

A line of ants is walking along a curved green stem against a blue background. The ants are positioned along the top edge of the stem, which arches across the top of the page.

BUSINESS TRANSFERS AND TUPE - TRANSFER OF UNDERTAKINGS

It may be the case that your employer's business, or part of it, is transferred to another business. Similarly, it may be that your employer takes over an existing business or part of it. In those circumstances, all or some employees may be transferred with the business. If this happens, you could be protected under the Transfer of Undertakings (Protection of Employment) Regulations 2006, referred to as TUPE.

What is a TUPE transfer?

There are generally two types of transfers covered by the TUPE regulations. These are business transfers and service provision changes.

Business transfers

A business transfer is when a business, or part of a business, is transferred to another business. This could be by way of a merger or a takeover. It does not, generally, include a share sale as that would result in the same company continuing to be the employer.

Service provision change

A service provision change is generally relevant to outsourced businesses such as cleaning, IT, workplace catering and security. A service provision change occurs when:

- a contractor takes over activities from a client (known as outsourcing).
- a new contractor takes over activities from another contractor (known as re-tendering).
- a client takes activities in-house from other contractors (known as insourcing).

For employees to transfer in these circumstances, they generally need to be assigned to the part of the business or contract which is being transferred. Therefore, if you work most of the time in the part of the business being transferred, you will be transferred with it. If you work on other things, and only spend a relatively small amount of time on the business being transferred, TUPE will not apply.

For TUPE to apply to any work being outsourced it will also have to be fundamentally the same as the work prior to the transfer.

What rights does a transferring employee have?

Employees transferring to a new business under TUPE will retain their continuous employment rights and generally their full contractual terms and conditions. They also retain their full statutory rights for such matters as redundancy and dismissal. There are, however, complex rules about pension rights and full occupational pension benefits are not protected.

Dismissal: To dismiss an employee who has been transferred from another business, just because they have been transferred, would be automatically unfair. Any dismissal connected to the transfer is unlawful. To make changes to the workforce as a whole for an economic, technical or organisational reason entailing a change in the workforce, known as ETO reason, can be potentially fair but would need to be fully considered before any action is taken.

Terms and conditions: Changes to your contract can only be made if your employer can justify it as an ETO reason or if your contract permits such alterations. It is not the case that an employer can change terms and conditions if they wait for a period of time after the transfer, usually quoted as a three-month waiting period. There is in fact no time limit for actions associated with a transfer. The key question in each case is whether any alteration is by reason of the transfer and does it qualify as an ETO reason.

Does my employer have to consult with me about the transfer?

Where employees are going to be transferred, an employer must consult with them via an employee representative. This is usually a trade union official or a representative elected by the employees. If there are less than ten employees an employer may consult directly without the need for representatives.

What happens if I don't want to be transferred?

It is possible for you to refuse to work for your new employer but this will be treated as a resignation and it will therefore not generally be possible to claim redundancy or unfair dismissal.

If you do not want to be transferred it is not necessary to give notice. You are required to tell your existing or new employer that you do not wish to be transferred and your employment will automatically terminate on the transfer date.

What if my new employer does not recognise me as an employee?

We sometimes receive a call from someone who says the business to which they are being transferred refuses to accept they are now their employee.

The cause of this difference of opinion is usually due to the failure of the new business to recognise and acknowledge that the person concerned is employed to undertake the role being transferred. This is particularly the case in businesses concerning outsourced service, such as cleaning, where the change in contracting parties results in employees transferring to different employers on a relatively regular basis.

If this is the case you will need to contact your new employer directly to discuss the matter.

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