



TUPE myths demystified

Many HR professionals shudder when they hear the word “TUPE”, but what are the most common misconceptions? This article sets out the top five TUPE myths...

As a reminder, TUPE applies to a “relevant transfer” which covers:

- a. Business transfer: a transfer of a business, undertaking or part of the same where there is a transfer of an economic entity which retains its identity; and
- b. Service provision change: a client engaging a contractor to do work on its behalf, reassigning such a contract or bringing the work “in-house”.

1. Myth 1: TUPE doesn’t apply to intra-group reorganisations

Truth: the transfer of a business within a group can be a TUPE transfer if there is an economic entity which retains its identity following the sale. There may also be a “service-provision change” TUPE if a group company “outsources” the provision of services to another group company. So, the specific circumstances should be considered in each intra-group reorganisation to cover off whether TUPE will apply.

2. Myth 2: If an employee objects to a TUPE transfer, they stay with their current employer, and don’t transfer across

Truth: if an employee objects to a TUPE transfer, their contract of employment will not transfer and their employment will automatically terminate with their current employer on the date of the transfer. The employee is not entitled to compensation in this scenario unless they have objected in response to a serious breach of their contract by the employer or face a substantial change to their working conditions to their detriment as part of the transfer. If they want to stay with their current employer and object to the TUPE transfer in order to avoid transferring, their current employer will need to offer them new employment to commence after the transfer.

3. Myth 3: You can harmonise terms and conditions of employment of employees who have transferred across, as long as enough time has passed

Truth: if a change is made to a transferring employee's contract, then it will generally be void if the main reason for the change is the transfer, no matter how long has passed since the transfer. Changes are allowed primarily where they are (a) not related to the transfer; (b) due to an "ETO" reason (a change in the workforce which involves a change in the numbers, location or functions of the employees); or (c) permitted by the terms of the contract. Clearly, the more time that passes, the harder it will be to show that the changes are being made because of the original TUPE transfer, but this is always a risk.

4. Myth 4: You can settle all TUPE related claims

Truth: it is not possible to settle a claim for failure to inform and consult on a TUPE transfer by a settlement agreement. To validly settle such a claim, you would need to do this via ACAS. The same applies for a failure on the part of the transferring company to provide certain employee information. You can also not use a settlement agreement to push through a variation in terms of conditions that would be in breach of TUPE.

5. Myth 5: There is no qualifying service period when an employee is claiming automatic unfair dismissal because of a TUPE transfer

Truth: employees must have the two years' continuous service before they can make a claim of unfair dismissal for a TUPE-related reason.