

HR Recruiters' Forum

Public sector

Hidden risks with TUPE

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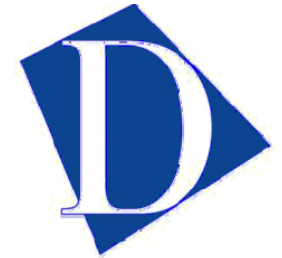
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Hidden Risks with TUPE



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Partner and Head of Employment

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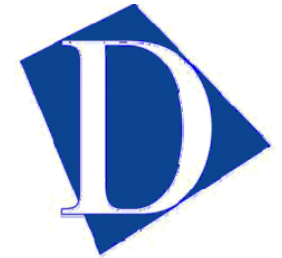
Overview of Session

- TUPE
- TUPE and transfers from the Public Sector: the differences explained
- Hidden risks
- Round Table discussion
- Your Questions



TUPE: An Overview

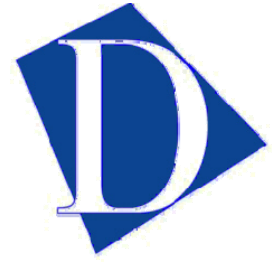




TUPE

- Transfer of Undertakings (Protection of Employment) Regulations 2006
- Replaced Transfer of Undertakings (Protection of Employment) Regulations 1981
- Came into force on 6 April 2006

What Happened Before TUPE?



- On the transfer of assets or change of service provider parties could choose which employees transferred, if any
- Transferee could employ the transferring employees on any terms it chose
- No obligation to inform or consult with the representatives of the affected employees
- No liabilities transferred
- Break in service



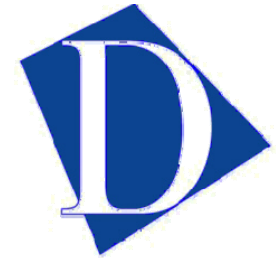
What Changed with TUPE?

- TUPE introduced 4 concepts into UK law:
 - Protection against dismissal in connection with a TUPE transfer
 - The automatic transfer of employees on their same terms and conditions
 - The obligations to inform and consult/provide information
 - Transfer of certain liabilities
- TUPE provided that any agreement that excluded or limited these principles was null and void



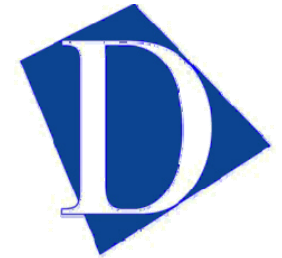
When Does TUPE Apply?

- TEST 1:
Transfer from one entity to another of an undertaking or business or part of an undertaking or business..... where there is a transfer of an economic entity which retains its identity
- TEST 2:
A service provision change where there is an organised grouping of employees which has as its principle purpose the carrying out of the activities concerned on behalf of the client
- Some transfers can satisfy both tests
- TUPE applies to transfers in both the public and private sector including not for profit organisations



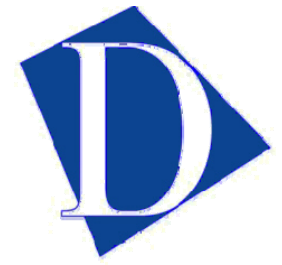
What Protection Does TUPE Afford

- Automatically transfers employees to the new employer:
 - on the same terms and conditions (including collective agreements) or
 - terms and conditions that are no less favourable
- Ensures the new employer is responsible for anything done/not done by the old employer
- States that no changes to employees' terms and conditions can be made except in limited circumstances
- States that any dismissal connected with the transfer is automatically unfair except in limited circumstances
- Requires employers to inform/consult collectively regarding the transfer
- Requires transferor to provide certain limited information to the transferee



Who Transfers?

- Employees – excludes contractors
- Employed immediately before the transfer (or if dismissed any liabilities for their unfair dismissal)
- Employed in the business or service being transferred
- Whose employment would otherwise have been terminated
- Do not object
- Excludes employees temporarily assigned to the business or those who are permanently re-assigned to other work outside the transferring business



Employees who Work Part of Their Time

- No specific percentage of time an employee must devote to a business before being regarded as being “assigned”
- Time is only one factor
- Rule of thumb: 50% not considered enough





What Obligations Transfer?

- All rights, liabilities and duties connected with the contract of employment
 - Contractual terms
 - Contractual liabilities – arrears of wages
 - Statutory liabilities – discrimination
 - Continuous employment
 - Liability for personal injury
 - Bonus schemes
 - Collective Agreements
- Pre-transfer and post transfer liabilities should be addressed in transfer agreement:
 - Second generation contracting

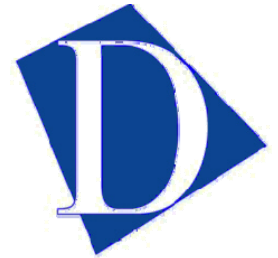
What Doesn't Transfer?



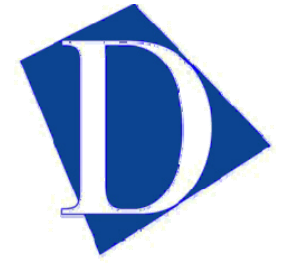
- Criminal liabilities
- Some pension rights



Changing Terms & Conditions



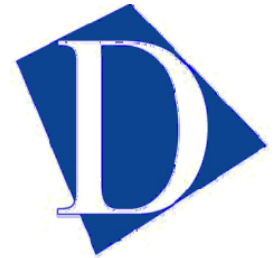
- Where reason is unconnected with the transfer or
- Reason is connected with the transfer but is an economic, technical or organisational reason (ETO) entailing changes in the workforce
- ETO:
 - Profitability or market performance of transferee's business
 - Relating to the management or organisational structure of the transferee's business
- Entailing changes in the workforce:
 - Changes in numbers employed
 - Changes in functions performed by employees
- Changes agreed with the employees concerned



Substantial Change to Working Conditions

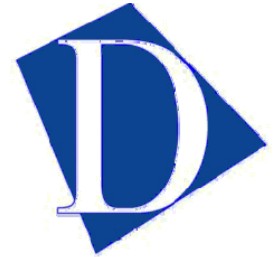
- Employees can resign if the transfer involved a substantial change in working conditions to their material detriment
- Treated as being dismissed with notice
- Could cover a major relocation of the workplace
- Whether or not unfair is a matter for a tribunal

Dismissals



- Dismissals can be carried out where:-
 - Reason for dismissal is unrelated to the transfer or
 - There is an ETO reason for the dismissal entailing changes in the workforce
- Employee must have more than 1 year's service to claim unfair dismissal

The General Position on Pensions

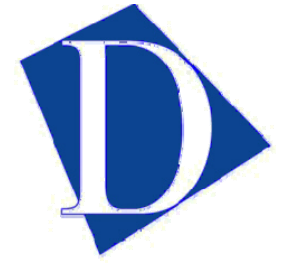


- Rights under an occupational pension scheme do not transfer *except for benefits which are not related to old age, invalidity or survivors*
- Contractual obligation to contribute to a group personal pension scheme or personal pension scheme does transfer
- Employees participating in an occupational pension scheme entitled to certain limited pension benefits
- Employees cannot claim constructive dismissal for transferee providing a less generous pension scheme



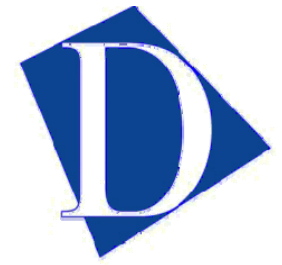
Informing and Consulting

- Inform and in some cases consult with employee representatives - no threshold on numbers
- *As transferor*
 - Regulation 13 letter to employee representatives giving certain information on the transfer
 - Consult prior to transfer if necessary
- *As transferee*
 - Advise transferor of measures – this will include pension arrangements
 - Consult post transfer if necessary



Informing and Consulting

- Penalty for any failure – 13 weeks pay per employee (a week's pay is not capped) – is shared jointly
- Transferor employer must provide the transferee with certain limited information about the transferring employees not less than 14 days before the transfer except where not reasonably practicable
- Penalty for such a failure – not less than £500 per employee unless it is “just and equitable” to award less and takes into account:-
 - Loss suffered by the transferee
 - Any contract terms addressing this situation



TUPE and Transfers from the Public Sector





Statement of Practice on Staff Transfers

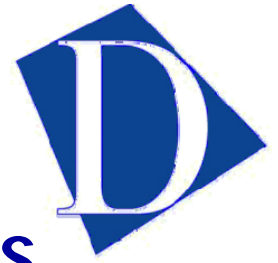
- Issued by Cabinet Office – January 2000 (revised 2007)
- Public sector contracting authority should ensure staff transfer as if TUPE applies except where:-
 - Services are ancillary to the provision of goods
 - Where the activity is new or a one off project
 - There are no groupings of staff specifically assigned to the project
 - Where the continuing service is significantly different from the previous service.
- Protection of pension rights of transferring staff
 - Admission to public sector scheme
 - Alternative scheme which is actuarially certified as broadly comparable

Code of Practice for Public Sector Service Contracts



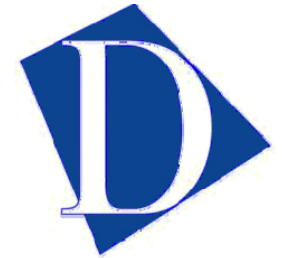
- The Code initially applied to
 - A local authority service contract which involved a transfer of staff from the local authority to the service provider; or
 - A local authority service contract in which staff originally transferred out from the local authority as a result of an outsourcing of TUPE, transfer to a provider under a re-tender of a contract
- Advertised after 13 March 2003
- Does not apply if no staff transfer
- Unclear the status of the Code on renewal or extension of an existing contract
- Now extended to all public sector transfers

Code of Practice for Public Service Service Contracts

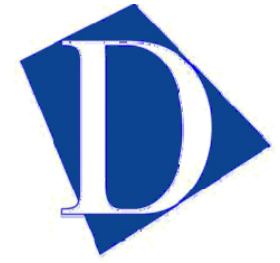


- Encompasses the Cabinet Office Statement
- Introduces new provisions for new recruits

New Recruits to an Outsourced Workforce

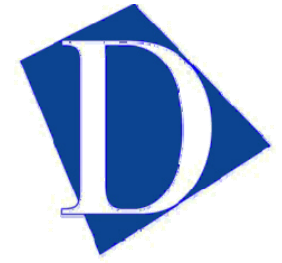


- Fair and reasonable conditions which are overall no less favourable than those of transferred employees
- Terms and conditions to be considered in the round as a “package”
- Consultation with trade union or elected employee representatives to agree terms



New Recruits to an Outsourced Workforce

- Pension Provisions
- Obligation to offer
 - Membership of the public sector pension scheme
 - Membership of a good quality employer pension scheme (if a scheme is a defined contribution / stakeholder scheme employee contributions to be matched up to 6%)
- On a retender the new service provider to comply with similar provisions



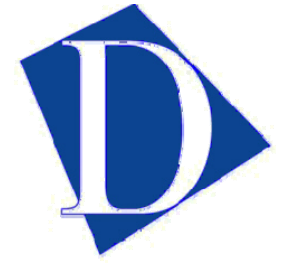
How will the Code be Monitored?

- Service provider to provide public authority with information as requested
- Information will include terms and conditions for transferred staff and for new recruits
- Information to be restricted to that required for the purpose of monitoring compliance

Enforcement by Public Authority



- Complaints to be resolved between trade unions and service providers wherever possible
- Public authority ability to seek explanation and request remedial action
- Ability by public authority to enforce terms of the contract
- Public authority not bound to consider service providers for future work where failure to comply



Enforcement by the Audit Commission

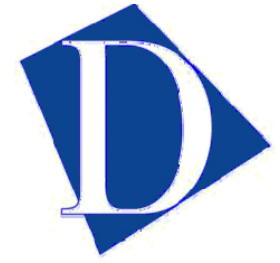
- Certification by public authorities that best value arrangements have been complied with
- Monitoring and investigation by the Audit Commission
- Exercise of statutory powers by the Audit Commission

The Best Value Authorities Staff Transfers (Pensions) Direction 2007

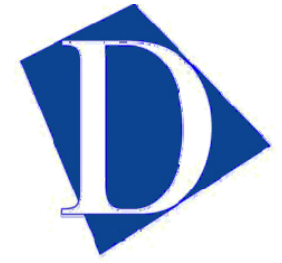


- Pension protection for Local Authority employees where services are contracted out
- Pension protection:
 - the same pension scheme or
 - a broadly comparable pension scheme
- LA must put wording into contract to provide for:
 - pension protection on initial contracting out and subsequent re-tendering
 - pension protection is enforceable by the employee

The NHS REM Model As an alternative to TUPE



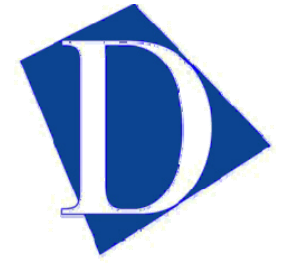
- Intention
 - Most employees remain with NHS
 - Secondment
 - Managerial staff transfer
- Process
 - Opt out of TUPE
 - Complex contractual documents
 - Revised HR practices
- Risk underwritten by the NHS
- Advantages
 - Primarily for the staff
 - No two tier workforce
- Disadvantages
 - Residual legal risk



TUPE: the Hidden Risk – Pensions

Focus on LGPS:

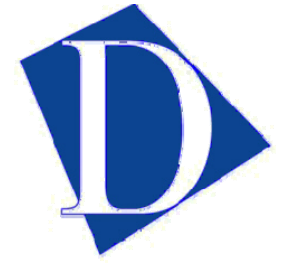
- Pre and post March 2008
- Funding risks
 - Historic underfunding
 - Ongoing underfunding
 - Exit payments
- 85 year rule
- Redundancy/restructure/early retirement
- Quantifying the legal and financial risks
- Appropriate legal protection



TUPE: the Hidden Risks – Equal Pay

- Effect of Equality Clause
- Unequal Pay
 - To the point of transfer
 - From transfer
- Incomplete and inaccurate job evaluation
- Quantifying the risks
- Addressing the risks

TUPE: the Hidden Risks – Unidentified Employees



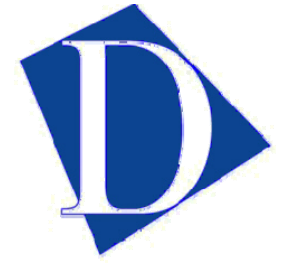
- Check contractual terms
- Check employee liability information
- The legal position
- Commercial issues and options
- Strategy for the future

TUPE: the Hidden Risks – Inaccurate and Incomplete Information



- Contractual terms
- Legal obligations
- Strategy for the future

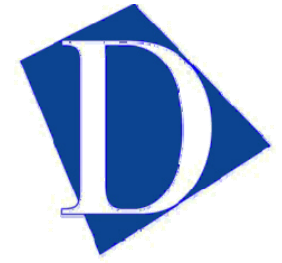
TUPE: the Hidden Risks – Financial Unknowns



- Number of employees
- Terms and conditions
- Past liability and ongoing liability
- Equal pay
- Pensions



TUPE: the Hidden Risks – Your Own Two Tier Workforce

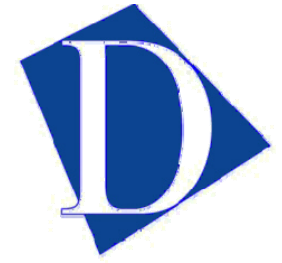


- Consequences of TUPE on your workforce
- Transferring and new staff
- Harmonisation of terms and conditions
 - Can you?
 - How do you achieve it?

TUPE: the Hidden Risks – Unions



- Involvement of unions pre transfer and post
- Effect of TUPE on collective and individual rights
- Industrial relations



TUPE: the Hidden Risks – Lack of Certainty at the End of the Contract

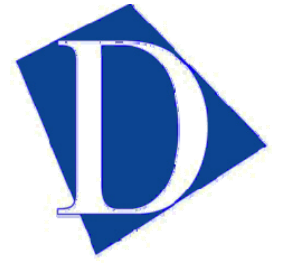
- Legal position
- Contractual position
- Impact on Employees
- Financial Consequences
- Mitigating the risks



Implementing a Strategy to mitigate the legal and financial risks of TUPE when contracting out/for services



Your Questions



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Thank you for attending
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