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TUPE Transfers: An Overview on Current Legislation Booklet | September 2019

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1. INTRODUCTION

TUPE is one of the most challenging, well-established areas of UK Employment Law. It originates from European Regulations that date back to 1981 – the principal amendments taking place in 2006 and 2014.

- The legislation in the UK covers two main business endeavours: business transfers and service provision changes.
- The latter are particularly relevant to the hospitality industry, as they refer to the transfer of a contracted service from a supplier to another – both operating for a third party, “the client”.
- TUPE establishes a series of safeguards for employees: it ensures terms and conditions of employment remain unchanged before and after a transfer; protects employees from dismissal and redundancy connected directly to the transfer. It also sets clear rules for both outgoing and incoming employer in terms of information exchange and management of existing or future liabilities, e.g. employment tribunal cases.
- This paper offers an *overview* of the legislation as it is now – it is a synthesis of existing relevant literature on the Regulations and the in-depth insight I gained during a specialist ACAS course I attended during the summer.
- It is designed to inform and raise awareness of the key accountabilities established by the law, presented and explained in a clear, comprehensive manner. It is addressed mainly to smaller catering businesses and their clients and it serves two purposes: to share information on how the process works and to offer useful input to enhance current organisational practices in this area.
- The principal finding of this report is the fact that **TUPE proceedings in contract catering** seem to differ slightly from ordinary service provision changes, despite the legislation being the same: timings are usually challenging and incoming employers find themselves in a situation where they need to handle both the transfer process and set-up a new, vibrant, enticing hospitality offer at the same time, with limited access to the premises they will manage and sometimes uncooperative incumbents.

Warranties and indemnities do not seem to apply to the industry – to the point that employees may not turn up for work on day one and businesses need to operate regardless. All these issues can be avoided to a certain extent, as long as businesses are given the opportunity to get employees to buy into the changes and commit to a new organization – communication being essential at any stage of a transfer. We will in fact demonstrate how the legislation offers a certain degree of flexibility in terms of communication between employers.

- For the purposes of this document, Redundancies are not included in our overview, as we assume they may arise at a later stage – once the incoming caterer has set-up its service and is in a better position to assess its employment needs for the future.



2. TUPE: A DEFINITION

The acronym TUPE stands for “Transfer of Undertakings (Protection of Employment) Regulations. The legislation originates from a European Directive that dates back to 1977. This was implemented in the UK in 1981 and modified twice over the following 20 years.

More specifically, the current TUPE regulations are a product of:

- a) 2006 *Transfer of Undertakings (Protection of Employment) Regulations (SI 2006/246)* | this piece of legislation is particularly important to the contract catering sector because it introduced a legal framework for TUPE in a context of “service provision change”;**

- b) 2014 *Collective Redundancies and Transfer of Undertakings (Protection of Employment) Amendment Regulations (SI 2014/16)***

3. TUPE: WHEN IT APPLIES

TUPE can apply to transfers outside the UK and the EU – potentially, a workforce could be located anywhere in the world but if the business is present in the UK, TUPE applies. It also applies to businesses located in the UK **before** the transfer. Specifically, TUPE applies to businesses of any size or sector where a **business transfer** or a **service provision change** take place.

A. Business Transfer

Definition: when a business or part of it is transferred to a new owner. This also applies if two or more separate entities merge into one.

In this case, for TUPE to apply, the identity of the employer must **change**.

A business transfer must involve *the transfer of an economic entity which retains its identity*.

In this context, **economic entity** means “*an organized grouping of resources which has the objective of pursuing an economic activity*”.

(source: *Transfer of Undertakings (Protection of Employment) Regulations 2006*)

TUPE **does not apply** to the following transfers:

- Transfer/sale of shares to a new shareholder;
- Transfer/sale of assets and not employees.

B. Service provision change

Definition: when an organisation assigns the management of a particular service to another business, e.g. catering, reception services, cleaning services, security; this usually happens through tender.

There are **3 types** of service provisions changes:

- a. *Outsourcing:* a contractor takes over activities for a client;
- b. *Retendering:* a new contractor takes over a certain activity from the existing contractor;
- c. *Insourcing:* after the service was outsourced for a while, an organization decides to regain control of certain activities and therefore manage them directly.

Amendments introduced in 2014 specify that a service provision change is recognisable (and therefore subject to TUPE) if:

[the new supplier undertakes] *activities which are **fundamentally** the same as activities carried out by the person who has ceased to carry them out.*

(source: Department for Business, Energy & Industrial Strategy, 2014)

A further condition to be identified for TUPE to apply is the existence of a so-called **organized grouping**: the existence of an identifiable, dedicated team of employees whose main purpose is to carry out a certain activity on behalf of the client.

TUPE **does not apply** to the following service provision changes:

- if the service provision is connected to a one-off, single event or a certain task is carried out for a limited period of time, e.g. supplying catering for a party or exhibition;
- if the provision is simply a supply of goods, rather than a service.

Business Transfers and Service Provision Changes are often referred to as **relevant transfers**.

IN A NUTSHELL | SERVICE PROVISION CHANGE

TUPE applies if:

- The client remains the same before and after the transfer;
- The activities performed for the client are fundamentally the same (they might be subject to slight changes, as long as the intrinsic nature of the service remains the same);
- An “organised grouping” can be identified within the service provision, i.e. a group of employees clearly allocated to supply that service (even a single employee).

4. TUPE: THE PROCESS

This section deals with the process as outlined by the law with reference to a Transfer of Undertakings.

- Business transfers and service provision changes are subject to the **same regulations** but slightly different in the way proceedings are managed.
- The principal difference is the fact that in service provision changes contracts are awarded following a tender – rather than being the product of a sale or acquisition.
- Therefore, in a service provision change scenario a potential new employer does not necessarily need to weigh pros and cons of taking over a business in the first place – this particular aspect will probably (ideally) be resolved before a company accepts an invitation to tender and submits a proposal.
- In addition to this, in a post-tender context, the time allocated to consult transferring staff and carry out a successful mobilisation may be limited; therefore, the highest degree of planning is required.
- As outlined by current regulations, a few fundamental steps should be followed, to avoid future legal claims and guarantee transparency. These include (but are not limited to):
 - 1) information** | sharing information with all employees about the transfer; sharing information between employers (mainly from outgoing to incoming);
 - 2) consultation** | both outgoing and incoming employer need to consult with employees (or their representatives) about the changes that are going to take place and the future of the organization;
 - 3) organized grouping** | this is the group that will be transferring. No well-defined organized grouping will mean that TUPE does not apply. In a tender scenario, it is relatively simple to identify, as there will be a well-defined group of people who will be allocated to providing a service for the client.

In other circumstances, it might be more challenging – employers cannot choose what employees will be included, as the group needs to exist in connection to the activity that the incoming business is taking over.

5. TRANSFER PROCESS: OUTGOING / INCOMING EMPLOYER DUTIES

Table: The Transfer Process

OUTGOING EMPLOYER	INCOMING EMPLOYER
PREPARING FOR THE TRANSFER	
INFORMING: Communicate to employees that the transfer will happen, when it will happen, what consequences it will have on the workers.	INFORMING: Communicate to employees that an undertaking will happen, when it will happen, what consequences it will have on the business.
ORGANISED GROUPING: Identify the "Organised Grouping": the group of workers that will transfer.	ORGANISED GROUPING: Request and receive information on the composition of the "Organised Grouping" that will be joining the business.
EMPLOYEE LIABILITY INFORMATION: Share the relevant information with the Incoming Employer - at least up to 28 days before the transfer. <i>If feasible, collaborate with Incoming Employer to arrange a preliminary meeting with the Organised Grouping (best practice, not a legal requirement).</i>	EMPLOYEE LIABILITY INFORMATION: Request Employee Liability Information to the Outgoing Employer. <i>Asses with the Outgoing Employer the possibility to meet with the organised Grouping to introduce them to the business and understand their roles (best practice, not a legal requirement).</i>
CONSULTING: Consult with employees and/or their representatives about the proposed changes and additional measures that might be implemented after the transfer (changes to the business operating structure and procedures).	CONSULTING: Consult with employees and/or their representatives about the proposed potential changes to the business structure and the job roles brought about by the transfer.
THE TRANSFER	
Selected employees are transferred to another business. The former Outgoing employer turns its attention to the remaining employees within the organisation, consults with them and takes action to make sure that as little disruption as possible occurs within the business.	Selected employees are welcomed to the business. The former Incoming Employer turns its attention to the existing employees within the organisation, consults with them and takes action to make sure that as little disruption as possible occurs within the business.
AFTER THE TRANSFER	
Employer to liaise continuously with employees to make sure they are engaged and productive, despite recent organisational changes. Address any concern that might arise. Assess performance under the new circumstances and review operating procedures/ employee duties if necessary.	Selected employees are welcomed to the organisation. An induction programme is in place and ready to be rolled out - new employees are introduced to the business and to existing staff - they gradually start developing within their new roles. Employer to allow for a transition period to take place, so that the business adapts to the changes. Assess performance under the new circumstances and review operating procedures/ employee duties if necessary.

6. EMPLOYEE LIABILITY INFORMATION (ELI) AND DUE DILIGENCE

a. The Timeframe

- i. The Outgoing Employer is due to supply this information **no later than 28 days before the transfer**. Information needs to be shared in writing and to facilitate the transition, it should be supplied as soon as possible to the Incoming Employer.
- ii. If information is not supplied within the deadline, the Incoming Employer may refer to an Employment Tribunal to seek **compensation** – compensation amounts to a minimum of £500 per transferring employee.
- iii. **Note:** transferring employees need to be made aware of the information that will be shared with the Incoming Employer. They have the right to refuse to share such information – in that case, the transfer will not take place for that particular employee.

b. Employee Liability Information (ELI) to be supplied:

- i) Identity of transferring employees;
- ii) Terms and conditions of their employment (employment particulars);
- iii) Disciplinary records covering the last 2 years of employment;
- iv) Grievances raised during the previous 2 years of employment;
- v) Existing or potential legal claims made by transferring employees.

In addition to this information, the total number of **temporary staff and agency workers** must always be expressly mentioned, including where they work and the type of work they do.

The Incoming Employer may ask for **additional information** not included in the TUPE process. In this case, additional information may be supplied in anonymous form or in agreement with affected employees.

“Who can share employee liability information?”

- The Outgoing Employer;
- A third party;
- The client itself, in case of a contractor taking over a business for that client. The client might also be involved in a business transfer between 2 contractors, should the Outgoing Employer delay in supplying employee liability information.

Due diligence: in this context, the term refers to additional investigation or information requests carried out by the Incoming Employer to assess risks, identify employment costs and further potential liabilities.

Source: Handling TUPE Transfers - The ACAS Guide, 2016

WARRANTIES AND INDEMNITIES

- In the context of TUPE proceedings, both Outgoing and Incoming Employer may want to seek further reassurances that the counterpart will be respectful of the terms of the transfer. Therefore, warranties and indemnities can be negotiated and included in a transfer agreement.
- A **warranty** is a contractual statement by the outgoing employer certifying the good state of the business. Another common warranty to the incoming employer could consist in stating that the information provided during the transfer phase is correct and up to date, e.g. information about transferring employees.
- An **indemnity**, instead, is a written guarantee that compensation will be paid should any liability arise after the transfer, e.g. legal costs for existing employee claims that were not communicated prior to the transfer.
- The existence of a transfer agreement is in itself a precondition to their implementation and for this reason they are more common during business transfers than during service provision changes, where a contract might not exist between Outgoing and Incoming Employer.
- The only exception to this is when an organisation outsources a service for the first time (i.e. a first-generation transfer) – in this case a written statement is usually in place and the incoming contractor may seek warranties that information supplied at the due diligence stage is accurate.

7. TUPE: TRANSFERS WITHIN TUPE | EMPLOYEE RIGHTS

Four types of **relevant employee details** that **will transfer** are:

- (1) Employees' Terms and Conditions of Employment: this includes relevant, pre-existing company policies and procedures that are incorporated into contracts;
- (2) Length of service;
- (3) Rights and liabilities: holiday entitlement, disciplinary proceedings, outstanding grievances;
- (4) Collective agreements included in their contracts, if any: they can be renegotiated only one year after the transfer.

Elements that **do not transfer**:

Employee Pensions: existing occupational pension schemes are not included in the transfer. According to the law though, Incoming Employers must provide a "reasonable alternative".

Contracts of Employment cannot be modified/changed for reasons related to the transfer. Harmonisation (i.e. adapting the T&Cs of transferring employees to those of existing staff) **is also forbidden under TUPE legislation.**

The following exceptions are contemplated:

- when the reason for variation is completely unrelated to the transfer;
- where the variation is favourable to the employee;
- where there is an **economic, technical or organisational reason** (ETO reason) entailing changes in the workforce and the employer and employee agree to the variation.

ECONOMIC, TECHNICAL, ORGANISATIONAL REASONS THAT ALLOW CHANGES IN EMPLOYMENT CONTRACTS (ETO Reasons)*₁

TUPE does not clearly define this area but relevant examples include:

- **economic:** business conditions have changed (e.g. fall in overall market performance and profits) and the Incoming Employer cannot afford to honour existing contracts;
- **technical:** production methods have changed, and therefore changes in the workforce are required (e.g. increased use of technology within production, change of operating procedures);
- **organisational:** the organisational structure and management practices of the Incoming Employer is changing (e.g. the business needs to relocate elsewhere).

To be considered fair and therefore applicable to contract changes, these reasons must be *entailing changes in the workforce* – this concept was interpreted by the Courts to indicate changes in the number of employees or changes in the functions performed by employees.

Employees are also **protected from dismissal as a consequence of a transfer**.

Should a redundancy scenario arise in connection with TUPE, it must be for one of the ETO Reasons detailed above – and proper redundancy procedures must be followed (including all employees in the process).

8. EMPLOYEES OPPOSING TO THE TRANSFER

This is probably one of the most relevant sections to the foodservices industry, as transfers are not always successful and mobilisations may conclude with only a small number of employees accepting to transfer to the new employer, thus creating initial disruptions to the new service provision.

Employees are entitled to refuse to transfer

If they wish to do so, they should communicate it to the Outgoing Employer in writing.

- This will be considered as official **resignation** from their post and therefore they will not be entitled to redundancy pay and will be required to work throughout their notice or be paid in lieu.
- Their employment will come to an end at the point of transfer, i.e. the day the transfer occurs, and they will receive all outstanding payments.

If the transfer is yet to take place: The Outgoing Employer could look into *alternative employment* and offer a new role (it is not obliged to do so). In this case continuity of employment will be preserved.



In both instances, in addition to Employee Liability Information, the outgoing employer will need to inform the incoming employer that the employee will no longer be transferring.

9. CONSULTATION AND OVERALL COMMUNICATION

According to TUPE legislation, both Incoming and Outgoing Employers are bound to carry out an **information and consultation process** with:

- transferring employees (i.e. the organized grouping);
- employees that remain with the Outgoing Employer;
- employees that already work for the Incoming Employer.

Consultation usually can take place in three different ways:

- a) with **trade union** representatives;
- b) with existing or ad - hoc **employee representatives**;
- c) with **individual employees** affected by the transfer – this is the preferred option for organisations that have **10 employees or less**.

Employers need to make sure that space, time and resources (e.g. paid time off for representatives to take part to meetings) are allocated to this very important process and that there are no obstacles to consultations.

“What information needs to be shared with employees?””

- a) The fact that a transfer is going to happen, why and when;
- b) Legal, social, economic Implications of the transfer, especially for transferring employees;
- c) Any additional measures that might be implemented such as changes to working practices, job descriptions, working hours, pay day (subject to approval).

Consultation is important in terms of engagement because it gives employees the impression that they have been listened to – it is empowering, and it fosters a positive attitude towards change.

Most importantly, failure to inform and consult may result in a fine for either Outgoing or Incoming employer – they are indeed both liable: employees affected are entitled to a maximum of **13 weeks' pay in compensation**.

This type of claims is usually submitted to employment tribunals for both employers, to be able to cover the transition period.



The importance of Communication

The legislation mentions a crucial element to the consultation process: it needs to be **meaningful**.

If from a legal point of view this term might be open to several contrasting interpretations, from a psychological point of view it may make a difference in the context of a successful mobilisation and transition.

Employees that are subject to a transfer will probably have questions and worries of their own that the Outgoing Employer might not be able to address (all it is required from it is cooperation in terms of sharing information timely and potentially guarantee that service levels remain the same during the transfer).

For this reason, it is good practice for the Incoming Employer to be allowed **access to the transferring workforce prior to the transfer** – this is not a legal

requirement, so it is up to the Outgoing Employer to make up the time and the space.

Connecting and communicating with transferring staff during the transition period is beneficial for the following **five reasons**:

1. The incoming employer can introduce its business to the new prospective employees, explain its objectives and ambitions, create a sense of purpose and communicate the company mission. This introductory phase will hopefully reduce fears about the transfer and give employees something to look forward to after experiencing challenging times;
2. Employees will also be concerned with their job security and feel powerless in regard to their future – legitimate feelings that can be addressed right away and mitigated by sharing accurate information;
3. As the service provision is about to change, it is fundamental for an incoming employer to establish a “connection” with the workforce it will inherit – it is an opportunity to get to know the people behind a certain job title and somehow gain their trust;
4. Employees who operate on the premises everyday can offer a thorough understanding of how the business functions and how it is organised. They are able to offer a unique insight that cannot be inferred by looking at facts and figures only;
5. Transfers initiate a long and sometimes challenging period of **change**: new employees are required to become familiar with new operating procedures, reporting lines, upper management structure, company policies, performance standards. Whatever the nature of the change, making employees aware of every stage of the transition may reduce the overall resistance to change when the incoming employer will officially take over.

For further details on employee reactions towards change, please refer to Appendix One and Two.

9. TUPE AND GDPR



GDPR | A DEFINITION

The General Data Protection Regulation (GDPR) 2016/679 is a regulation in EU law on data protection and privacy for all individual citizens of the European Union and the European Economic Area. It also addresses the transfer of personal data outside the EU and EEA areas.

- TUPE and GDPR Regulations are interconnected for one principal reason: it is a legal requirement to share relevant information between Outgoing and Incoming Employer, and more specifically personal data of transferring employees, referred to as Employee Liability Information. Besides these, the Incoming Employer might require further data to complete its due diligence process. In this brief section, we will try to clarify a few more details about the connection between these two relevant pieces of legislation and the need to balance between making sure that the transfer is completed successfully and guaranteeing employee rights when it comes to their personal information.
- At this stage, it is necessary to clarify that official guidance on the correlations between TUPE and GDPR is not currently available. None the less, The Information Commissioner's Office (ICO) supplies useful information on how to manage data in a TUPE scenario in the booklet *Disclosure of Employee Information Under TUPE*, available at the following link:

<https://ico.org.uk/media/for-organisations/documents/1063/disclosure-of-employee-information-under-tupe.pdf>

A. GDPR General Principles *₂

The **General Data Protection Regulations (GDPR)** came into force at the end of May 2018 and deals with the collection of people personal data, thus protecting individual rights when it comes to how these data are obtained, processed, managed and stored.

The legislation sets out **six principles** regarding **personal data**:

1. Personal data must be processed *lawfully, fairly* and in a *transparent* manner;
2. They must be collected for *specified, explicit and legitimate purposes*;
3. They must be *relevant, adequate* and only serve the purposes for which they are collected;
4. Data must be kept *up to date* and updated or rectified promptly if they are not;
5. They *must not be kept for longer than necessary*, i.e. they cannot be kept after they have served the purpose for which they were gathered;
6. They must be processed so that their *security* is protected, including protection against accidental loss or damage.

The meaning of the term **lawful** mentioned in point one is clarified by Article 6 of the Regulations. There are five principal circumstances where personal data collection is considered lawful*₃:

- a) **Consent**: the individual has given clear consent;
- b) **Contract**: certain data are necessary to produce a contract, e.g. employment contracts;
- c) **Legal obligation**: the collection and processing of data is necessary to comply with the law;
- d) **Legitimate interests**: data processing is necessary for legitimate interests pursued by the organisation that is holding such data or by a third party, unless these interests jeopardise *fundamental rights and freedoms* of an individual;
- e) **Public tasks**: when data processing is necessary for the performance of a task carried out in the public interest.

The **lawful basis that applies to each specific case needs to be determined in advance**, before data processing begins. It also needs to be demonstrable and clearly documented. A different lawful basis is required for each processing purpose.

Individuals whose data are collected and processed need to be informed that:

- a) Data gathering is about to take place;
- b) **what specific purposes** it serves;
- c) the **lawful basis** for processing data;
- d) they are entitled to oppose to the disclosure of their data and consent can be withdrawn anytime.

If an individual agrees to the processing of its data, acceptance must be stated clearly (not implied) and possibly in writing - *a clearly distinguishable consent, using a clear and plain language*⁴.

B. Personal Data in the context of TUPE

According to recent articles by HR Professionals, the two most relevant legal grounds that justify collecting, processing and managing data in a TUPE context are **legal obligation** and **legitimate interest**.

1. **Legal Obligation** | The transmission of **Employee Liability Information (ELI)** falls within this category: data are shared with the Incoming Employer up to 28 days before the transfer date to comply with the law and avoid incurring in fines.
2. **Legitimate Interests** | When the Incoming Employer is completing its due diligence procedures, it might ask the Outgoing Employer for further useful information, such as data on absences, sickness or maternity leave, just to name a few.

In the words of the Information Commissioner' Office (ICO): *"The legitimate interest basis is likely to be most useful where there is either a minimal impact on the individual, or else a compelling justification for the processing"*.

(Source: Information Commissioner's Office: Guide to general Data Protection Regulations – Legitimate Interest.)

The Regulatory Body goes even further in its clarifications by specifying that such reason include a very broad variety of circumstances and is generally applicable when:

- the processing is not required by law, but it offers clear benefits to the organisation, the individual or other counterparts;
- there's a limited privacy impact on people;
- the individual is already aware of how the organisation will be using its data;
- the individual is highly likely to give its consent anyway and asking for such consent would only be a burden for the individual in question.

IN A NUTSHELL | INFORMATION DISCLOSURE UNDER TUPE: LEGAL OBLIGATION VS. LEGITIMATE INTEREST

It is fundamental to identify in advance what your lawful basis for processing information is by referring to the criteria outlined by GDPR.

1. **Disclosure of Employee Liability Information:** Legal Obligation is the lawful basis that applies.
2. **Disclosure of Additional Relevant Information** (unless special category information): Legitimate Interest is the lawful basis in this case

How to deal with information in case of “legitimate interest”:

- i. Identify the purpose for which a certain information needs disclosing and processing;
- ii. Make sure the purpose cannot be served in a different, less intrusive way;
- iii. Balance organisational interest against the interest of the person whose data is disclosed;
- iv. Once obtained, make sure the information is not disseminated more widely than necessary;
- v. anonymise the information if possible: the regulation uses the term *pseudonymised*, i.e. assign a reference code to the information so that identities are not disclosed; balance your interest against individual interest (i.e. the person whose data is collected/transmitted)
- vi. create or update existing Privacy Notice, so that it anticipates the possible disclosure of information in a TUPE scenario;
- vii. Information to third parties in a bidding context: try to receive reassurances that information will be safeguarded, and if TUPE does not go ahead such information will be returned or securely destroyed.

Special Category Information

- This includes the following type of information: race, ethnic origin, political or religious beliefs, genetics, biometrics, health condition, sexual orientation, trade union membership.
- The disclosure of such information could potentially compromise individual rights and freedoms, therefore it needs further protection, to avoid the risk of direct/indirect discrimination.
- To be entitled to process this information, organisations must:
 1. Define the **lawful purpose** as described in Article 6 of the Regulation;
 2. Satisfy an additional condition – specifically one of those listed in Article 9 of the Regulation:
 - a) **Consent:** the individual has given clear consent;
 - b) **Compliance Purposes:** processing information is vital to carry out legal obligations in the area of employment, social security, social protection;
 - c) **Protection of Vital Interests** of the individual whose information is processed or another “natural person”;
 - d) **Processing connected to the activities of a foundation, association or non-profit organisation:** the processing must be limited to data belonging to current/former members or individuals that have regular contact with the organisation. Data can be shared internally but cannot be disclosed outside without authorisation;
 - e) **Data that are processed were previously made public by the individual;**
 - f) **Legal Claims:** data are necessary to establish legal claims, both as a claimant or as a defendant;
 - g) **Preventive Occupational Medicine:** information that aim at assessing the working capacity of an employee, a medical diagnosis, the provision of health and social care by a certified medical professional;
 - h) **Public Interest:** including measures to safeguard individual rights, to protect individuals against serious threats to health or to achieve scientific, historical and statistical purposes.

CONCLUSION

- TUPE is a very complex area of Employment Law. It is designed to protect employees when a business or a service transfers from an organization to another.
- It is often viewed as a “HR Exercise” for its high degree of technicality and the organizational implications it has on businesses – transferring information, resources and employees is no easy task, and it happens in our industry almost on a daily basis.
- The greatest challenge of all for employers is to make sure their employees (both old and new) buy into the dynamic and the necessity of change and are not affected in their productivity and commitment by doubt and constant worry.
- It is therefore essential that individuals have the possibility to voice their concerns and receive comprehensive, understandable answers.
- At the time of writing, it is currently unknown if Brexit will have an impact on the legislation as we know it, which is applied in the UK in a slightly different fashion compared to other countries as far as *Service Provision Changes* are concerned. **Will TUPE Regulations still apply in their entirety?**
- According to the latest *Chartered Institute of Personnel and Development (CIPD) Guidelines on TUPE*, “major changes seem to be unlikely” (CIPD, 2017, p. 17): organisations are used to this well-established set of rules and changes would have disruptive effects on business continuity, not to mention employee backlash if current practices and protections were changed dramatically.
- On the other hand, recent literature speculates that two aspects of TUPE may be subject to change: the possibility for employers to modify terms and conditions of transferred employees and the rules on collective consultation during transfers. This is a matter that will be resolved in the near future.

APPENDIX

APPENDIX 1:

BEHAVIOURAL RESPONSES TO CHANGE

HR theory provides some interesting input on how employees react differently to change and establish their own coping mechanisms. It also suggests how to manage individual workers effectively in times of organisational change.

The impact of change on individuals depends mainly on three factors:

- The significance of change for each employee;
- Personal ability to cope with change;
- Personal views on change, whether positive or negative.

In his 1990 publication *The Fifth Discipline*, Scientist Peter Senge*⁵ identified the following individual responses to change, summarized in the table below:

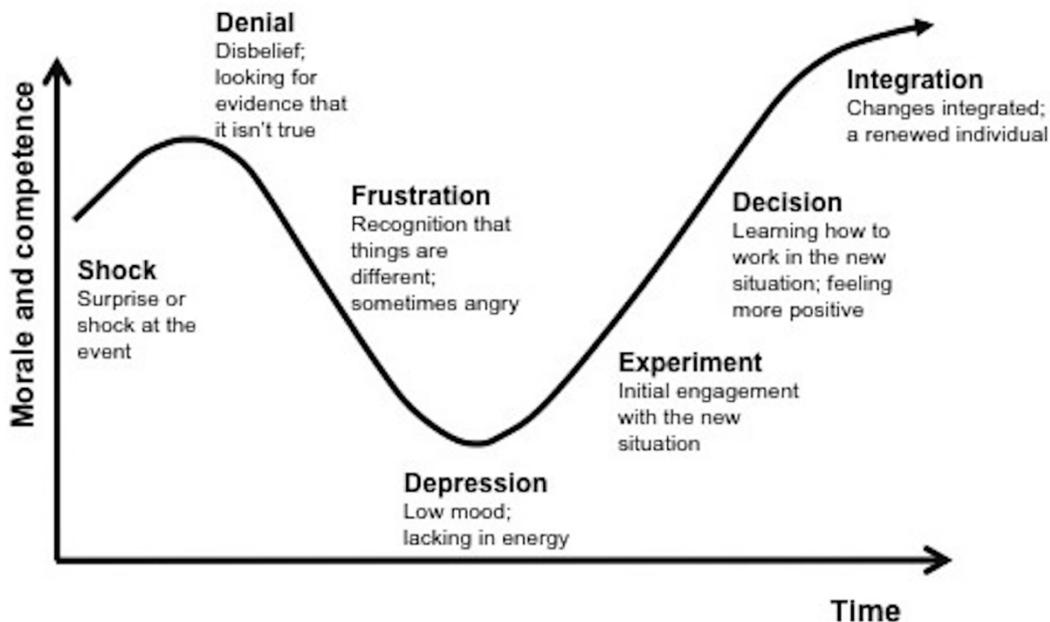
Position	Response to Change
Commitment	The Individual wants change to happen and will collaborate to facilitate it. How to manage: these individuals can be relied upon as “change champions” to help communicate change.
Enrolment	The Individual wants change to happen and will work towards it within pre-determined frameworks. How to manage: give clear instructions and manage closely to make sure he is working effectively towards change.
Genuine Compliance	The Individual understands the positive impact of change and will do whatever is required of him, thinking proactively about what he could do. How to manage: involve in the process by implementing its suggestions to gain full commitment.
Formal Compliance	The Individual is not hostile to change and will do whatever he is asked, but nothing more. How to manage: continue to communicate the benefits of change.
Grudging Compliance	The Individual does not recognize the benefit of change. He will do what he is asked not to jeopardise its position but will voice dissent and hope for failure. How to manage: gain commitment through negotiation, persuasion and influencing skills.
Non – Compliance	The Individual does not recognize the benefit of change and will not do what he is asked to, as he has nothing to lose by saying no. How to manage: monitor behaviour carefully and consider adopting formal processes (e.g. disciplinary)
Apathy	The Individual does not support or oppose change. How to manage: communicate regularly what is happening to gain his commitment.

APPENDIX 2:

THE KÜBLER-ROSS CHANGE CURVE

Emotional Responses to Change*₆

The Kübler - Ross curve was originally designed to reproduce the stages of grieving and is currently used as an intuitive framework to summarise people's reactions to change. The initial individual reaction/response to change is usually **emotional**. The curve therefore identifies the different emotions people develop towards change over time.



Source: *Understanding how people react to Change* | Author: Government Communication Service | year: 2014

The theory also explains how to manage employees' emotions during the different phases. There are four main subsequent stages*₇:

- 1. Shock, Denial and Anger:** the initial reaction is one of disbelief. Individuals may be thinking that change might not even go through in the end and are in a genuine state of uncertainty. At this stage, it is advisable to communicate as much information as possible, as clearly as possible. It is also useful to provide opportunities for employees to discuss their feelings and their concerns (*behaviours that are often observed: apathy, non-compliance*);

- 2. Frustration, Fear, Depression:** individuals will gradually start processing their thoughts and feelings about the change. They may as well become disengaged and not interested in organisational success. Again, communication is really important, as it might give people the right tools to start thinking more positively about the change (*behaviours that are often observed: apathy, grudging-compliance*);
- 3. Acceptance, Understanding, Exploration:** individuals finally realise the inevitability of change and appreciate it is underway. This is the phase where the organisation needs to generate the necessary “buy-in” by developing a common understanding about the future - it is the ideal time to share “easy, wins” brought about by the transition (*behaviours that are often observed: formal/genuine compliance*);
- 4. Commitment and Moving On:** at the final stage of the change curve, organisational developments are being fully embraced and individuals will start thinking about how they can “*make change work for them*” (Martin and Whiting, 2017). Some individuals may reach this phase earlier than others – organisations can therefore count on their support in communicating the advantages of the new organisational structure (*behaviours that is often observed: commitment*).

Sources:

Page 14 | *1 Source: Employment Rights on The Transfer of an Undertaking, January 2014. Page 20 | *2 Source: Guide to the General Data Protection Regulation.

Page 20 | *3 Source: General data Protection Regulation. Page 21 | *4 Source: DSPR Regulations.

Page 26 | *5 Source: Martin and Whiting, Human Resources Practice 7th Edition, 2017.

Page 27 | *6 Source: Government Communication Service: Understanding How People React to Change.

Page 27 | *7 Source: Martin and Whiting, Human Resources Practice 7th Edition, 2017.

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