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# Myerson **Employment**

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**Our guide to TUPE**

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# Welcome

We understand the complexities of modern life and, therefore, everything we do is ultimately about you, and it is important you get to know the team that will be working with you every step of the way. It's a deep source of satisfaction that so many clients choose Myerson as their trusted adviser.

## Why Myerson?

Our Employment Solicitors offer clear and confidential advice to businesses facing employment issues.

As a Top 200 UK Law Firm, we are also proud to be ranked as '**Top Tier**' in the prestigious international directory **The Legal 500**, and commended by The Times '**Best Law Firms 2023**'. This means you can be certain that you will be receiving the highest quality legal advice.

Being a full-service law firm means we are well placed to provide wide-ranging, tailored legal advice to meet your individual needs. We work closely with other departments internally including Real Estate, Corporate, Commercial and Private Wealth Lawyers to ensure that your needs are protected comprehensively.

You can find out more about our **Employment Team** by clicking [here](#).



# A guide to TUPE

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## What does TUPE Stand for?

The Transfer of Undertakings (Protection of Employment) Regulations 2006.

## When does TUPE apply?

TUPE protects the employment of employees of a business where there is a 'relevant transfer', including where:

- there is a sale of a business as a going concern (including in some insolvency situations); or
- there is a change of service provider or contractor i.e. a service or activity is outsourced to a third party (or contractor) or transferred from one contractor to another, or brought back in-house. This is common, for example, in relation to cleaning, catering, IT and logistics services.

TUPE does not normally apply where a sale is affected by a sale of shares in a company. TUPE can apply in relation to transfers between group companies.



# What is the effect of TUPE?

The principal effect of TUPE is that the contracts of employment of employees assigned to the business or activity transferred is (normally) automatically transferred from the old employer to the new employer. The new employer effectively 'stands in the shoes' of the old employer in all respects. This means that:

- continuity of service for the purposes of calculating entitlement to statutory rights such as redundancy payments and unfair dismissal is protected (or in other words carried forward).
- continuity of service for the purposes of calculating entitlement to benefits e.g. holidays and sick pay is protected.
- claims about past acts and omissions of the old employer can be brought against the new employer. This would include, for example, claims for unpaid wages.
- terms and conditions of employment which apply to employment with the old employer must apply to employment with the new employer and are protected from change. This is a complex area and there are potential exceptions, particularly in relation to pensions, bonuses, commission schemes, share option schemes and restrictive covenants.

## Are dismissals connected with TUPE unfair?

A dismissal connected with a 'relevant transfer' is an automatically unfair dismissal, subject to certain statutory exceptions including, for example, a genuine redundancy situation. The 2 years' service qualification period applies in relation to claims of unfair dismissal on grounds of TUPE.

Employees (with 2 years' service) may also claim automatic unfair constructive dismissal where the new employer proposes changes to terms and conditions of employment which breach the protected contract of employment or are otherwise to the employee's material detriment (again subject to certain statutory exceptions).



Typically, but not always, any claim of unfair dismissal will be made against the new employer. It is therefore very important for those buying a business, or taking on a service contract, to ensure that appropriate terms and indemnities are agreed with the seller or former employer in relation to potential claims.

## What pension rights does an employee have after transferring under TUPE?

Most rights under occupational pension schemes are exempt from TUPE. However, entitlement to contributions to personal pension schemes and group personal pension schemes will transfer. It is important for an incoming employer to understand the pension rights of transferring employees (as they may be required to match the contributions made by the outgoing employer).

Even if a pension scheme, on the face of it, does not transfer, certain rights may still transfer, including certain rights on early retirement and pension related redundancy rights. These employee entitlements may be extremely expensive to replicate.

Although rights under an occupational pension scheme may not transfer under TUPE, incoming employers may be obliged to provide a minimum level of pension contributions for the transferring employees.



# How long do TUPE protections apply for after the transfer?

TUPE limits the changes that a new employer can make to the contract of transferring employees and protects employees from dismissal connected with the transfer. There is no black and white period after which TUPE protection no longer applies post-transfer.

The real issue is whether the dismissal or any proposed changes to a transferred employee's terms and conditions is connected to the transfer itself. For example, an attempt to harmonise the contracts of transferred employees and bring them into line with existing staff is likely to be regarded as transfer connected, unless a separate, standalone reason can be identified.

An employer can, however, make changes to a transferred employee's terms and conditions or make the employee redundant if the employer has an Economic, Technical or Organisational ("ETO") reason. This is a complex area and, in addition to identifying a fair reason, the employer must act reasonably in all of the circumstances.

The passage of time after the transfer may make it harder for an employee to claim that the reason for any dismissal or proposed change is the transfer itself but it is a myth that the protection lapses after a certain period.

## Do employers need to consult with employees on TUPE?

TUPE requires that employers comply with certain rules that require employee representatives to be informed and consulted particularly in relation to the impact of the transfer on the employment of affected employees. These rules apply irrespective of whether there is a trade union and irrespective of the number of employees affected. Such consultation must be meaningful.





Additional obligations to inform and consult with employee representatives may apply where, in addition to a 'relevant transfer', there are collective redundancies (see the [redundancies page](#) for more information).

## How long does consultation with employees need to last for?

Although there will be a duty to inform affected employees of a TUPE transfer, the duty to consult only arises where the new employer envisages taking measures in respect of affected employees. Measures is a term of wide meaning and captures any proposed changes, whether contractual or not, except for minor administrative changes.

Measures, in particular, includes changes in relation to pension provision. Unlike the collective consultation rules in collective redundancy situations, there is no set period of consultation that must be complied with. However, TUPE requires that employers must provide the prescribed information about the transfer and its impact on employees to employee representatives (or individuals, if there are fewer than ten employees in the business) long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives.

Therefore, an employer will need to be mindful of setting aside an appropriate amount of time for consultation.



# Claims to an Employment Tribunal

Employees can enforce their rights under TUPE by making claims to an Employment Tribunal, as follows:

- claims for unlawful deduction from wages (and possibly claims for breach of contract) where an employer has failed to comply with the terms of their protected contract of employment.
- claims for unfair dismissal (including constructive dismissal), breach of contract and holiday pay where an employee is dismissed in connection with the transfer or resigns in response to a failure to maintain protected terms and conditions of employment.
- claims for failure to inform and consult with employee representatives in relation to a relevant transfer. The award in such claims is up to 3 months' pay per employee. Further awards may be made where, in addition to a transfer, a collective redundancy situation has arisen (see our Brief Guide to Collective Redundancies).
- claims relating to TUPE are very often brought by groups of employees who have all been treated in the same way. Such claims can be very significant as groups of employees are able to share the cost of Employment Tribunal proceedings and an employer may be exposed to significant risk due to the value of multiple claims.

TUPE is regarded as one of the most complex areas of employment law. A key aspect of mitigating potential liabilities is understanding the law, due diligence and forward planning. It is not possible to contract out of the effects of TUPE but it is possible to regulate liabilities through settlement agreements and through sale and purchase agreements and agreements for the provision of services.





# You're in safe hands!

If you would like further information about how we can help you with **TUPE**, or if you have any questions, please don't hesitate to contact a member of our **Employment Law Team** today.

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