Guide to: The Transfer of Undertaking Regulations (TUPE)

When negotiating a deal to purchase a business it's important to consider the impact such an acquisition will have on its employees. If the Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE) apply then there could be a number of consequences, potentially impacting on the deal financially.

TUPE has three main concepts intended to protect employees, namely:

1. Employees automatically transferring from the seller to the buyer who is required to take on all the rights, liabilities and obligations of the transferring employees.
2. Protection against dismissal for a reason connected with the transfer.
3. A duty to inform and consult with affected employees or their duly elected representatives.

Does TUPE Apply?

Firstly, it should be determined whether TUPE applies to the purchase. Generally, TUPE does not apply when buying share capital. In such an instance the business remains in the same company. All that changes is the share ownership and therefore the employees are unaffected.

On the other hand, TUPE may apply on an asset sale (for example a transfer of contracts, plant and machinery, goodwill etc from one company to another).

TUPE will apply if the whole or part of a business or undertaking, which is an economic entity, transfers and that entity retains its identity after the transfer. Broadly speaking, this means a collection of resources (i.e. assets and people) which pursue a specific economic objective being transferred from one business to another and performing the same, or a similar, objective. This is the case regardless of a business' size or industry.

Automatic transfer

Should the requirements for TUPE be met then there is an automatic transfer of the relevant employees. If there is a transfer of part of the business only then this will be the employees principally assigned to that part of the business or undertaking. However, before the transfer happens the employees will have the opportunity to opt out, in which case their employment will end on the date of the transfer, generally without liability for the buyer.

If not, the employees are entitled to move over on the same contractual terms and conditions with their continuity of employment maintained. For employment purposes, the buyer steps into the shoes of the seller.

Changing employment terms

Any changes to terms and conditions are generally automatically void. This may scupper any plans of buyers to harmonise terms with their own employees. Buyers should also be aware that resignations in response to substantial changes in working conditions to an employee's material detriment may give rise to liability for unfair dismissal.

There may, however, be some very limited scope to make changes to employment terms, such as a result of a permissible economic, technical or organisational (ETO) reason or a mobility clause in an existing contract of employment.

Protection against dismissal

TUPE provides employees greater protection against being dismissed, subject to having sufficient continuous service to bring an unfair dismissal claim. A dismissal will be automatically unfair if the sole or principal reason for the dismissal is the transfer, unless there is an ETO reason which could render the dismissal fair.

The employees being redundant could be an ETO reason but a fair and due redundancy process would have to be followed. The buyer would likely have to pick up the redundancy costs.

Information and consultation

The buyer and the seller have certain requirements to inform and consult with their own employees or appointed employee representatives in relation to the transfer. This will include consultation on any measures (employment changes) planned to be implemented by the buyer.

Also, if relevant, there are minimum statutory obligations with redundancy consultation that are more onerous than a TUPE consultation.

Employment liability information

The buyer will need to undertake due diligence and the seller has certain obligations under the Regulations to provide information, known as the Employment Liability Information (ELI).

This includes information on who is transferring, their period of continuous service, their employment terms and conditions and information about disciplinary and grievances. This is required to be provided at least 28 days prior to the transfer.

Warranties and indemnities

Given the associated risks of TUPE, a prudent buyer will want contractual redress against the seller. This may include contractual protection that the ELI is complete and accurate in all material respects and that the seller has made no material employment changes and has discharged its employment obligations, including in respect of TUPE, prior to the transfer.

However, the negotiation of warranties and indemnities will likely depend on the allocation of risk based on the deal agreed.

TUPE is a complicated area of law and therefore for a smooth acquisition you should seek advice at an early stage.

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