



Comparison of TUPE Legislation ROI v GB

We continue our series of comparison between Great Britain (GB) and the Republic of Ireland. In this article we will summarise the key differences with TUPE requirements in GB and Ireland. This is an area which impacts many parties including the transferor, the transferee and the employees. It is vital that employers get appropriate legal advice in advance of any transfer as there are various timelines in place. Unlike other areas of employment law, there are less substantial differences between the jurisdictions, with those differences being more nuanced in nature.

We have summarised some of the key differences below:



 Statutory Protection	The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) ("2006 Regulations")	European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 S.I. No. 131 of 2003 ("2003 Regulations")
 What is TUPE?	The 2006 Regulations emanate from the European Acquired Rights Directive (2001/23/EC). TUPE stands for the Transfer of Undertakings (Protection of Employment) Regulations. Its purpose is to protect employees if the business in which they are employed changes hands. Its effect is to move employees and any liabilities associated with them from the old employer to the new employer automatically. The provisions of TUPE cannot be waived by the parties to the transfer.	The 2003 Regulations emanate from the European Acquired Rights Directive (2001/23/EC). As such, there is no substantive difference in the definition in the GB versus ROI.



Comparison of TUPE Legislation



When does TUPE apply?

TUPE applies where there is a "relevant transfer". There are two types of relevant transfer: business transfers; and service provision changes (SPCs).

A business transfer is the "transfer of an economic entity which retains its identity". In determining whether this has happened, the employment tribunal takes into account factors such as:

1. the type of undertaking being transferred;
2. whether any tangible assets (buildings, moveable property etc) are transferred;
3. whether any intangible assets are transferred and the extent of their value;
4. whether the majority of the employees are taken on by the new employer;
5. whether any customers are transferred;
6. the degree of similarity between the activities carried on before and after the transfer;
7. the period for which the activities were suspended, if any.

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The definition in ROI mirrors the GB definition of a business transfer, but there are no equivalent provisions on SPCs.

TUPE applies where there is a "relevant transfer". A relevant transfer means the "transfer of an economic entity which retains its identity". In determining whether this has happened, the Workplace Relations Commission ("WRC") takes into account factors such as:

1. the type of undertaking being transferred;
2. whether any tangible assets (buildings, moveable property etc) are transferred;
3. whether any intangible assets are transferred and the extent of their value;
4. whether the majority of the employees are taken on by the new employer;
5. whether any customers are transferred;
6. the degree of similarity between the activities carried on before and after the transfer;
7. the period for which the activities were suspended, if any.

In Ireland the TUPE test must be applied in all cases.



Comparison of TUPE Legislation



When does TUPE apply?
cont'd

The concept of a SPC is contained in the 2006 Regulations but is not derived from the European Acquired Rights Directive. A SPC may occur where:

1. a service is outsourced from a client to a contractor;
2. a new contractor takes over provision of an outsourced service from a previous contractor; or
3. the client brings provision of a service back in-house.

In order for there to be a SPC in any of the above situations:

1. there must be an organised grouping of employees whose principal purpose is to perform the relevant activities for the client; and
2. the client intends the activities before and after the change to be fundamentally the same.

However, there will be no SPC if the activities are:

1. for a single specific event or task of short-term duration; or
2. related wholly or mainly to the supply of goods for the client's use.

The part of the organisation that's transferring / organised grouping of employees must be in GB for TUPE to apply.



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Who does the TUPE regulations apply to?

TUPE regulations apply to the public and private sectors, as well as charities.

The Irish position mirrors the GB position.



What individuals does TUPE impact?

TUPE impacts "employees". Employees are defined under the Act as any individual who works for another person whether under a contract of service or apprenticeship or otherwise. However, it does not include anyone who provides services under a contract for services.

Recent case law also suggests workers may be covered by TUPE. However, this was an employment tribunal decision, so it is not binding. An appeal decision would be needed to provide certainty.

TUPE impacts "employees" who are defined under the Act as a person of any age, who has entered into or works under a contract of employment. A person holding office under, or in the service of, the State (including a civil servant within the meaning of the Civil Service Regulation Act 1956 (No. 46 of 1956)) shall be deemed to be an employee employed by the State or Government. An officer or servant of a harbour authority, health board or vocational education committee shall be deemed to be an employee employed by the authority, board or committee, as the case may be.

It does not include anyone who provides services under a contract for services.

There is no equivalent "worker" category in Ireland.



Comparison of TUPE Legislation



Transferor and Transferee Obligations - Information and Consultation

In a transfer situation, both the transferor and transferee ("the parties") must inform the appropriate representatives of the employees affected by the transfer, of -

1. the date or proposed date of the transfer;
2. the reasons for the transfer;
3. the legal implications of the transfer for the employees and a summary of any relevant economic and social implications of the transfer for them, and any measures envisaged in relation to the employees.

Consultation is only required if an employer envisages taking measures in relation to any of its affected employees in connection with the transfer.

Both parties can be penalised if they do not comply with information and consultation requirements.

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Both parties can be penalised if they do not comply with information and consultation requirements.

Timing - The timing is more prescriptive in Ireland. The parties must give this information to the employees' representatives, where reasonably practicable, not later than **30 days before** the transfer date and in any event, in good time before the transfer occurs.

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Comparison of TUPE Legislation



Transferor and Transferee Obligations - Information and Consultation cont'd

Timing - There is no set timeline in which an employer must inform (and, where necessary, consult with) employees. However, the employer must allow long enough to enable consultation if required.

Although in most cases information (and consultation, if required) must be with employees' representatives, an employer may inform (and consult) affected employees directly where there are no existing representatives in place and:

1. the employer has fewer than 50 employees; or
2. the transfer involves fewer than 10 employees.

The obligation in the 2003 Regulations is to provide information and consult with employee representatives. In practice, employers often consult directly with impacted employees in small organisations where the appointment of representatives is not practical due to the low numbers involved.

There is no threshold triggering information and consultation obligation in Ireland under the 2003 Regulations. There is a separate obligation under the Employees (Provision of Information and Consultation) Act 2006 which is triggered by a formal, written request from at least 10% of the workforce in an undertaking with 50 or more employees.



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Insolvency

TUPE regulations protect employees' rights when they transfer to a new employer. This includes transfers when the old employer is insolvent.

In a TUPE transfer, the type of insolvency and when it happened will affect:

1. who pays any money owed to employees
2. what protections employees have under TUPE

If an organisation – or a part of it – is being rescued and transferred or taken over by a new owner, employees are protected under TUPE.

If an organisation is closing down, employees are not protected under TUPE. This is because there's no transfer.

The contractual rights of the employees do not transfer where the original employer is subject to proceedings whereby he may be adjudicated bankrupt, or wound up for reasons of insolvency, by order of the High Court. However, if the sole or main reason for the institution of bankruptcy or insolvency proceedings is the evasion of an employer's legal obligations under the Regulations, then the Regulations apply to a transfer effected by that employer.



What obligations are placed on the employer if TUPE applies?

All the rights and obligations of an employer under a contract of employment (including terms incorporated from collective agreements) other than pension rights (see below), are transferred to the new employer on the transfer of the business or part thereof.

The new employer is prevented from changing the terms and conditions of employees who have transferred to it under TUPE. If the reason for any changes is the transfer, they will be void.

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All the rights and obligations of an employer under a contract of employment (including terms inserted by collective agreements) other than pension rights (see below), existing on the date of transfer, are transferred to the new employer on the transfer of the business or part thereof.

The new employer must continue to observe the terms and conditions of the collective agreement until it expires or is replaced.



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What obligations are placed on the employer if TUPE applies? cont'd

However, there are some exceptions. A change is permitted if:

1. it is for an economic, technical or organisational reason entailing changes in the workforce;
2. an existing flexibility clause within the employee's contract allows it; or
3. it is to a term incorporated from a collective agreement, the change takes place more than a year after the transfer, and the varied terms are no less favourable to the employee overall.

All the rights and obligations of an employer under a contract of employment (including terms inserted by collective agreements) other than pension rights (see below), existing on the date of transfer, are transferred to the new employer on the transfer of the business or part thereof.

The new employer must continue to observe the terms and conditions of the collective agreement until it expires or is replaced.



Pension Rights

Employees' rights to old age, invalidity, and survivors' benefits under occupational pension schemes do not transfer under TUPE.

However, the Pensions Act 2004 requires the new employer to offer specified minimum pension provision for eligible transferring employees. The new employer may provide a defined benefit, defined contribution (DC), or stakeholder scheme. If offering a DC or stakeholder scheme, they must match employee contributions up to 6% of pay or the transferor's previous rate.

Obligations in employment contracts to pay into personal or stakeholder pensions do transfer, as do terms not related to old age, invalidity, or survivors' benefits, such as enhanced redundancy terms.

Employees' pension rights in relation to old age, invalidity or survivors benefits under supplementary company or inter-company pension schemes do not transfer to the new employment.

However, where there is a pension scheme in operation in the original employer's business at the time of the transfer, the Regulation provides that

1. if the scheme is an occupational pension scheme within the meaning of the Pensions Act, 1990, then the protections afforded by the Pensions Act apply to any such scheme, and

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Comparison of TUPE Legislation



Pension Rights cont'd

- in respect of the pension schemes which do not come within the remit of the Pensions Act, the new employer must ensure that rights conferring immediate or prospective entitlement to old age benefits, including survivor's benefits, are protected.



Remedies for breaching Regulations

Claims by Employees

Employees affected by the transfer can also bring a claim to the employment tribunal.

1. Unfair dismissal claim.
 Employment tribunals may find a dismissal automatically unfair if the principal reason for the dismissal was the transfer. However, if the dismissal was for an economic, technical or organisational reason requiring changes in the workforce, the question of fairness will be judged on ordinary principles. Changes in the workforce are changes in the numbers or functions of employees, or a change in workplace location.

An employee may bring a claim for unfair dismissal within three months of the dismissal date. If the tribunal upholds the claim, it may make an order for reinstatement or re-engagement of the dismissed employee.

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Claims by Employees

Employees affected by the transfer can also bring a claim to the WRC.

1. Unfair dismissal claim -
 Transfer-related dismissals are prohibited by TUPE. A transfer-related dismissal will automatically be an unfair dismissal unless it can be justified by economic, technical or organisational reasons which require changes in the workforce. An employee may file a complaint for dismissal under the Unfair Dismissals Act or under Regulation 10 of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (S.I. No. 131 of 2003) within 6 months of the date of transfer.

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Comparison of TUPE Legislation



Remedies for breaching Regulations cont'd

However it is more common for the tribunal to make an award of compensation. This is comprised of a basic award of up to £21,570 (calculated based on age and length of service) and a compensatory award to reflect the employee's financial loss (capped at the lower of £118,223 or 52 weeks' gross pay).

2. Compensation for failure to inform and consult

Claims for breach of the information and consultation requirements must be brought within three months of the transfer date. They must usually be brought by the employees' representatives, although they can in some circumstances be brought by the employees directly. The respondents in such cases may be either the transferor or new employer, or both of them, depending on the circumstances. The compensation cannot exceed 13 weeks' pay per affected employee. If employees are not paid the compensation, they may present individual complaints to the tribunal, which may order payment of the amount due to them. These complaints must be presented within three months from the date of the original award.

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2. Compensation for failure to inform and consult - If an employer is in breach of Regulation 8 of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (S.I. No. 131 of 2003) relating to information and consultation an employee or trade union representative is entitled to file a complaint in the WRC within 6 months of the date of transfer.

A decision issued by the Adjudication Officer shall do one or more of the following:

1. declare that the complaint is or, as the case may be, is not well founded;
2. require the employer to comply with these Regulations and, for that purpose, to take a specified course of action; or
3. require the employer to pay to the employee compensation of such amount (if any) as in the opinion of the rights commissioner, is just and equitable in the circumstances, but -

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Comparison of TUPE Legislation



Remedies for breaching
Regulations cont'd

- 3. protective awards for breach of collective redundancy consultation requirements** If the transfer involves a sufficient number of dismissals to trigger statutory collective redundancy consultation obligations, and the employer who is subject to those obligations fails to comply, employees (usually through their representatives) may bring an employment tribunal claim for a protective award. If the tribunal upholds the claim, it may order the employer to pay a protective award of a week's pay for each week of a protected period of up to 90 days. (Note, under the Employment Rights Bill, the government is proposing to double the maximum protected period to 180 days. This change is expected to take effect in April 2026).

Claims by the Transferee

The new employer might be able to make a claim to an employment tribunal if:

1. the old employer does not give employee liability information (ELI) to the new employer at least 28 days before the transfer date
2. any of that information is incorrect
3. the old employer fails to inform the new employer of any changes to the ELI

If the claim is successful, the new employer could receive compensation. This could be at least £500 for each employee about whom the old employer gave incorrect or no information.

- in the case of a contravention of Regulation 8 relating to information and consultation, not exceeding 4 weeks remuneration and,
- in the case of a contravention of any other Regulation, not exceeding 2 years remuneration, in respect of the employee's employment calculated in accordance with Regulations made under section 17 of the Unfair Dismissals Act 1977.

For further information please contact:



Sinead Morgan
Legal Director - Dublin
+353 123 19682
simorgan@dacbeachcroft.com



Katie Doherty
Solicitor - Dublin
+353 (0) 1 231 9653
kdoherty@dacbeachcroft.com



Louise Bloomfield
Partner
+44 (0) 113 251 4717
lbloomfield@dacbeachcroft.com



Joanne Bell
Legal Director - Manchester
+44 (0) 161 934 3179
jbell@dacbeachcroft.com



Josh Hornsey
Solicitor - Leeds
+44 (0) 7738833473
jhornsey@dacbeachcroft.com



Sara Meyer
Knowledge Lawyer - London
+44 (0) 20 7894 6231
smeyer@dacbeachcroft.com



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