



PROTECTING YOURSELF

What if the business changed
hands?

**EMPLOYMENT PROTECTION AND TRANSFER
OF UNDERTAKINGS REGULATIONS (TUPE)**

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WHAT IS TUPE?

Transfer of undertakings (Protection of Employment)
Regulations 2006

Protects the rights of employees when a business changes hands.

- **Consultation**
- **Contract**
- **Continuous employment**
- **Dismissal**

HOW MAY A BUSINESS CHANGE HANDS?

- Share Transfer
- Sale of business
- Sale of part of the business
- Service Provision Change
- Franchise

SHARE TRANSFER

Company A buys all the shares in Company B – employees still employed by Company B and will carry on as before.

- Business does not change hands
- Same legal owner
- Still employed by the same company
- Employment rights remain as before
- *TUPE will not apply*

Unless:-

SHARE TRANSFER

Change of management *after* a share transfer

- In example above, Company A takes over day to day management of Company B, then TUPE may apply, as the running of the business has been transferred

Transfer of business after a share transfer

- All of the employees and business assets transferred to Company A after the share sale.

TUPE *will* apply in the following:-

- **Sale of Business**

A Optical Services Ltd sells its branch in Colchester, including the premises, equipment goodwill etc....to B Optometrists Ltd.

- **Sale of Part of a Business**

AB Chemist Ltd has it's own 'in-house' ophthalmic opticians. It sells that part of it's business to DD Opticians Ltd.

TUPE *will* apply in the following:-

Franchise

Franchise (e.g. Specsavers) changes hands

Change of Service Provider

AB Ophthalmic Services contract with local authority to carry out eye testing in schools. When the contract expires, the local authority decides to change service provider and awards the contract to BC Opticians or take the service back in house.

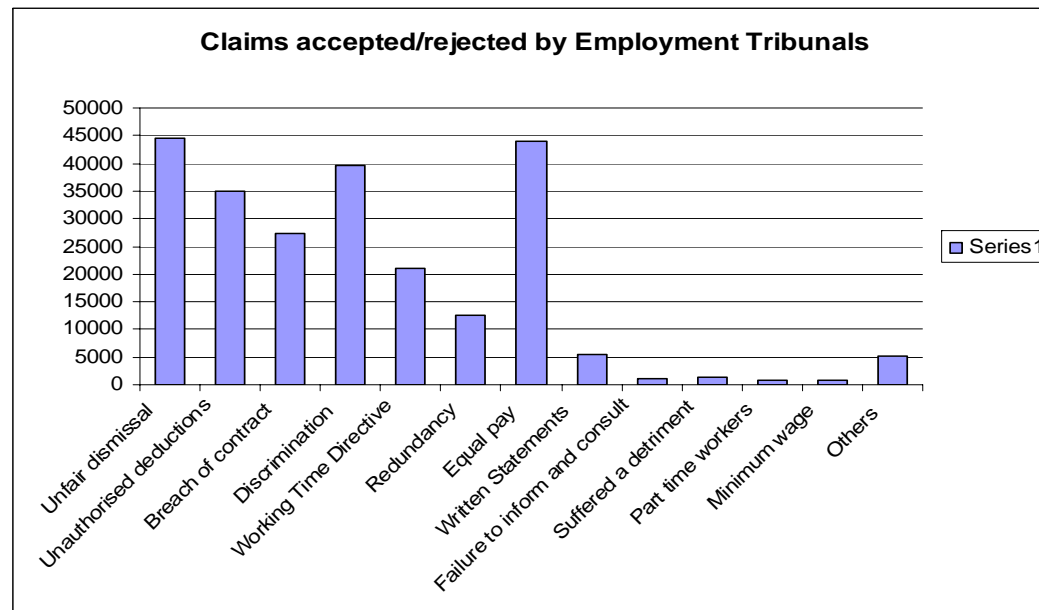
WHAT ARE YOUR RIGHTS UNDER TUPE?

Information and Consultation

Employer must inform “appropriate representatives” that:-

1. That transfer is to take place
2. When
3. Why
4. Legal economic and social implications
5. “Measures” – envisaged by new employer. If any measures are envisaged, employer must *consult* with representatives with a view to reaching agreement.

Failure to inform or consult – award of up to 13 weeks pay.



Transfer to new employer

- All those employed in the business unit that is changing hands, will automatically transfer to the new employer.
- Continuous employment is carried over.
- Terms and conditions remain the same (except those relating to pensions).
- All rights and liabilities connected to contracts of employees are assigned to the transferee.

Do Employees have to transfer?

Right to object

- Employee cannot be transferred against his will.
- If employee objects to transfer – employment will terminate and will not be treated as dismissal

BUT

- Where transfer will result in substantial change to working conditions to the material detriment of the employee – he may treat himself as dismissed.
- Where there is or will be a fundamental breach of contract, employee may still claim constructive dismissal.

Protection of Terms and Conditions

Terms and conditions remain the same as before, as if there had been no change in employer.

Even if employees agree to changes – if the reason is the transfer or a reason connected to it, the agreement may be void.

Exceptions:-

- Where changes not connected to the transfer (with employee's agreement)
- Where there is an ETO reason (with employee's agreement)
- Where the transfer arises out of the rescue of an insolvent business (with agreement of employee representatives)
- Pension scheme

ETO reason "an economic technical or organisational reason entailing changes in the workforce".

Collective agreements

- Do transfer and last until expiry date
- But not usually legally binding
- Terms of collective agreement incorporated into individual contracts will be protected

Union Recognition Agreements

If there is:-

- A transferred organised grouping of resources or employees for which the previous employer recognised a union.
- Which maintains an identity distinct from the remainder of the new undertaking
- The union is deemed to be recognised by the new employer for that group of employees

Restrictive Covenants

Case law suggests that:-

- Employer's rights under restrictive covenant does transfer
- Protects only the undertaking that transferred – not all of the transferee's business.
- Cannot be enforced by the transferor

Protection against dismissal

Dismissal will be automatically unfair if:-

- The reason is the transfer *or*
- It is for a reason *connected* to the transfer

Unless – for an ETO reason

If dismissed immediately before the transfer – claim may be against the *transferee or the transferor*

Pension Rights

- Regulations specifically exclude occupational pension schemes.
- No right to stay in the transferor's scheme.
- New employer is not obliged to provide an identical scheme.

But –

- Liability in connection with non-occupational pension schemes such as a personal pension will transfer.
- Rights to benefits under an occupational pension scheme that do not relate to old age invalidity or survivors benefits transfer.

Pension Rights

And –

- Where transferor had an occupational pension scheme and
- The employee is a member or is eligible to be a member or would have become eligible
- New employer may be obliged to provide a replacement scheme and must make contributions
- Scheme may be a defined benefits scheme, or money purchase or stakeholder scheme.

Insolvency

Rescue culture – protection of employees under TUPE is diluted in order to encourage the rescue and survival of business in financial difficulty.

If there are bankruptcy or insolvency proceedings with a view to liquidating assets:-

- No right to transfer with the business
- If voluntarily re-engaged by transferee, rights duties liabilities in connection with contract **do not** transfer.
- No protection against variation of contract or dismissal

Insolvency

But where "relevant insolvency proceedings" i.e. where assets are not to be liquidated:-

- Some debts will be paid by Government rather than transferee
- Contractual variations will be valid and binding where agreed with employee representatives – even if connected with the transfer and not an ETO reason.