not breach other statutory entitlements. For example, any agreed pay rates must not be set below the national minimum wage; and
- a 'permitted variation' must be made with the intention of safeguarding employment opportunities by ensuring the survival of the undertaking or business or part of the undertaking or business.<sup>24</sup>

### **Q. What types of insolvency proceedings are covered by these aspects of the Regulations?**

A. These provisions are found in Regulations 8 and 9. Those two Regulations apply where the transferor is subject to 'relevant insolvency proceedings' which are insolvency proceedings commenced in relation to him but not with a view to the liquidation of his assets. The Regulations do not attempt to list all these different types of procedures individually. It is the Department's view that 'relevant insolvency proceedings' mean any collective insolvency proceedings in which the whole or part of the business or undertaking is transferred to another entity as a going concern. That is to say, it covers an insolvency proceeding in which all creditors of the debtor may participate, and in relation to which the insolvency office-holder owes a duty to all creditors. The Department considers that 'relevant insolvency proceedings' does not cover winding-up by either creditors or members where there is no such transfer.

## **Part 7 – Remedies**

This document has set out a number of rights and duties for employees, their representatives and a right for the new employer to receive information from the transferor employer. This section describes how these rights can be enforced and remedies obtained.

### **a) Rights for employees and their representatives**

If any employee considers that their contractual rights have been infringed, they may be able to seek redress through the civil courts or the employment

<sup>24</sup> In addition, the sole or principal reason for the permitted variation must be the transfer and not a reason which is referred to in regulation 4(5)(a) (namely an economic, technical or organisational reason entailing changes in the workforce).

tribunals. However, before doing so employees are advised to discuss these issues with Acas (the Advisory, Conciliation & Arbitration Service) on 08457 47 47 47 or at [www.acas.org.uk](http://www.acas.org.uk) or to seek their own independent legal advice, through their trade union, from a local office of the Citizens' Advice Bureau or from a local law centre.

## Complaining to an employment tribunal

An employee can make a claim to an employment tribunal by completing a claim form, available from jobcentres, law centres and Citizens' Advice Bureaux, or online at [www.gov.uk/government/publications/employment-tribunal-claim-form](http://www.gov.uk/government/publications/employment-tribunal-claim-form). This will generally need to be done within a specified time limit and may require payment of a fee. Details can be found at [www.gov.uk/employment-tribunals/apply-to-the-tribunal](http://www.gov.uk/employment-tribunals/apply-to-the-tribunal). You may be able to get help in paying your fees if you can't afford them (eg you're on benefits or a low income). You can also apply for help with fees using the online service.

You can complain to an employment tribunal if you are:

- an employee who has been dismissed or who has resigned in circumstances in which they consider they were entitled to resign because of the consequences or anticipated consequences of the transfer (see Part 4). An employee must complain within three months of the date when their employment ended. See guidance on [www.gov.uk/employment-tribunals](http://www.gov.uk/employment-tribunals). It may be unclear whether claims should be made against the previous or the new employer. In such cases, employees should consider whether to claim against both employers;
- an elected or trade union representative, if the employer does not comply with the information or consultation requirements (see Part 5) or with requirements regarding collective redundancy consultation (see Part 4). A representative must complain within three months of the date of the transfer in respect of information and consultation requirements under TUPE and in respect of collective redundancy consultation requirements, either before the date on which the last of the dismissals to which the complaint relates takes effect, or during the three months beginning with that date;
- a representative or candidate for election who has been dismissed, or suffered detriment short of dismissal. A complaint must be made within three months of the effective date of termination (or, in the case of a detriment short of dismissal, within three months of the action complained of);
- a representative who has been unreasonably refused time off by an employer, or whose employer has refused to make the appropriate payment for time off. A complaint must be made within three months

of the date on which it is alleged time off should have been allowed or was taken;

- an affected employee where the employer has not complied with the information or consultation requirements under TUPE other than in relation to a recognised trade union or an elected representative. A complaint must be made within three months of the date of the transfer.

For complaints about collective redundancy requirements, an affected employee or an employee dismissed as redundant in relation to complaints of failures relating to the election of employee representatives and other failures not relating to employee representatives or representatives of a trade union. A complaint must be made before the date on which the last of the dismissals takes effect, or during the three months beginning with that date.

In any one of the above cases the tribunal can extend the time limit if it considers that it was not reasonably practicable for the complaint to be made within three months. For further detail, see [www.gov.uk/employment-tribunals](http://www.gov.uk/employment-tribunals) and [www.gov.uk/being-taken-to-employment-tribunal-by-employee](http://www.gov.uk/being-taken-to-employment-tribunal-by-employee).  
an employee who wishes to claim a redundancy payment. The application should normally be made within six months of the dismissal (see [www.gov.uk/redundant-your-rights/redundancy-pay](http://www.gov.uk/redundant-your-rights/redundancy-pay)).

If a representative complains to an employment tribunal that an employer has not given information about action proposed by a prospective new employer, and if the employer wishes to show that it was 'not reasonably practicable' to give that information because the new employer failed to hand over the necessary information at the right time, the employer must tell the new employer that he or she intends to give that reason for non-compliance. The effect of this will be to make the new employer a party to the tribunal proceedings.

An employee must have at least 2 years<sup>25</sup> continuous service before they can make a complaint of unfair dismissal for a TUPE-related reason.<sup>26</sup>

### Awards made by an employment tribunal

If complaints are upheld, awards may be made against the previous or new employer, depending on the circumstances of the transfer as follows:

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<sup>25</sup> This applies to cases where the period of continuous employment began on or after 6 April 2012. For cases where the period of continuous employment began before that date, the qualifying period is one year.

<sup>26</sup> Exceptionally, this qualifying period does not apply where an employee claims that he was unfairly dismissed for asserting his TUPE rights.

a) Unfair dismissal awards

Employment tribunals may order reinstatement or re-engagement of the dismissed employee if the complaint is upheld, and/or make an award of compensation. Further details are at [www.gov.uk/dismissal/unfair-and-constructive-dismissal](http://www.gov.uk/dismissal/unfair-and-constructive-dismissal).

b) Detriment awards

The employer may be ordered to pay compensation to the person(s) concerned. The compensation will be whatever amount the tribunal considers just and equitable in all the circumstances having regard for any loss incurred by the employee.

c) Information and consultation awards under TUPE

The defendants in consultation cases may be either the transferor or new employer, or both of them – the choice is for the complainant to make. Where either the transferor or the new employer is the sole defendant, he may seek to join the other employer to the case. Where joining occurs, both the transferor and the new employer are liable to pay compensation to each affected employee for a failure to consult. The compensation cannot exceed 13 weeks' pay. If employees are not paid the compensation, they may present individual complaints to the tribunal, which may order payment of the amount due to them. These complaints must be presented within three months from the date of the original award (although the tribunal may extend the time-limit if it considers that it was not reasonably practicable for the complaint to be presented within three months).

d) protective awards for breach of the collective redundancy consultation requirements

Tribunals may make protective awards if they find a complaint well-founded. This is an award in respect of one or more descriptions of employee who have been dismissed (or it is proposed to dismiss) as redundant and in respect of whose dismissal the employer failed to comply with a requirement regarding the consultation or any election of representatives. The employer must pay remuneration for the protected period. The protected period starts on the earlier of the date of the award or the date on which the first of the dismissals takes effect and the tribunal determines its length, subject to a maximum of 90 days.

**Q. Are there any procedures which a complainant may need to follow before making an application to the employment tribunal?**

A. Yes, for some of the jurisdictions mentioned above. For details see [www.gov.uk/employment-tribunals](http://www.gov.uk/employment-tribunals).

**(b) The right of the transferee employer to ‘employee liability information’**

This entitlement is described in Part 5. If the transferor does not comply, then the new employer can present a complaint to an employment tribunal. If the tribunal finds in favour of the new employer it will make a declaration to that effect. Also, the tribunal may award compensation for any loss which the new employer has incurred because the employee liability information was not provided.

The level of compensation must be no less than £500 for each employee for whom the information was not provided, or the information provided was defective. So, if information was not provided for 10 of the transferring employees, then the minimum compensation would be £5,000. However, the tribunal may award a lesser sum if it considers that it would be unjust or inequitable to award this default minimum payment.

**Q. When would the tribunal not award the minimum award of compensation because it was unjust or inequitable?**

A. That would of course be a matter for the tribunal. But it might be fair to assume that trivial or unwitting breaches of the duty may lead to a tribunal waiving what would otherwise be a minimum award of compensation.

## Sources of further information

**Acas**

Helpline: 08457 47 47 47, Helpline for text phone users: 08456 06 16 00  
[www.acas.org.uk](http://www.acas.org.uk)

**Department for Business, Innovation and Skills (BIS)**

Enquiry line 020 7215 5000 [www.gov.uk/bis](http://www.gov.uk/bis)

BIS guidance

Employment rights on the transfer of an undertaking: a guide to the 2006 TUPE regulations for employees, employers and representatives (June 2009) [www.gov.uk/transfers-takeovers/help-and-advice](http://www.gov.uk/transfers-takeovers/help-and-advice)

Guidance on employment rights and responsibilities can be found on the government central websites:

**Department for Communities and Local Government**

Enquiry helpdesk: 020 7944 4400

[www.communities.gov.uk](http://www.communities.gov.uk)

**Department for Work and Pensions (DWP)**

[www.dwp.gov.uk](http://www.dwp.gov.uk)

**Gov.uk**

[www.gov.uk](http://www.gov.uk)

**Tribunals Service**

Enquiry helpline: 0845 795 9775

[www.justice.gov.uk/tribunals/employment](http://www.justice.gov.uk/tribunals/employment)

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