

INSTITUTE OF EMPLOYMENT RIGHTS

# TUPE Update

## Your Questions Answered

Richard Arthur, Thompsons Solicitors

# WHEN DOES TUPE APPLY?

- Business Transfers;
- Service Provisions Changes; and
- Public Sector

# BUSINESS TRANSFERS

*“A transfer of an undertaking, business or part of an undertaking.....to another person where there is a transfer of an economic entity which retains its identity”. (Reg.3(1)(a)).*

An *“economic entity”* is:

*“An organised grouping of resources which has the objective of pursuing an economic activity.....” (Reg. 3(2)).*

*“Retention of identity”* means that the link between the workers and materials and a similar economic activity must be retained:  
Klarenberg v Ferrotron Technologies GmbH [2009] IRLR 301.

# SERVICE PROVISION CHANGES

- “Activities” cease to be carried out by a client/contractor;
- “Organised grouping of employees” whose “principal purpose” is the carrying out of the activities;
- Not in connection with a “single specific event or task of short duration” and
- Activities not wholly or mainly the supply of goods or services.

# SERVICE PROVISION CHANGES

- The activities do not have to be identical after the transfer:  
Metropolitan Resources Limited v (1) Churchill Dulwich Limited and (2) Martin Cambridge UKEAT/0286/08;
- There may be no service provision change if the service is so fragmented that no transferee can be identified: Thomas-James and others v Cornwall County Council ET Case Nos. 1701021-2 and Clearsprings Management Limited v Arkins and others UKEAT/0054/08/LA; and
- It may be possible to identify a transferee even if the service is split: Kimberley Group Housing Limited v Hambley and others [2008] ICR 1030

# THE PUBLIC SECTOR

- Cabinet Office Statement of Practice on Staff Transfers in the Public Sector 2000;
- Code of Practice on Workforce Matters in Local Authority Service Contracts 2003 (withdrawn March 2011);
- Code of Practice on Workforce Matters in Public Sector Service Contracts 2005 (withdrawn December 2010); and
- Fair Deal for Staff Pensions-consultation closed recently.

# EFFECT ON TERMS AND CONDITIONS

- Transfer of *“transferor’s rights, powers, duties and liabilities under or in connection with the contract”*;
- Exclusion of occupational pensions; and
- Importance of ascertaining what the contract contains.

# COLLECTIVE AGREEMENTS

- Automatic transfer (but is it legally enforceable?);
- “Static interpretation”: Werhof; and
- “Dynamic interpretation” (?)- Supreme Court in Alemo-Herron.



# CONTRACTUAL CHANGES

- If the sole or principal reason for the variation is (1) the transfer itself or (2) a reason connected with the transfer that is not an ETO reason, the variation is void;
- ETO reason “.....entailing changes in the workforce”;
- Change in headcount or job description;
- Variations permitted where the reason is connected with the transfer, and is an ETO reason;
- Does that comply with the ARD?
- Power v Regent Security Services Limited [2007] IRLR 226

# THE COALITION

- Remove “Service Provision Changes” (?);
- Withdraw COSOP/Fair Deal for Staff Pensions (?); and
- Permit harmonisation of terms and conditions (?)-would require amendments to the Directive.