



Deconstructing TUPE

By Daniel Barnett







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Acknowledgments

This is the fifth in my series of small employment law books. They're designed as a guide for HR Professionals, to give you a solid grounding in a subject which you won't learn about through normal avenues. This book does not contain original content, but is a repackaged version of a series of articles which appeared over several months in the HR Inner Circular (the monthly magazine for members of www.hrinnercircle.co.uk).

These books are very much pitched at degree level – which sounds scary, but it's not. When I took a law degree (many, many years ago), I could quote hundreds of cases by name. In my career, I've needed to use less than a third of them, and have forgotten the vast majority. When graduating, I lacked an understanding of how they all tied together in the real world. These small books knit the information together, without boring you senseless by using lots of academic caselaw. I think anyone who reads, absorbs and understands any of these small books would comfortably achieve a 2:1 in the subject if sitting a University exam.

I'd like to thank Victoria Gough for her help with the content, Rufus Barnett for editing, Jennie Hargrove for general help and assistance, and Tincuta Moscaliuc for





her – as always – fantastic work on cover design and internal layout.

I also want to thank all the members of the HR Inner Circle (www.hrinnercircle.co.uk). Your questions, suggestions and observations keep me going, and provide much of the inspiration for the content of all these books. I like to single out a few members for particular recognition, and this time I want to pay tribute to the six members who provided 6 minute spotlight sessions at the HR Inner Circle Annual Conference in 2019. They are: Claire Vane, Dianne Lambdin, Donna Negus, Jo Mosley, Nancy Prest and Quentin Colborn.

Recently, I posted on Twitter asking for people's favourite TUPE jokes. We had some great replies, but my favourites came from the Lewis Silkin employment team (who are a great bunch of people, and superb lawyers). I've turned three of them into cartoons in this book – you'll have to guess which three...

Daniel Barnett
November 2019





ABOUT THE AUTHOR



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Daniel is a past chair of the Employment Lawyers' Association's publishing committee and electronic services working party. He is the author or co-author of eight books, including the Law Society Handbook on Employment Law (currently in its 7th edition). He is the creator of the Employment Law (UK) mailing list, an email alerter bulletin service sending details of breaking news in employment law three times a week to 24,000 recipients.

Legal directories describe him as 'extremely knowledgeable and [he] can absorb pages of instructions





at lightning speed’, ‘involved in a number of highly contentious matters’, ‘singled out for his work for large blue-chip companies’, ‘combination of in-depth legal knowledge, pragmatism, quick response times and approachability’, ‘inexhaustible’, ‘tenacious’, ‘knowledgeable’, and ‘an excellent advocate’.

He is one of the leading speakers and trainers on the employment law and HR circuit. He has presented seminars for the House of Commons, the BBC, Oxford University, HSBC, Barclays Bank, Ocado, and dozens of other organisations in-house. In 2013, 2014, 2016, and 2019 he designed — and was the sole speaker at — the Employment Law MasterClass national tour.

As well as full-time practice as a barrister and speaker, Daniel is the founder of the HR Inner Circle – a membership club for smart, ambitious HR Professionals. In 2007, he co-founded CPD Webinars Ltd, then the UK’s leading webinar training company for lawyers, and sold it to Thomson Reuters in 2011.

Daniel is widely sought after as a commentator in both broadcast and print media on all legal issues. Since 2010 he has presented the Legal Hour on LBC Radio. In 2019, he launched Employment Law Matters, a weekly podcast with short explanations of employment law topics. Subscribe at www.danielbarnett.co.uk/podcast

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PREFACE

TUPE can seem intimidating. The provisions are complex. The HR processes involved in a TUPE transfer can be detailed, time consuming and emotional for everyone involved.

This small book aims to deconstruct the law and explain the relevant principles in simple and practical terms.

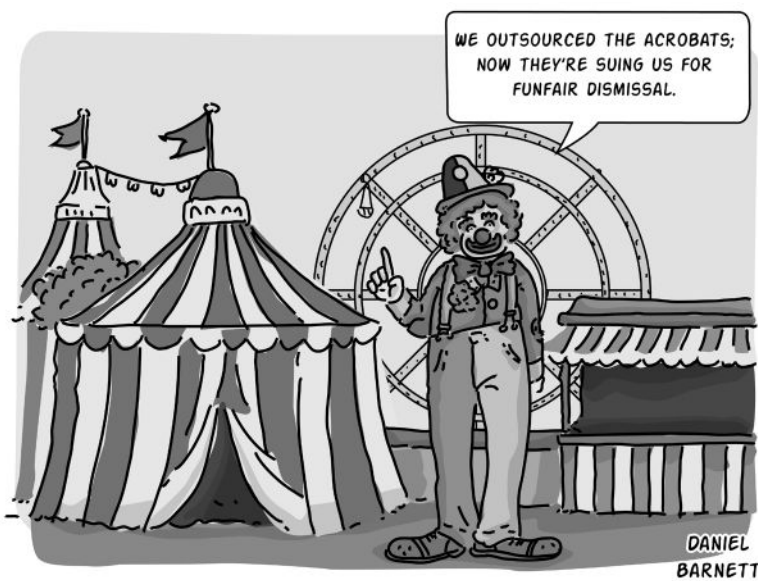
TUPE is the acronym used to refer to the *Transfer of Undertakings (Protection of Employment) Regulations 2006*. TUPE is a legal mechanism which protects employees when the business they work for transfers to a new owner. TUPE does three important things:

- When there is a TUPE transfer, employees transfer automatically from the **transferor** (original employer) to the **transferee** (new employer). The transferee steps into the original employer's shoes and inherits all rights, liabilities and obligations in relation to employees;
- TUPE protects employees against dismissal in connection with a TUPE transfer;
- TUPE requires employers to inform and consult representatives of any affected employees before a transfer takes place.





This book addresses all these issues, and explains the practical things to think about when faced with a potential TUPE transfer.





CHAPTER 1

Business Transfers

TUPE applies to a ‘relevant transfer’. Regulation 3 of TUPE sets out two types of relevant transfer:

- a business transfer; and
- a service provision change.

Business transfers are also known as ‘standard transfers’. This is where a business, or part of a business, moves to a new owner. The identity of the employer must change to qualify as a business transfer. There must be a transfer of an ‘economic entity’ that retains its identity afterwards. There are three key elements:

- An economic entity;
- A transfer of that economic entity; and
- The economic entity must retain its identity after the transfer.

What is an economic entity?

Regulation 3(2) of TUPE describes an economic entity as ‘an organised grouping of resources which has





the objective of pursuing an economic activity, whether or not that activity is central or ancillary.’

Sometimes it will be clear that an economic entity has transferred. If a company sells its entire business to another company as a going concern, that will be a business transfer.

Example: Cleanaway Limited buys the whole of Notsoclean’s cleaning business. Cleanaway takes over premises, equipment and staff of Notsoclean and continues to provide the same cleaning services to Notsoclean’s customers.

The **economic entity** here is Notsoclean’s cleaning business:

- The staff, equipment and premises are an **organised grouping of resources**;
- This ‘organised grouping’ pursues an **economic activity** - the provision of cleaning services.

The economic entity must be more than just a collection of assets though. And certain types of asset are more important to certain types of business. A cleaning company is a ‘labour intensive’ business. This means that staff are the main asset. The transfer of staff is therefore key to whether TUPE applies. (A business cannot refuse to take on employees in order to avoid TUPE though. A dismissal is automatically unfair if the sole or principal





reason for dismissal is the transfer (regulation 7 TUPE). We will look at TUPE and dismissals later in chapter 8).

In an asset-reliant business, it can be helpful to look at the core assets of a business to see if they have transferred and are being used in the same way afterwards. If someone is selling a farm, the transfer of the farm land is crucial to the farm's economic activity of farming. If the sale relates to the sale of farm equipment without the land, it is just a sale of assets rather than an economic entity.

Stability

The economic entity must be stable. 'Stability' here means that the economic activity must be ongoing when it transfers. A contract to complete a short-term building contract would not be an economic entity because it is too short-term. It is not a stable, ongoing activity. In a labour-intensive business like a cleaning business, a stable economic entity would be an organised group of workers who are permanently assigned to particular work (as in our Notsoclean example).

Part of a business

The transfer of part of a business can be a TUPE transfer provided the part is a self-contained economic unit. Any assets, including staff, would need to be grouped together to create a distinct economic entity which can be severed from the rest of the business.





If Notsoclean had separate domestic and commercial cleaning functions, the transfer of only one of those functions to Cleanaway could be a business transfer (provided the rest of the test is met).

Did the economic entity transfer?

Most of the time, it will be obvious when a business transfer has taken place. Usually there will be a date and time when the transfer happens and when the new employer takes over responsibility for the employees.

In our example, Cleanaway now owns all Notsoclean's assets and is carrying out cleaning services for Notsoclean's former clients with Notsoclean's former employees. Notsoclean is no longer operating a cleaning business. The entire business of Notsoclean has transferred to Cleanaway.

Sometimes it might not be clear whether a business has transferred from one company to another. This can be the case when employers are trying to avoid or ignore TUPE. The key element in a transfer is that the identity of the employer responsible for running the business has changed. Whether an economic entity has transferred is a question of fact which cannot be brushed under the carpet or avoided. If necessary, the courts will look at the substance of what has happened and decide if there has been a business transfer.





A transfer can include mergers where two companies close and combine to form one new employer. A transfer can happen even if employees are entirely unaware of it, for example if they have been deliberately kept in the dark.

Does the economic entity retain its identity?

We know that the transfer must relate to a 'going concern' – a business with an ongoing economic activity. The business and its business activities must still exist after the transfer. Usually this will be easy to establish.

In our example, Cleanaway are carrying on the same business with the same staff for the same clients as Notsoclean did before the transfer. The business looks the same before and after the transfer.

It might not always be so obvious. To establish whether the business has retained its identity, these questions might be helpful:

- Have physical assets transferred, such as buildings and office equipment?
- Have most employees been taken on?
- Have the customers transferred?
- Has goodwill (any value in the brand name or the customer database) transferred?





- How similar are the activities before and after the transfer?
- Has there been any disruption to activities or a gap in active business?

Similar activities

Whether economic activities are similar before and after the transfer will depend on the similarities and differences between the goods and services sold before and afterwards. In *Mathieson v United News Shops*, a hospital shop sold newspapers, sweets and gifts. The shop was sold and the new owner changed the business to sell a wider range of convenience food, clothes and electrical goods as well as papers, sweets and gifts. The Employment Appeal Tribunal said that TUPE did not apply because the business did not retain its identity after the sale. There was too big a difference between the goods sold before and after the transfer.

Gaps in activity

A gap in active business will not necessarily prevent there being a transfer. For example, a short period of inactivity to acquire an alcohol licence would not prevent TUPE from applying to the sale of a bar. A five-month gap in activity did not stop TUPE applying to a contract to operate a music school in *Colino Siguenza*, a European Court of Justice case. In that case, three out of the five months were school holidays. This was relevant because activities would have stopped during





that period anyway. Temporary gaps for good reason are fine, provided the transferred business retains its identity when it restarts.







CHAPTER 2

Service Provision Changes

TUPE 2006 codified the law around service provision changes. Before that, service provision changes were governed by case law.

A service provision change can happen in three ways:

- A company (the client) stops doing certain activities on its own behalf, such as commercial cleaning, and gets a contractor to do it instead. This is called outsourcing. The transfer here would be from client to contractor;
- The client changes which contractor does certain activities. This is called re-tendering. The transfer would be from outgoing contractor to incoming contractor;
- The client decides to take the work back in-house from a contractor. This is called in-sourcing. The transfer here would be from contractor back to client.





Example: Widgets Plc contract out their canteen and catering facilities to a contractor, Cooking Crew. The contract with Cooking Crew is due to expire. If Widgets Plc retender and change contractors, or take the catering service back in-house, that will be a service provision change and TUPE will apply.

Other conditions need to be satisfied for TUPE to apply:

- There must be an organised grouping of employees whose main purpose is to carry out those activities on behalf of the client. It is those employees who will transfer;
- The activities are fundamentally the same before and after the transfer;
- The client wants the contractor to carry out the activities on an ongoing basis, rather than for a single event or on a short-term basis;
- The activities are not only related to the supply of goods.

What is an organised grouping of employees?

This requirement limits TUPE to situations where the outgoing contractor has a team of employees who are dedicated to the activities which will transfer.





If Cooking Crew always use the same employees in the Widget Plc kitchen and canteen, that will be an organised grouping of employees. If the contractor changes, or the work is taken back in-house, TUPE will apply (provided the other parts of the test are met).

On the other hand, if a courier company uses different couriers at different times to service a particular client, that will not be an organised grouping of employees. If the client changes courier companies, TUPE will not apply.

To meet the test, employees must be deliberately organised into a group which services the client. If work is assigned to people because of the shifts they are on, rather than because they are assigned to a particular client's work, then this will not be an organised grouping. In *Eddie Stobart v Moreman*, employees worked on a particular contract because their shifts coincided with the time that work needed doing. They spent most of their time on the contract but were not deliberately assigned to it. A new company won the contract. Did the employees working on the contract transfer to the new contractor? The Employment Appeal Tribunal (EAT) said no. The employees did the work because it happened to fall within their shift pattern, not because of any organised grouping. TUPE did not apply.

Fundamentally the same activities

The activities before and after the transfer must be fundamentally the same but do not need to be identical.





When it had the catering contract at Widgets Plc, Cooking Crew cooked and served hot dinners in the staff canteen. When the contract ended, Widgets Plc decided to stop providing hot food and instead have self service fridges containing ready prepared snacks and drinks. Cool Gang won that contract. TUPE is unlikely to apply to Cooking Crew's employees because the activities before and after the contract change are not fundamentally the same.

There are good examples of this principle in case law. In *Salvation Army v Bahi*, the Council contracted out its homelessness services to CLL. CLL provided accommodation at various locations. They also provided support workers to help people with everyday tasks and issues. The Council merged its homelessness and ex-offender support services. The Salvation Army won the new contract for the merged service. The Salvation Army provided their own, different accommodation. They changed the referral system and made minor changes to the services provided. However, the core activities were essentially the same – accommodation-based support for homeless people and the provision of support workers. The changes to premises and the nature of the service were not enough to make the activities provided by the Salvation Army fundamentally different from those provided by CLL. There had been a service provision change and TUPE applied.

The situation was different in *Nottinghamshire Healthcare v Hamshaw*. Residents were originally looked after by care workers in a care home. The care home closed, and residents were rehoused into





their own homes and looked after there by a private care contractor. The nature of the care changed significantly, from managing residents in an institution to supporting them in their own homes. Routines were different and staff slept over in residents' homes rather than working active night shifts. The activities after the change were fundamentally different from before. There had been no service provision change. TUPE did not apply and the employees did not transfer.

You can see from these two decisions that the existence of a transfer really depends on the facts. The Courts will look in a common-sense way at whether the activities are essentially the same after the transfer.

Multiple contractors

If a contract is retendered and one contractor secures the work, that will be a service provision change and TUPE will apply. TUPE can still apply if more than one contractor takes on the work, provided it is clear where each employee will transfer. The key is to establish which part of the business the employee was assigned to and which contractor took over that work.

But what if the work is allocated among several different contractors, and the work is allocated randomly? This happened in *London Care v Henry*. Sevacare provided home-based care to residents on behalf of the local authority. Work was allocated geographically to workers to minimise travel between jobs and ensure continuity of care for residents.





Sevacare lost the contract and the work was divided between four new contractors, including London Care. Was there a TUPE transfer due to a service provision change? The EAT said no. The work had been given to four contractors and allocated on a random basis rather than geographically. It was impossible to tell where some of the employees should transfer because the residents they had cared for were now being looked after by different contractors. The service had become too fragmented. The activities were not ‘fundamentally the same’ as before the contract change.

Contracts to supply goods and short-term contracts

TUPE will not apply where a business simply changes their suppliers. A transfer must involve the supply of services as well as goods. If a restaurant changes its grocery suppliers, TUPE will not apply and employees will not transfer from original supplier to new supplier.

TUPE will not apply to a single event or short-term task either. This is designed to avoid TUPE applying when a business buys in services for a one-off event, like a conference or an exhibition. But whether TUPE applies to a single event also depends on how long the contract will last. For example, a big event like the Olympic Games might have several different security contracts. One contract might deal with the provision of ongoing security advice for several years leading up to the Games. Another contract might provide





for security staff to protect athletes during the event itself. Both contracts are one-off because they relate to the one-off event of the Olympic Games. The first is much longer though and would be subject to TUPE if contractors changed part way through the delivery of the contract. The second contract is both one-off and short-term, and TUPE would not apply.







CHAPTER 3

Other Situations

Share sales

TUPE does not apply to share sales. There is no transfer of a business from one person to another when a company is taken over in a share sale. The legal identity of the employer does not change. TUPE does not apply because the employees continue to be employed by the same company.

Public authorities

TUPE does not apply to transfers of public administrative functions within public authorities. This is because the exercise of public powers is not considered to be an 'economic activity'. If administrative functions are transferred from one local authority to another, TUPE will not apply (although similar rules are often applied in practice).

However, TUPE can apply to the transfer of staff carrying out 'economic activities' in the public sector. For example, cleaning and maintenance services do not involve the exercise of any public power and are





economic activities. Cleaning and maintenance services which transfer from one public authority to another could be covered by TUPE.

TUPE will also apply to transfers from the public sector to the private sector. This usually involves the outsourcing of activities previously done by local authorities, such as refuse collection. It will be a service provision change from local authority to private contractor.

Transfers abroad

TUPE potentially applies to the transfer of a business from the UK to another country, especially where the contracts of employment say that UK law applies. TUPE simply states that it applies to 'relevant transfers' if the undertaking (or, for service provision changes, the organised grouping of employees) were based in the UK. In *Hollis Metal Industries Ltd v GMB* [2008] IRLR 187, the EAT confirmed that TUPE potentially applied when a company sold part of its UK manufacturing business to a company in Israel, which moved the manufacturing function over to Israel. The EAT decided that, since the purpose of TUPE was to protect the rights of workers in the event of changes of employer, the better approach was to ensure those employees are protected even if the transfer was across borders outside the EU.





Many companies are choosing to outsource services like call centres to other countries where costs are lower.

But the situation is complicated. Let's take the sale of a UK business to a company in the Philippines. If TUPE applies, employees transfer on current terms, including their place of work. If the new company does not need staff in the UK, there is a place of work redundancy situation. The new company might offer alternative employment abroad, but it would be on local, less attractive terms. Most employees would prefer redundancy to employment abroad on those terms. Most would also prefer the UK employer made any redundancies before the transfer to avoid having to pursue a foreign company for payments. For this reason, there are few cases on the issue. Businesses must ensure they understand any TUPE obligations which apply to transfers abroad and seek advice on how to protect the business against potential liabilities.

All clear then?

Hopefully the building blocks of a TUPE transfer are now a bit easier to understand. The principles relating to business transfers and service provision changes are based on the same things:

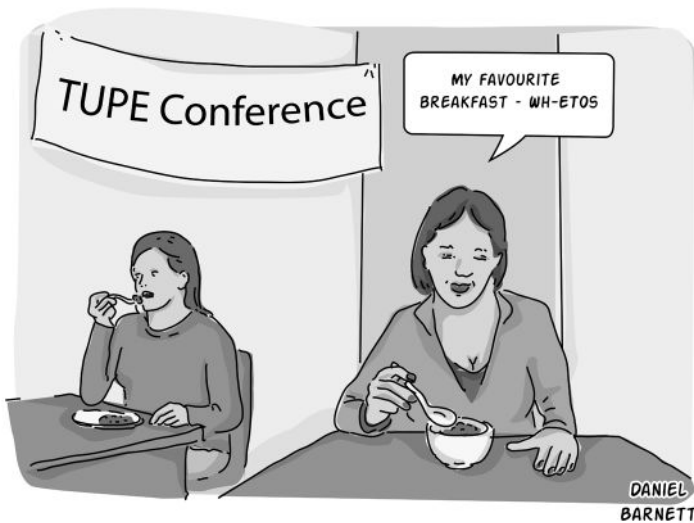
- a change of employer;
- the transfer of an ongoing active business; and





- a business activity which looks pretty much the same before and after the transfer.

Employers should assume TUPE applies in these business scenarios. As case law has shown, the facts will establish whether TUPE applies, rather than employers.





CHAPTER 4

The Automatic Transfer Principle

How does the ‘automatic transfer’ principle work in practice? What does it mean? Who and what transfers to the new employer?

What does ‘automatic transfer’ mean?

When there is a TUPE transfer, employees’ contracts do not terminate when their employment with the transferor ends. Instead, employees transfer automatically from the transferor to the transferee on their existing terms of employment. Their employment carries on as if made directly with the transferee. Their continuity of employment will be preserved.

Example: Cleanaway Limited buys the whole of Notsoclean’s cleaning business. There is a TUPE transfer of Notsoclean’s employees to Cleanaway. The employees’ contracts of employment with Notsoclean transfer and continue seamlessly, as if they had been made directly between the





employees and Cleanaway. Both the employees and their contractual terms have automatically transferred. If Sarah Smith was employed by Notsoclean for 3 years before the transfer, she will still have 3 years' continuous service after the transfer, with Cleanaway.

Who transfers?

Regulation 4 of TUPE says that the employees who transfer are:

‘..employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer..’

It will usually be easy to establish the ‘organised grouping of resources or employees’ in a business sale. In our example, Cleanaway bought the whole of Notsoclean’s business. All Notsoclean’s employees are part of the organised grouping of resources which transfers automatically to Cleanaway.

Sometimes it might not be so easy to tell which employees have transferred. If only part of a business is sold, disputes can arise about which employees should transfer to the buyer and who stays with the seller. In this situation, an employment tribunal may have to assess which employees were assigned to the part which was sold. The same is true in service provision changes, especially if the service is transferred to more than one new contractor.





Let's look at the wording of regulation 4 in more detail.

What is an employee for the purposes of TUPE?

The definition of employee in TUPE is wider than the definition contained in the *Employment Rights Act 1996 (ERA)*. The ERA says an employee is someone who works under a contract of employment. That is straightforward and rules out both workers and the self-employed.

The TUPE definition of employee is contained in Regulation 2. An employee is:

'any individual who works for another person whether under a contract of service or apprenticeship or otherwise'.

Does this include workers?

The inclusion of 'or otherwise' appears to make the definition wider. The self-employed are not included, but what about workers? TUPE comes from the EU Acquired Rights Directive, where the definition of employee refers to a relationship '*arising from a contract of employment or from an employment relationship*'. That definition also goes beyond the ERA definition. However, the Directive is not intended to override national laws on the definition of employment and employment relationships. There is no case law on whether a worker might fall within the wider TUPE definition, but for that reason it seems unlikely.





What about directors?

The definition of employee can include executive directors who are also employees, provided they are assigned to the organised grouping of resources. A director's role as office holder might change once employed by the transferee though, because they won't necessarily be a director of the new company. A director's contract of employment will be important in establishing their role in the new business. And even if a director is not considered to be the transferor's employee, they might fall under the wider TUPE definition.

What does 'employed by the transferor' mean?

The identity of the employer will usually be straightforward. But what if an employee works in the part of the business to be transferred but is technically employed by a service company or a holding company – will they transfer? Strictly speaking, no. But there are occasions where the courts are prepared to 'lift the corporate veil' where complicated company structures conceal the reality of an employment relationship. This can happen in a large corporate group where employees are employed by one company but assigned to a different company within the group which then transfers. If complicated structures are used to avoid TUPE, tribunals might be prepared to look beyond which company is named in the employee's contract of employment. In *Duncan Webb v Cooper*, the Employment Appeal Tribunal acknowledged that an





employee could be treated as assigned to a transferring business if they spend most of their time working in it. This can be the case even if they are technically employed by another company. It will be rare though and tribunals will only be persuaded if the situation is being used as a mechanism to avoid TUPE.

What does ‘assigned to the organised grouping’ mean?

Assignment here means permanent rather than temporary assignment. Whether an assignment is temporary will depend on the facts, including the length of the assignment. In *Gale v Northern General Hospital*, a student nurse was temporarily assigned to work at a particular hospital for training purposes. The Court of Appeal said he was not permanently assigned as he was not part of the ‘human stock’ of the hospital.

Rather unhelpfully, the courts have refused to give detailed guidance on assignment because they say the facts will vary from case to case. How much time an individual spends in the part of the business being transferred will be relevant but is only one factor. *Skillbase Services v King* involved a service provision change. The Council had contracted out its housing maintenance to Skillbase, which had other contracts too. The Council then brought housing maintenance back in-house. A dispute arose over which employees would transfer back to the Council from Skillbase. One employee spent all his time on the housing maintenance contract. The Court of Session agreed that he transferred. However, two other employees each





said they spent 80 per cent of their time on the housing maintenance contract. Why did only one of them transfer?

The one who transferred spent 80 per cent of his time on the contract. His employment contract related specifically to the performance of the housing maintenance contract. That was enough to be ‘assigned’ to the housing maintenance contract.

The third employee was a manager and in charge of lots of contracts including the housing maintenance one. The Court was not convinced about his assertion that he spent 80 per cent of his time on the housing maintenance contract. He was more of a figurehead than a worker on the contract and was not involved in day to day operational matters. His employment contract was general in nature relating to overall company management. The Court said he was not assigned to the housing maintenance contract.

The Court said the following things were relevant when considering whether an employee is assigned to a particular section of the business:

- The time spent in one part of the business or another;
- The value given to each part of the business by the employee;
- The employee’s contractual terms showing what they can be required to do;





- The allocation of the cost of the employee's time to different parts of the business.

The key is to first identify the organised grouping of employees (which will transfer), and then decide whether an individual was assigned to that group. In *WGC Services v Oladele*, the employees were employed by JKG, which provided cleaning and housekeeping services to hotels. JKG lost various contracts in relation to 19 hotels. Two area managers had been responsible for the hotels between them. JKG claimed that the two managers should transfer to WGC, the company which won the contract for 6 hotels. The employment tribunal said the managers were part of an organised grouping which transferred to WGC. The Employment Appeal Tribunal disagreed. The tribunal should have looked at each hotel individually and then assessed whether the area managers were assigned to any organised grouping of employees.

This issue seems complex but do not despair. In practice, the transferor and transferee usually agree a list of employees who will transfer to avoid disputes.

Employees who are absent

Employees who are absent at the time of the transfer will usually transfer. This includes employees on maternity leave or sick leave, even if it is long term. What if someone has remained employed only to access permanent health insurance? If someone has been off sick for many years with no prospect of returning, but kept on the books to access PHI payments, they





will not be assigned to the organised grouping of employees.

Employees who are suspended pending disciplinary proceedings will remain assigned to the organised grouping, provided they haven't been removed from it. If an employee has been deliberately removed from activities following a client instruction, they will not be assigned, and will not transfer. It will all depend on the facts. Even employees who have been temporarily laid off can potentially form part of an organised grouping, provided the group of employees retains its identity as an 'organised grouping of employees'. The length and reason for the lay-off will be relevant. This principle avoids a TUPE loophole which would allow businesses to temporarily lay off staff prior to a transfer in order to avoid TUPE.

Employed immediately before the transfer

The automatic transfer principle applies to anyone employed in the organised grouping of resources immediately before the transfer. It also applies to employees who would have been employed immediately before the transfer if they hadn't been automatically unfairly dismissed. They can pursue a claim against the transferee. However, if there is an economic, technical or organisational reason for the dismissal (the 'fair reason' defence in TUPE cases) then the employee will not be deemed to have been employed immediately before the transfer. Liability for any claims stays with the transferor.



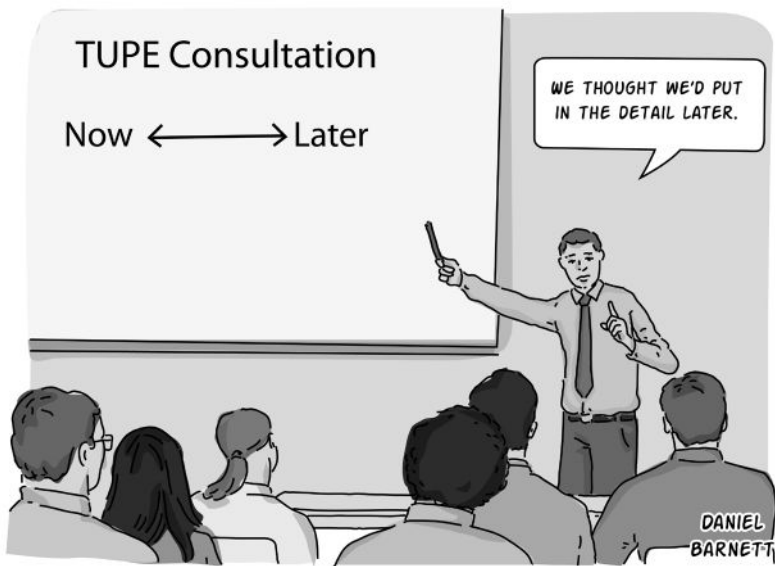


If an employee is dismissed before the transfer, but appeals and is reinstated after the transfer, they are deemed to have been employed at the time of the transfer. This is because the dismissal ‘vanishes’ like in other appeal cases. This principle won’t apply if an appeal is simply pending before the dismissal. The appeal must be successful for the dismissal to vanish.

Objecting to the transfer

Employees can choose who they want to work for. Some employees may not want to work for the transferee. If an employee objects to the transfer, then their employment will not transfer. Their employment will terminate on the transfer date but there will be no dismissal. That means they are not entitled to any compensation. It must be a clear objection though. Expressions of concern or unwillingness about a proposed transfer might be just that – an expression of unhappiness rather than an objection. Employers should seek clarification if the position is unclear. It isn’t compulsory to tell employees about their right to object, but it might be best practice to do so, together with information about the consequences.







CHAPTER 5

What Transfers?

Regulation 4(2)(a) says that all the transferor's '*rights, powers, duties and liabilities under or in connection with any such [employment] contracts*' pass to the transferee. This is not just the paper documents. Although the written contracts of employment will contain some rights and liabilities, they won't necessarily cover everything. The transferee must do some research to ensure they know exactly what duties and liabilities they are taking on. This process is called 'due diligence'.

All statutory and contractual benefits will transfer. This might include:

- Holiday pay;
- Medical insurance or permanent health insurance (PHI);
- Company car;
- Contractual bonus or commission schemes;
- Enhanced maternity and redundancy schemes.

TUPE will not create rights where they didn't exist previously though. A genuinely non-contractual





policy which was not legally enforceable against the transferor will not transfer to the transferee. This is because non-contractual policies do not contain rights or obligations. Non-contractual policies contained in a handbook will only transfer if they are incorporated into contracts of employment (which is rare).

Accrued liabilities

Remember that the transferee steps into the transferor's shoes. Anything done by the transferor before the transfer is treated as having been done by the transferee. If an employee is injured before the transfer due to the transferor's negligence, liability for that injury will pass to the transferee. The same applies to acts or omissions which give rise to claims such as unfair dismissal and discrimination. Consequently, it is vital for transferees to ensure they are suitably indemnified by the transferor against pre-transfer liabilities. An indemnity means that the transferor must compensate the transferee if any of those liabilities result in a claim against the transferee.

Discrimination

Equal pay claims for any pre-transfer period must be brought within 6 months (the usual limitation period for equal pay claims) of the transfer even though the claim would be against the transferee. This is because the limitation period in equal pay claims starts to run from the end of 'employment'. It is different from a standard discrimination claim, where time starts to run from the date the discrimination took place or the end of any





continuing act. Theoretically a discrimination claim could be brought against a transferee for a pre-transfer period provided it is brought within 3 months of the last alleged discriminatory act in a continuing series.

Insurance policies

An employee's right to benefit from an insurance scheme (such as private medical insurance) transfers to the transferee. A transferor's right of indemnity from an insurance company may also transfer. Let's say an employer's liability insurance policy is triggered by a personal injury claim which pre-dates the transfer. Liability for the injury transfers to the transferee. But does the right to indemnity under the insurance policy transfer to the transferee too? This theory was tested by the courts in *Martin v Lancashire County Council*. Here, the judge said the right to indemnity did transfer. He pointed out that if it didn't transfer, an employee could potentially be left without a remedy. This is because a transferee is unlikely to have insurance relating to incidents pre-dating the transfer.

Union recognition and collective agreements

Collective agreements are not usually legally binding between the parties. However, they can be relevant in some legal claims, for example in deciding whether an employer has acted fairly where the employer has breached a collectively agreed redundancy procedure. Consequently, Regulation 5 of TUPE provides for any





collective agreement made between a recognised trade union and a transferor to transfer to the transferee.

Some parts of a collective agreement may also be incorporated into employment contracts and transfer that way. This might apply to a term in a collective agreement which stipulates how pay should be calculated. This term could be enforced directly against the transferee. Some parts of a collective agreement will not be incorporated into contracts, for example sections which deal with a collectively agreed redundancy process. Regulation 5 means transferees cannot ignore these collectively agreed procedures.

Regulation 4A of TUPE sets out that collective terms agreed after the transfer will not automatically transfer where the transferee is not party to the collective bargaining process (the negotiations between an employer and a trade union). The collective terms which transfer are only those that apply at the point of transfer. If employees transfer from a local authority to a private contractor, any collectively agreed terms between the local authority and the trade union made after the transfer will not apply to the private contractor.

Union recognition also transfers to the transferee under Regulation 6. It is likely to apply to both voluntary and statutory recognition. This means that certain rights – such as the right for union representatives to have paid time off - transfer to the new employer. But this only applies if the organised grouping of resources maintains a distinct identity from the rest of the transferee's undertaking after the





transfer. This means that the grouping has the power to govern itself without the direct intervention of the transferee. If the transferee has operational as well as ultimate control, union recognition will not transfer. If after the transfer, the transferring business is reorganised and fully integrated into the transferee's business, union recognition will not transfer.

Regulation 6(2)(b) of TUPE allows for transferred recognition agreements to be varied or revoked. However, transferees should consider the risk of industrial action or an application for statutory recognition before taking such steps. Some things are better negotiated than litigated.

Pension rights

Most rights under an occupational pension scheme do not transfer. Old age, invalidity and survivors' benefits under occupational pension schemes are expressly excluded from TUPE by Regulation 10. The transferee does not have to mirror the transferor's pension provisions or contribute to their scheme.

This principle does not apply to early retirement benefits, including the right to retire early. If a transferor's pension scheme provides for early retirement with the employer's consent, then the employee's right to be considered for early retirement benefits will transfer to the buyer. It's worth remembering that employees will become deferred members of the transferor's scheme when they transfer. This means that the transferee only assumes responsibility for the enhancements to an





early retirement pension, not the full amount. TUPE does not create the right to double recovery.

Share schemes and profit share schemes

Many profit share and share schemes say they are non-contractual and non-contractual schemes do not transfer. Care should be taken as non-contractual schemes can become an implied contractual term by regular use over a long period. If a share save scheme is contractual, the transferee must provide an equivalent scheme or potentially buy out the employees' rights if a similar share save scheme isn't available.

Restrictive covenants

Although these terms will transfer along with the employment contract, they will refer to the transferor rather than the transferee. The customers or activities they refer to will be those of the transferor. This can cause problems. Transferees may seek to agree new covenants with key employees. We will look at changing terms and conditions in chapter 10.

And what doesn't transfer?

The transferor retains a few residual liabilities. If employees have share options, the TUPE transfer might give employees the right to exercise those options under the transferor's share option scheme and the transferor will have to deal with that. Accrued pension rights up to the transfer date also remain with the transferor. The transferor will also retain any criminal





liabilities arising from issues such as breach of health and safety legislation. PAYE responsibilities relating to the pre-transfer period also stay with the transferor, because the money is owed to HMRC, not employees.







CHAPTER 6

When Does the Transfer Take Place?

There is debate about whether a transfer can extend over a period or whether it must happen at a particular point in time. Case law originally suggested the former, but the European Court of Justice more recently decided that it must happen at a particular point in time. But Regulation 3(6) of TUPE says a transfer can consist of a series of two or more transactions. So, which is it?

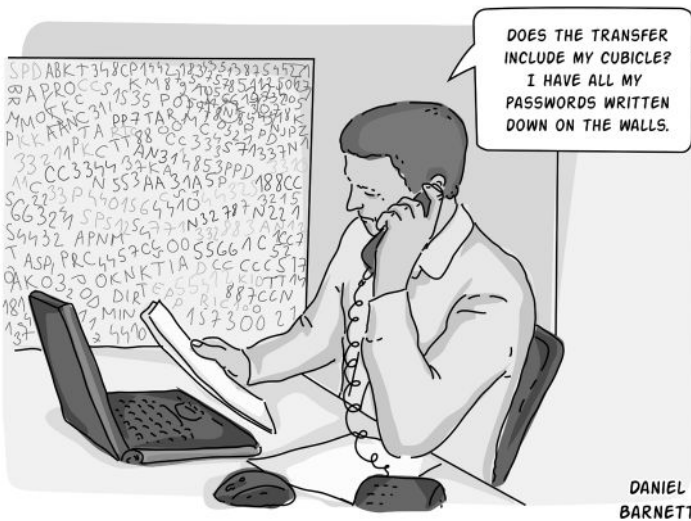
The UK courts have applied the ECJ ruling and stated that the transfer takes place when responsibility for the business transfers from transferor to transferee. It is a factual date and time, not something that can be agreed between the parties despite facts which point to something different. In *Housing Maintenance Solutions v JF McAteer*, the employment tribunal decided that the transfer happened when the new employer took responsibility for the transferring employees. The EAT said this was wrong. The transfer takes place when the new employer takes responsibility for the business, not the employees.





In terms of the legal paperwork, the transfer usually takes place on completion, rather than exchange of contracts. However, the definitive answer will be in the facts of the transaction - when the new employer takes responsibility for the business - not when paperwork is signed off.

The situation might be a little easier to establish in service provision changes. The transfer will usually take place as soon as there is a change in the legal person responsible for running the service. This will be when the contractors change or when the old operating licence terminates and the new one takes effect.





CHAPTER 7

Information and Consultation

Regulation 13 of TUPE requires the transferor and the transferee to inform and consult with their ‘affected’ employees about any transfer before it happens. This process stops employees being kept in the dark about a transfer and ensures that they can object if they want to. An employer must always provide employees with information about a transfer. However, a consultation exercise is only required if the employer plans to take any ‘measures’ in connection with the transfer which will affect employees.

Which employees are ‘affected’ by the transfer?

Transferors and transferees must inform and consult in relation to their own affected employees. This means employees who are affected by the transfer, or any measures taken in relation to it. This doesn’t just mean employees who are in the ‘organised grouping’ of employees/resources which transfers. Affected employees are:

- The transferor’s employees who may or will transfer





- The transferor's employees who are not transferring but whose jobs might still be affected by the transfer
- The transferee's employees whose jobs are affected by the transfer (and the incoming employees).

For example, an employee who isn't going to transfer might still be affected by the transfer if they do some work for the part of the business which is being sold. An employee who has a job application pending in a business (or part of it) will also potentially be affected by any transfer.

Each to their own

The rules say that the transferor and transferee must inform and consult with representatives of *their own employees*, not each other's. A trade union recognised by the transferor has no right to information or consultation from the transferee before the transfer. In practice, though, there may still be voluntary communication between a transferee and the transferring employees. We will look at this later when we talk about consultation on 'measures'.

Who are the appropriate representatives?

If the employer recognises a trade union, they should inform and consult with union representatives. If there is no trade union, then the employer must consult employee representatives, either existing ones or new ones elected for the task. Existing





employee representatives should only be used if their remit already covers this sort of responsibility. Representatives from a works council which deals with financial matters would probably be suitable; representatives elected to organise an office party definitely would not.

If trade unions only represent some groups of employees, employers might find themselves dealing with both trade unions and employee representatives to ensure all employees are covered off. Meetings can be joined to avoid too much duplication.

Employers must allow representatives access to employees and any other facilities they might need to conduct proper consultation with employees and management. This might include meeting rooms and access to phones and email.

There are detailed rules about electing employee representatives which are contained in regulation 14. The employer must ensure that the process is fair and that elected representatives cover all employee groups. All representatives must be ‘affected employees’ themselves and must be elected before consultation starts. This means an employer might have to break the news about a TUPE transfer earlier than they would like.

Small employers

The rules are relaxed for small businesses with fewer than 10 employees. Regulation 13A allows these employers to inform and consult directly with affected employees if there are no existing representatives.





This takes some of the administrative burden off the employer without removing protection for employees.

Providing information about the transfer

What information?

The employer must provide some basic information about the transfer: the fact it is happening, when it will happen, and the reasons for it. They must also provide information about the transfer's 'legal, economic and social implications'. Unhelpfully, this phrase isn't defined in TUPE. For a transferor's employees, it should include enough information about the proposed transferee to allow employees to assess the impact of the transfer.

'Legal' implications include whether TUPE applies to the transfer and the effect of TUPE on an employee's legal rights. This would include any changes to terms and conditions or major plans like a relocation or redundancies.

'Economic' implications would include the effect the transfer will have on employees' pay and benefits, or the amount of work they might be given if they are hourly paid rather than salaried. The transferor should give enough information to allow its employees to assess whether the transferee is financially stable.

'Social' implications might include any proposed changes to working patterns or shifts. If the transferee intends to relocate the business, moving to a new house





or school would be a social implication for employees and their families. Employers should provide information on house prices and local schools in the new area.

Information must also be provided about the number of agency workers employed, where they are working in the business and the type of work they are doing.

Information on ‘measures’

Employees are usually most concerned about potential changes which the transfer will bring about. ‘Measures’ is a wide term and includes any action, step or arrangement taken in connection with the transfer. It could include changes to things like pay, working hours and union recognition. It could also include a relocation or redundancies.

The transferor must give its own affected employees information about any changes they plan to make. However, the transferor must also inform employees about any measures that they envisage the transferee will take after the transfer. Communication between buyer and seller here is key to ensure that the transferee provides that information in good time for the transferor to pass it on to employees.

In relation to measures, nil responses are required. If no measures are intended, employers must tell representatives that. The transferor must also tell transferring employees if the transferee doesn’t intend to make any changes after the transfer.





When should the information be given?

Employers must ensure that relevant information is given to representatives long enough before the transfer to allow any consultation to take place. There is no set timescale so the time period will depend on the extent of any measures that are planned (remember, no planned changes means no consultation is needed). The more measures intended, the more time will be needed between providing relevant information and the transfer. Circumstances are relevant too. If an employer gives the information a few weeks before the transfer, but two weeks of that is a shut-down period where no one can be contacted, that is unlikely to be enough time. That's because there won't be enough time left for consultation before the transfer.

How should the information be given?

Information should be in writing and copies given to each of the employee representatives. It should be hand delivered or sent by post to the address specified by representatives.

Consultation about 'measures'

The duty to consult only arises if either the transferor or the transferee plan to make any changes in relation to their own employees. Consultation must be meaningful, and should aim to reach an agreement but, as with all kinds of consultation, this will not always be possible. If alternative suggestions are made by representatives, the employer must acknowledge them.





If the employer rejects any suggestions, representatives should be told why.

The consultation requirement is limited to an employer's own employees, about their own measures. This means that a transferee doesn't have to consult directly with transferring employees about changes it intends to make after the transfer. The transferee's only obligation is to provide that information to the transferor to pass on to employees. Nor does the transferor have to consult with transferring employees about the transferee's proposed measures — which makes sense: how can one business enter meaningful consultation about another business's plans?

This gap in TUPE-related communication arises because the TUPE rules relate to an employer informing and consulting its own employees about a transfer before it takes place. The transferring employees aren't employed by the transferee until after the transfer. So, consultation between transferring employees and the transferee about any proposed changes doesn't have to start until after the transfer. Any changes the transferee makes after the transfer will therefore need to comply not only with TUPE rules (i.e. regarding contractual changes after a transfer) but also with normal employment law rules.

This gap in communication can cause significant worry for employees, and the new relationship between the transferee and the transferring employees can start off on the wrong footing. For this reason, some transferees choose to open lines of communication voluntarily with transferring employees before the transfer takes place. Voluntary consultation about





proposed changes might help to get future employees on board with plans at an early stage. It is voluntary though, not a legal requirement — and the process should be carefully supervised by the transferor to ensure that nothing is done by the transferee which might open the transferor up to liability. For example, if a transferee says it is going to impose significant contractual changes after the transfer, that could be an ‘anticipatory’ breach of contract which allows an employee to resign immediately and claim constructive dismissal against the transferor.

Voluntary consultation can also start before the transfer if the proposed changes involve mass redundancies (20 or more). Some transferees have historically chosen to do this voluntarily, even though pre-transfer consultation did not count towards its legal collective consultation obligations. The law was recently changed by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014, allowing pre-transfer consultation to count towards collective consultation requirements. This is good news for transferees who want to act quickly following the transfer.

Special circumstances defence

An employer might have a defence if it can show there were special circumstances which made it not reasonably practicable to inform and consult and it had done its best in the circumstances to comply. This is not an easy win, but occasionally the defence will succeed.





In *Unison v Somerset Council*, the employer did not consult about a proposed measure which arose shortly before the transfer. A special circumstances defence was allowed where events moved rapidly, a deadline was imminent, and there was a chance the whole deal might collapse. In this case, the EAT noted that there had been ‘exemplary’ and significant consultation in all other respects. Just doing nothing will not wash, however.

Potential consequences for failure to inform and consult

The failure won’t affect the transfer itself. The remedy is a claim for compensation. Affected employees can bring a claim if the employer has failed in relation to the election of employee representatives. The employee representatives themselves or the relevant trade union can also bring claims for failure to inform and consult.

If the claim wins, a tribunal can award ‘appropriate compensation.’ This means the amount that the tribunal thinks is fair, bearing in mind the severity of the employer’s failure to comply with its duty. The maximum pay-out is 13 weeks’ gross pay for each affected employee. There is no cap on gross pay so the sums involved can be large.

The general approach is that the maximum should be awarded if there has been no consultation at all, unless there are circumstances which justify a lesser award. Technical breaches might attract no





compensation whereas a deliberate decision to ignore the rules will probably get the maximum sanction. Employers ignore their obligations at their peril.





CHAPTER 8

TUPE and Dismissal

Employees get extra protection against dismissal when there is a TUPE transfer. Employees must still have two years' continuous service to bring a TUPE unfair dismissal claim. However, certain dismissals will be *automatically* unfair, if the sole or principal reason for the dismissal is the transfer. Automatic unfair dismissals are different from normal unfair dismissal cases. In a normal unfair dismissal case, an employer must first show that they had one of the five potentially fair reasons to dismiss (conduct, capability, etc). Then they must satisfy the reasonableness test, by showing that the decision to dismiss was reasonable in all the circumstances. In automatic unfair dismissals there is no reasonableness test. If the sole or principal reason is the transfer, the unfair dismissal claim succeeds automatically. And the extra protection applies to any employee of the transferor or transferee who is dismissed because of the transfer, not just those assigned to the 'organised grouping' of resources/employees which transfers.

If the sole or principal reason for the dismissal is an economic, technical or organisational ('ETO') reason





then the dismissal is potentially unfair. That means that the employer still needs to show that it has acted reasonably in all the circumstances.

An employee without two years' service can bring a claim under section 104(4)(e) of the Employment Rights Act 1996 that they were dismissed for asserting their statutory rights under TUPE, but their circumstances must fit that kind of claim.

Dismissals where the sole or principal reason is the transfer

In these cases, much will turn on what 'the transfer' means. Often the question will be whether the employee was dismissed because of the transfer or for another reason, with the transfer being a coincidence rather than a cause. The real reason will be a question for the employment tribunal to decide. In *Hare Wines v Kaur*, the Court of Appeal agreed that the employee had been dismissed because the transferee didn't want her due to a poor working relationship with a future director. The transfer was not coincidental — it was the sole or principal reason for the employee's dismissal, rather than the poor relationship itself.

You may remember that dismissals 'connected with' a transfer also used to be automatically unfair before the 2014 TUPE amendment regulations. Transfer-related dismissals which were previously found to be connected with the transfer might still satisfy the sole or principal reason test.





Dismissals for an ETO reason

The normal rules of unfair dismissal law will apply to dismissals for an ETO reason. To avoid an unfairness finding, an employer must show that the dismissal was for an ETO reason entailing changes in the workforce, and then go on to satisfy the reasonableness test. This means following a fair procedure, including the Acas Code of Practice where it applies, or a fair procedure in redundancy cases. The ETO dismissal will be for ‘some other substantial reason’ or redundancy, depending on the facts.

To be potentially fair, the dismissal must be for an ETO reason and must ‘entail changes in the workforce’.

What is an ETO reason?

The ETO defence ensures that employees can be dismissed for a legitimate business reason when there is a TUPE transfer. An ETO reason relates to the day-to-day running of the business.

An economic reason might relate to the profitability of the employer or its market performance. In *Crystal Palace v Kavanagh*, a struggling football club had gone into administration (a type of insolvency). The administrator dismissed some of the club’s staff to enable the business to keep trading, not to make the business easier to sell. That was an economic reason.

A technical reason might relate to the transferee’s equipment or the production process. For example, the dismissal of employees might be for a technical reason if the transferee uses new technology to do the work





and the transferring employees do not have the relevant skills to use it.

An organisational reason might relate to the management of the business or its organisational structure. In *Nationwide v Benn*, the transferee had a narrower product range than the transferor. That was an organisational reason which led to detrimental changes being made to employee roles, their pay and eventually their dismissal.

What does ‘entailing changes in the workforce’ mean?

The ETO reason must entail changes in the workforce. The word ‘workforce’ isn’t defined in TUPE but means the people, workers, and employees of the business. Changes in the workforce can include:

- A change of location of the business — dismissals that result from a relocation will be potentially fair for redundancy, rather than automatically unfair
- A change in the number of employees, including genuine redundancies
- A change in the functions performed by employees — this might include changes in employee roles due to differences in operational structures between transferor and transferee, or a change in job function, from managerial to non-managerial for example, or from an administrative function to a sales function.





Changes in function

The changes in function don't necessarily have to affect the whole workforce but should affect a body of transferring employees. And it's a question of degree, too. Minor or trivial functional changes relating to only a few employees in a big workforce might not be enough to meet the test for an ETO reason.

The change in function must also directly affect the employee who brings the claim. The affected employee must be part of the workforce to which those functional changes apply. This is logical: changes to employee functions in one part of a workforce cannot be used to justify dismissals in another part. And trivial changes to an employee's function will not entail changes in the workforce either. Adding additional minor jobs to a cleaning role might not be enough to meet the test. Adding in significant new cleaning requirements or responsibilities might.

Dismissals resulting from harmonisation of terms

Dismissals caused by attempts to reduce salary and benefits might struggle to meet the ETO test. The changes in the workforce need to happen at the same time as the dismissal. In *Hazel v Manchester College*, six months after a transfer, the employer decided to make 200 redundancies and harmonise terms of employment to save costs. Most employees signed up to the new terms but two refused and were





dismissed. The employer said they had an ETO reason for the dismissals and the changes in the workforce were the 200 redundancies which sat alongside the harmonisation process. The Court of Appeal disagreed. The redundancy process had concluded by the time the new terms of employment were offered to employees. Although the dismissals were for an ETO reason (harmonising terms and savings costs), they did not entail changes in numbers or functions of the workforce.

Who carries the can?

Transferors and transferees will often agree that dismissals will be made before any transfer takes place. Who takes responsibility for those dismissals depends on the reason for them.

For dismissals before the transfer, where the reason for dismissal is the transfer, the dismissal will be automatically unfair, and the transferee will be liable for the dismissal. The position is different for pre-transfer dismissals where there is an ETO reason, but the dismissal is procedurally unfair under the normal unfair dismissal rules. In that case the transferor will be liable. The same goes for a dismissal before a transfer where the reason is not the transfer. Here, normal unfair dismissal rules apply, and liability stays with the transferor.

What about dismissals after the transfer? The transferee carries the can. The transferee will be liable for automatic unfair dismissal if the reason for the dismissal is the transfer. The transferee will also be





liable for any post-transfer dismissal if there is an ETO reason, but the dismissal is unfair under the normal unfair dismissal rules. The same goes for any post-transfer dismissal which is nothing to do with the transfer but unfair under normal unfair dismissal rules.

Deemed dismissals

There are two types of deemed dismissal under TUPE. People who resign in these circumstances are treated as having been dismissed and benefit from the enhanced protection TUPE provides for dismissals which are due to a transfer.

Constructive dismissal

Under regulation 4(11), TUPE preserves an employee's right to resign in response to an employer's repudiatory breach of contract. Like any other TUPE dismissal, a constructive dismissal will be automatically unfair if the reason for the dismissal is the transfer. If the sole or principal reason is an ETO reason, it is potential unfair and the normal unfair dismissal rules will apply.

Substantial changes to working conditions — quasi-constructive dismissal

Under regulation 4(9), an employee can resign if the transfer involves a substantial change to their working conditions to their material detriment. No breach of contract is required. Before the law changed in 2014





to specify that relocations can be an ETO reason, this section was often used by employees in TUPE relocation cases, many of which were clearly to the employee's material detriment.

The employee's resignation in this situation becomes a dismissal, but it isn't necessarily unfair. It just creates the opportunity for an employee to argue that it was unfair. But if the sole or principal reason for the quasi-constructive dismissal is the transfer — which in many cases it will be — the dismissal will be automatically unfair.

Who carries the can for deemed dismissals?

It depends on the facts. If the 'dismissal' is before the transfer but by reason of it, the employee will transfer to the transferee, because employees will transfer if they would have been employed immediately before the transfer but for being automatically unfairly dismissed. Liability in relation to any resignation should therefore transfer to the transferee. If an employee resigns under regulation 4(9) before the transfer, but also objects to the transfer, then the claim would be against the transferor. Any deemed dismissal after the transfer would involve a claim against the transferee.





CHAPTER 9

Managing the Transfer - Redundancies and Terms & Conditions Overlap

TUPE and collective redundancy consultations

After a TUPE transfer, the transferee often ends up with two workforces that it needs to combine. For this reason, an employer may choose to rationalise and restructure the combined workforce to allow the business to flourish, and this might involve redundancies. TUPE transfers and collective redundancies have similar consultation requirements which are governed by different laws. What happens when an employer ends up doing both at the same time?

TUPE rules

As set out earlier, an employer must tell employee representatives about the transfer and the reasons for it. They must also provide information about any





planned measures and consult on those measures with the aim of reaching agreement. The transferee must tell the transferor about any measures they intend taking after the transfer, for the transferor to pass on to the transferring employees.

Collective redundancy consultation rules

The Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) contains the rules about consultation on collective redundancies. If an employer proposes to make 20 or more employees redundant within a 90-day period, it must consult appropriate employee representatives. Consultation must begin 'in good time' before redundancies take place. If an employer proposes between 20 and 99 dismissals, consultation must start no later than 30 days before the first dismissal takes effect. For 100 or more dismissals, the process must start no later than 45 days before the first dismissal.

In the consultation process, employers must give employee representatives information about which employees are being made redundant and why. They should provide details about selection methods and any formulae for calculating contractual redundancy pay. Consultation must include discussions about how to avoid redundancies as well as reducing the number of redundancies and mitigating the consequences. As in TUPE consultation, the aim is for employer and employee representatives to reach agreement.





What are the similarities?

In both scenarios, the process should take place either with a recognised trade union or employee representatives. Elections must take place if there are no suitable existing representatives.

The sanctions are similar, too. Under the TULRCA, it can cost an employer up to 90 days' gross pay per employee for a failure to properly consult. Under TUPE, the penalty is up to 13 weeks' gross pay.

Both regimes have a special circumstances defence, if an employer can show that it was not reasonably practicable to comply with the rules but they did everything they reasonably could.

What are the differences?

The information which needs to be provided under each regime is different. This reflects the fact that the two sets of rules deal with potentially very different circumstances.

The rules also differ in relation to when the duty is triggered. In TUPE cases, the duty to inform arises when a TUPE transfer is planned. Consultation is triggered if an employer intends taking any measures. In redundancy cases, it might be less clear. The rules require an employer to consult about ways to avoid redundancies. Does this mean an employer needs to start collective consultation before it has made a strategic business decision, such as a site closure, or only after that decision has been taken? There has been debate on this point in the courts but the safest position





for an employer is to assume that consultation starts before the strategic decision is taken. Careful planning is therefore needed.

Timescales

The redundancy timescales are pretty clear. Collective redundancy consultation needs to start ‘in good time’ and at least 30 or 45 days before the first dismissal, depending on the number of redundancies proposed. The situation in TUPE is not so clear. Information should be given to representatives long enough before the transfer to allow consultation to take place. That’s a bit woolly. The appropriate period will very much depend on what and how many measures are planned. The more measures planned, the greater the period required. The employer will have to think more carefully about when to kick start the process.

Dealing with the overlap

The overlap between the two sets of rules will come into play when a transferee proposes making 20 or more transfer-related redundancies within 90 days.

As discussed earlier, the duty to consult under TUPE is often limited. It is the transferee who is most likely to take any measures and the transferor has no duty to consult with its employees about those measures before the transfer. The transferee has no duty to consult before the transfer either because the transferring employees are not their own at this stage. And because the TUPE rules only apply *before*





a transfer, the transferee has no duty under TUPE to consult transferring employees about measures after the transfer — though it must comply with normal employment law rules after the transfer, including those relating to redundancy consultation.

Despite the TUPE rules, the reality has always been somewhat different. Once a transferee has said ‘we are going to make mass redundancies after the transfer’, employees want more information. Representatives will quite reasonably seek more details about the proposed redundancies and might be unwilling to wait until after the transfer for answers. A transferee will not want to get its new employees or their representatives offside at this early stage.

Historically, there were two ways that buyer and seller used to deal with this practical problem. Sometimes, the transferor would make the redundancies before the transfer (and deal with the consultation process themselves). Or the parties would work together, with the transferee collectively consulting with the transferor’s employees.

Transferor redundancies

Dismissals which are by reason of the transfer are automatically unfair unless there is an economic, technical, or organisational reason. Redundancy often forms part of an ETO reason. However, the courts have said that a transferor cannot rely on a transferee’s post-transfer ETO reason. There may be circumstances where a transferor has its own ETO reason, for example in an insolvency situation where redundancies are





needed in order to continue trading. But if the reason for the redundancies is essentially the transferee's, the transferor cannot rely on it.

It might also be tricky for a transferor to meet the ordinary rules for a fair dismissal in pre-transfer dismissal cases, not least because the pool for redundancy selection might need to include transferee employees as well.

Informal joint approach

Pre-transfer collective consultation has always been common practice but historically could not count towards a transferee's collective consultation obligations. The transferor allows the transferee access to its employees and both businesses inform and consult jointly under TUPE and TULRCA before the transfer.

Sometimes the two businesses work together. Sometimes the work is divided, with the transferor providing information to its employees, but the transferee doing the consultation. The latter is more common, but the transferor must ensure it knows in advance what the transferee is going to say to avoid any 'anticipatory breaches.' This might occur if the transferee tells employees they intend to make significant changes to terms and conditions after the transfer which could entitle employees to resign and claim constructive dismissal against the transferor.





Statutory regime for pre-transfer collective consultation under TULRCA

In 2014, new rules came in to address the anomaly between the rules in TULRCA and what was happening between buyer and seller on the ground. The Government accepted that changing the rules would stop unnecessary duplication of work and reduce uncertainty for employees. The process is entirely voluntary and there are certain conditions:

- A transfer must be proposed
- The transferee proposes 20 or more redundancies within 90 days at one site
- At least one of the intended transferring employees may be affected by the proposed dismissals.

The transferee must tell the transferor that it intends to start consultation, and the transferor must agree. This will usually happen where buyer and seller have a good working relationship and are confident the deal will happen quickly. It might also be more likely if there is no question about pooling the transferring employees with the transferee's existing workforce. It is vital that the parties agree about what arrangements will apply to this process, in a written agreement if possible, so everyone is clear.





Who does the transferee consult with?

Where the transferring employees have a recognised trade union, the transferee should consult that trade union. If the transferee's own employees may be affected by the dismissals, the transferee should consult that union too.

If there is no trade union, the transferee can choose one of two routes: either consult with existing transferor employee representatives or elect new representatives for this purpose. If consultation has not finished by the time the transfer takes place it should continue afterwards and may do so with the same representatives.

The transferor may cooperate with the process by providing information and assistance to the transferee, but it doesn't have to. An uncooperative transferor will not give a transferee a 'special circumstances' defence for any defect in collective consultation. This situation can be avoided by proper discussion and agreement between the parties before the process begins.

Cancelling pre-transfer consultation

The transferee can do this at any time provided it tells all relevant people. This might happen, for example, where a transferor is not co-operating, and the process is stalling. Anything the transferee has done already will not count towards collective consultation. Cancelling pre-transfer consultation will not stop





transferor employees clamouring for information either, so the decision should not be taken lightly.

Once the process has been cancelled, it cannot be started again before the transfer. Consultation will have to begin afresh after the transfer.

Who carries the can for pre-transfer consultation obligations?

If it elects to do pre-transfer consultation, the transferee will be responsible for anything that goes wrong, not the transferor. The transferee would have to pay any protective award for any failings. This is the case even if the failure is due to the transferor's lack of information or cooperation.

What about dismissals?

Although the transferee might be doing the consultation, any pre-transfer dismissals would need to be made by the transferor because they are the employer. As mentioned before, pre-transfer dismissals might be automatically unfair if the reason for the dismissal is the transfer and not an ETO reason. It will usually be difficult for the transferor to rely on the transferee's ETO reason. Liability for that dismissal passes to the transferee.

Due to the inherent risks associated with pre-transfer dismissals, most parties choose to enter into tripartite settlement agreements with employees they are proposing to dismiss, to settle any potential unfair dismissal claims. The agreements would be between employee, transferor and transferee. The parties should





also consider whether it's better to delay dismissals until after the transfer when the transferee's ETO reason has the potential to stick.

Practical tips for pre-transfer consultation:

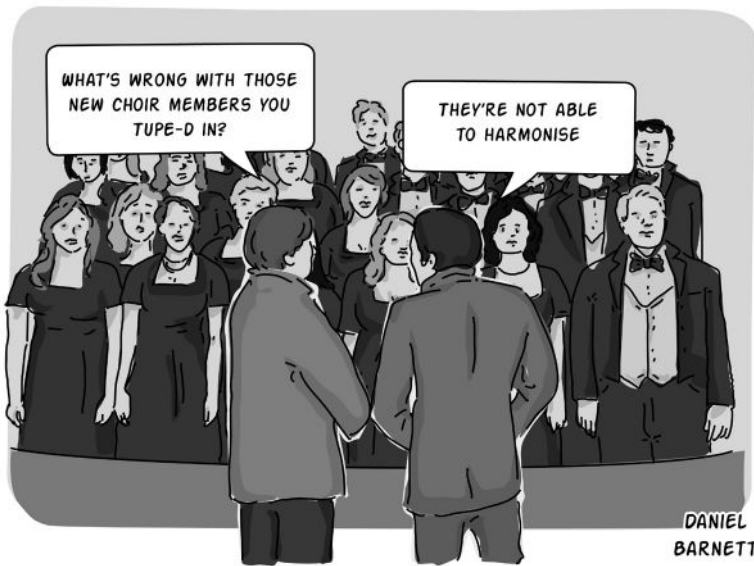
- Transferors should seek confidentiality agreements from the transferee relating to information gleaned pre-transfer via any consultation process (this will often form part of the business sale process anyway).
- It is always advisable to draw up a written agreement enshrining the arrangements for pre-transfer consultation, including how to deal with any costs associated with it and potential claims arising from it.
- Employee liability information (basic information about transferring employees provided by the transferor to the transferee) usually needs to be provided at least 28 days before the transfer. If pre-transfer consultation is taking place, this information might need to be given earlier, requiring the transferor to plan ahead.
- If pre-transfer consultation is cancelled by the transferee, the transferor's duties to inform and consult under TUPE still apply — the transferor needs to tell employees about the intended





‘measures’ (redundancies) but need only consult with employees if they intend to carry out the dismissals themselves before the transfer.







CHAPTER 10

Changing terms and conditions after a TUPE transfer

The natural consequence of a TUPE transfer is ending up with a combined workforce on different terms and conditions. Sometimes an employer simply wants to get everyone onto the same employment terms without making any ‘changes in the workforce’ such as redundancies or a change in location. It’s not that easy though.

The default position

The normal legal position for changing contractual terms is that an employer can do so if the contract allows the change (a mobility clause, for example) or the employee agrees to the change. The position is different after a TUPE transfer. Even if the employee agrees to post-transfer changes, the changes will be void under Regulation 4 if:

- The sole or principal reason for the change is the transfer; or





- The change is for a reason connected with the transfer that is not an ETO reason entailing changes in the workforce.

If a change is void, it will have no legal effect. If an employer simply wants to harmonise terms and conditions after a TUPE transfer, the sole or principal reason for the change will be the transfer and the changes will be void. The same is true if changes are made pre-transfer with a view to harmonising terms for those who are going to transfer. This significantly limits what an employer can do to address its two-tier workforce.

It is tempting to think that the passage of time will stop the changes being linked back to the transfer. Employers might be tempted to wait it out for a period of time and then make changes, hoping employees won't make the connection. The longer the gap, the more likely it is that any change can be linked to an intervening event rather than the transfer. Proceed with caution, though. In *Taylor v Connex South Eastern*, the Employment Appeal Tribunal found that an employee's rejection of new contractual terms was connected to a transfer from two years previously. Harmonisation of terms for harmonisation's sake will always run the risk of being linked back to the transfer, however much time has passed.

When can an employer make changes?

Despite the default position, there are some situations where an employer can make changes to terms and conditions after a TUPE transfer.





Changes for other reasons

It seems obvious, but a change which has nothing to do with the transfer is allowed (subject to the normal rules about making contractual changes). Sometimes, the reason for changing terms is not the transfer but some other event, which happens to arise around the same time as the transfer. If a business suddenly loses a major client, and any changes relate to that incident and not the transfer, then the changes will not be void. The same may apply if an anomaly is picked up during the TUPE process. In *Tabberer v Mears*, the employer discovered that an outdated travel allowance was still being paid during the process of the transfer. It removed the allowance because it was outdated and unjustified, not because of the transfer. The change was not void.

ETO reason

We looked at ETO reasons in relation to dismissals and the same principle applies to changing terms and conditions. Changes to employment terms are allowed if they are for an ETO reason such as a change in numbers or functions of employees. The parties must also agree to the changes. If an employer is simply looking to standardise terms across the workforce, it is unlikely to meet the ETO test because it won't entail changes in the workforce. If it doesn't meet the test, any change will be void.

This means an employer's ability to harmonise terms is very restricted. Some situations will fit the bill better than others though. Changes in the workforce can include a





change in location, so if an employee wants to move to a transferee's new location rather than be made redundant then that change is allowed provided the parties agree to it. There will be an ETO reason and the change in location will provide the necessary change in the workforce.

Changes that the contract allows

This might apply to an existing mobility clause which a transferee uses to vary a transferring employee's contract after the transfer. Theoretically that change will not be void if it is a change that the contract already allows. However, remember that regulation 4(9) allows an employee to resign and claim unfair dismissal if there is a substantial change in working conditions to their material detriment. For this claim, the relevant change does not have to be a breach of contract. An employer must exercise caution even if the contract seems to allow such a change.

Changing terms incorporated from collective agreements

Regulation 4(5B) of TUPE allows transferees to make changes to an employee's terms which stem from a collective agreement after a year has passed since the transfer. However, the terms overall must be no less favourable than the employee's previous terms. Changes will be void if they do not meet these conditions. How to construe 'no less favourable' is not clear so this issue





might well end up in the courts at some point in the future.

Insolvency

The rules about changing terms and conditions are relaxed when the transferor is subject to insolvency proceedings. This is to encourage the preservation and survival of businesses. For this reason, liquidation is not included, as this process involves the winding up and closure of the business. If the business is insolvent, contracts can be varied even if the reason is the transfer or connected with the transfer and not an ETO reason, provided it is designed to save the business and therefore preserve employment opportunities.

What about changes which benefit the employee?

Guidance from the government department for Business, Energy and Industrial Strategy says that changes which are entirely positive, and which are agreed by the employee, are not prevented by TUPE and are unlikely to be challenged anyway. But there can be a 'double recovery' danger for employers who vary terms in this way. What if an employer agrees some new, more favourable, terms with an employee? TUPE still operates to protect the employee's original terms which transferred across to the new employer. And the normal rules of contract law mean the transferee cannot wriggle out of the more favourable terms which it has agreed with the employee directly. This leaves the employee in a position to cherry pick whichever pre-





and post-transfer terms are most beneficial to them. Care must be taken to ensure the employer does not end up disappointed in both the terms and the pocket.

Restrictive covenants

This can be a particularly thorny issue in TUPE situations. Although the restrictive covenant terms transfer like any other, they transfer as drafted, with the terms protecting the transferor (and its business interests) not the transferee. They are therefore useless because there is no longer any employment relationship between employee and transferor and the business interests that need protecting are those transferred interests which are now the transferee's. This leaves the transferee exposed.

A transferee cannot force key staff to agree fresh covenants after the transfer. Any change the transferee imposes simply to harmonise covenant terms between new and existing staff will be void because it will be by reason of the transfer. Even if an employer could show that the variation is simply connected to the transfer, finding an ETO reason might be tricky. In cases where fresh covenants were accompanied by significant financial incentives, the courts have still found that the covenants were not enforceable, even when the overall contractual arrangement was beneficial to the employee.

Despite these difficulties, some employment contracts do have clauses which require an employee to agree to similar restrictive covenants with the transferee if there is a TUPE transfer. This is a contractual punt the employer takes in the hope that the employee will not object.





Sometimes the practical solution to a problem may not be legally enforceable and may come at a cost — a negotiated price or a litigated penalty. Careful judgement is required here and almost certainly some legal advice.

Varying terms and the best way to do it

Most employers won't just impose new terms on an employee. That potentially creates a breach of contract from which a constructive dismissal claim may spring. Dismissing an employee and reengaging them on new terms after the transfer will create an effective dismissal from the old terms but will be automatically unfair. The employment tribunal could order compensation and reinstatement to the old terms, rendering the whole process ineffective and potentially costly.

The safest way to effect change is by using a settlement agreement. An employer is not allowed to use a settlement agreement to agree a contractual change which would otherwise be void. However, a settlement agreement can be used in a dismissal and re-engagement situation to settle the automatic unfair dismissal claim. The new terms offered would not be a variation of contract (which would be void) but a fresh contract following a dismissal. This principle has not been fully tested yet though so employers should proceed with caution.

The upshot

Due to the technical difficulties associated with harmonising terms — even years after a TUPE transfer — employers should do their homework before the transfer

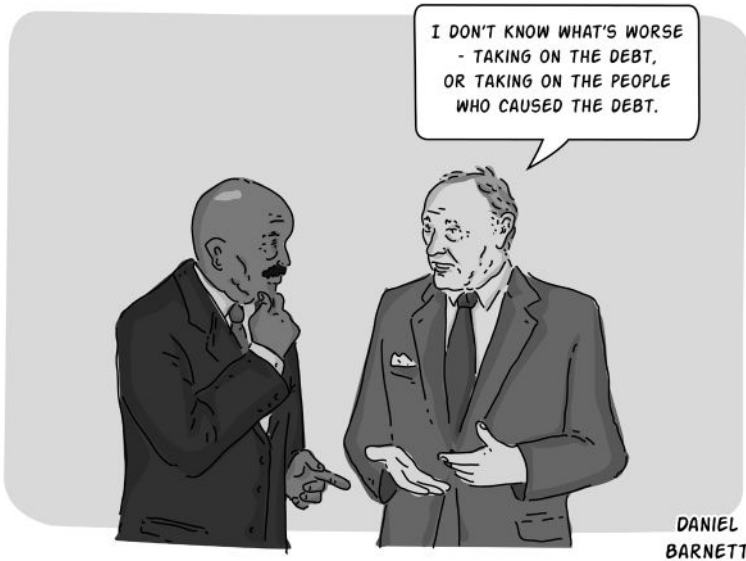




about the employment terms they are inheriting. Well before the transfer, employers should plan how to deal with any practical difficulties which flow from having a two-tier workforce and decide how best to approach that issue with staff. Changes which are void or create a legal claim can be costly in many ways. Preparation is everything.

Business transfers can be stressful for everyone. Inheriting employees who already feel aggrieved is not good for business. Use your best human resources managers throughout the process and ensure that the procedures you follow are open, honest, and supportive of transferring staff. The loyalty and commitment of your employees is likely to be worth an awful lot more to the business than a few pounds in the pay bill.

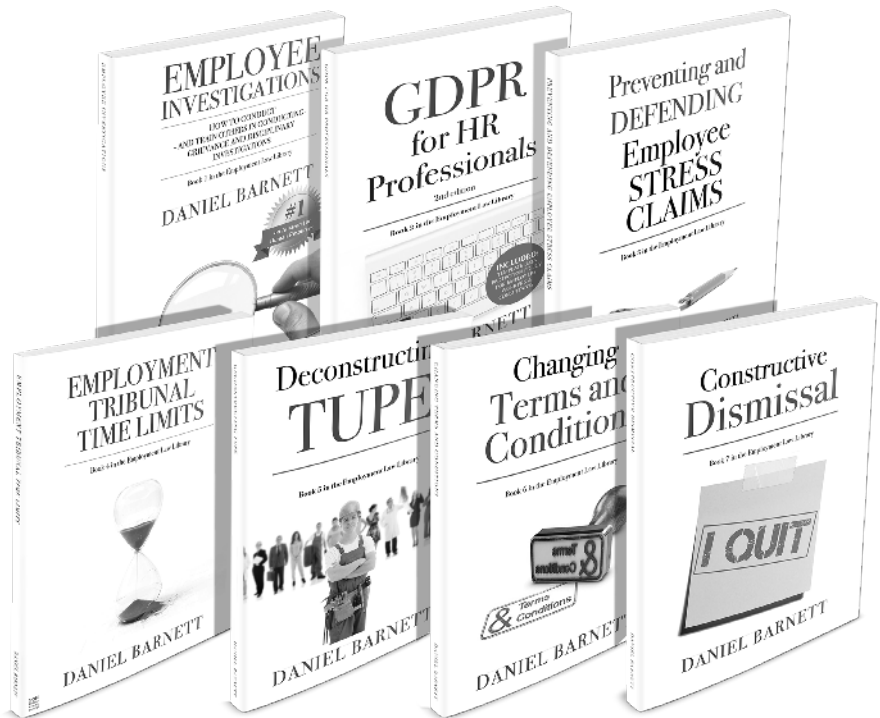






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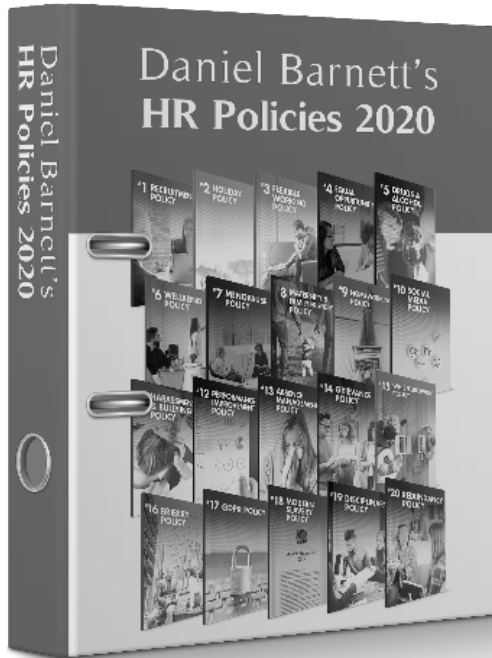
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- **Kirsten Cluer**, Owner of Cluer HR, HR Consultancy



I like being able to use the HR Inner Circle Facebook group to ask other members for a second opinion, or for ideas when I get stuck with solving a tricky situation. There's usually someone who has come across the situation before.

- **Helen Astill**, Managing Director, Cherington HR Ltd



When I transitioned from big employers to an SME, I didn't realise how much I would miss having peers to kick ideas around. If you haven't got an internal network, you've got to build an external one. I got so much out of the discussion at an Inner Circle meetup recently and I look forward to getting the Inner Circular.

- **Elizabeth Diver**, Group HR Director,
The Big Issue Group



Sign now! The monthly Q & A sessions are invaluable, the magazine is packed full of helpful info, you get lots of goodies and the Facebook page is really informative and a useful sounding board.

- **Caroline Hitchen**, Consultant, Caroline Neal Employment Law

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Being a member of HR Inner Circle is one of the best sources of HR information and advice, and receiving the monthly audio seminars and magazines is extremely helpful and interesting. I can't recommend becoming a member highly enough. There is a private Facebook group which is great for asking other members advice and sharing knowledge and experiences. I have also recently attended one of the meetups that is organised by Daniel Barnett, and it was good to meet other members (and of course Daniel) in a more social setting. It was also a good opportunity to ask any questions you wanted and being able to get advice or support as to how they would deal with whatever you ask.

- **Tracey Seymour**, HR Manager (Head of Dept), Kumon Europe & Africa Ltd



The help and advice from other HR professionals on Facebook is really valuable, and quick. All the team enjoy the audio seminars and magazines for updates on current issues.

- **Catherine Larke**, Director | myHRdept.co.uk

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