

## TUPE & Insolvency – Headline Summary

	Insolvency proceedings not with a view to liquidation of assets	Insolvency proceedings with a view to liquidation of assets
<b>Applies to...</b>	<b>Administration</b>	Winding up via voluntary or compulsory liquidation
<b>TUPE overview</b>	TUPE applies but certain debts of the transferor will not transfer <sup>1</sup> and transferee has greater scope to vary terms & conditions (see below)	Employees don't automatically transfer <sup>2</sup> and dismissals by reason of the transfer are not automatically unfair <sup>3</sup> (see below)
<b>Non-transfer of certain debts<sup>4</sup></b>  <b>-If employees transfer or are unfairly dismissed (pre-transfer) because of the transfer</b>  <b>-If employees dismissed (pre-transfer) for an economic, technical or organisational ('ETO') reason entailing a change in the workforce<sup>5</sup></b>	Liability for certain sums payable to a 'relevant employees' <sup>6</sup> under 'relevant statutory schemes' <sup>7</sup> does not transfer. <sup>8</sup>  -Debts paid by state are limited to wages & pay for holidays taken prior to insolvency  -As above plus statutory redundancy & notice payments	N/A (see below)

<sup>1</sup> e.g. statutory redundancy payments, up to 8 weeks' arrears of pay, up to 6 weeks' holiday pay and statutory notice payments which are payable instead by Secretary of State under the insolvency provisions via the National Insurance Fund. Commentary suggests that debts to the employees that fall outside the statutory scheme or which exceed the statutory limits will pass to the transferee.

<sup>2</sup> Regulation 4 TUPE

<sup>3</sup> Regulation 7 TUPE

<sup>4</sup> Regulation 8(5) TUPE

<sup>5</sup> i.e. a reduction in the number of people employed, a change in the place of work or duties of affected employees

<sup>6</sup> Defined by Regulation 8(2) of TUPE as one whose contract transfers or the transferee by virtue of TUPE or whose employment is terminated unfairly under Regulation 7(1) of TUPE

<sup>7</sup> Statutory redundancy provisions and insolvency provisions (e.g. up to 8 weeks' arrears of pay, up to 6 weeks' holiday pay, statutory notice payments, etc...)

<sup>8</sup> Importantly however commentary suggest that debts which exceed the statutory limits will pass to the transferee (as of course will debts which are not covered by the 'relevant statutory schemes')

Permitted variations to terms & conditions of employment	<p>The transferor, insolvency practitioner or transferee may agree changes to terms made with the intention of safeguarding employment by ensuring the survival of the business.<sup>9</sup></p> <p>Changes <b>must be agreed with appropriate representatives</b> of the employees.<sup>10</sup></p> <p>The new terms must not breach statutory entitlements (e.g. NMW or discriminate).</p> <p>The sole or principal <b>reason for the change must be the transfer</b> (not an ETO reason entailing changes in the workforce<sup>11</sup>) and made with the aim of safeguarding employment opportunities by ensuring the survival - A simple desire to migrate staff onto the transferee's T&amp;Cs would not, without more, satisfy this test.</p>	N/A but transferee free to change terms & conditions (see ' <i>Automatic transfer principle</i> ' below).
Automatic transfer principle, <sup>12</sup> ( <i>can you cherry pick staff?</i> )	Anyone employed by the transferor immediately before the transfer <sup>13</sup> and assigned to organised group which is subject the transfer will	Automatic transfer principle does not apply. <b>Transferee free to cherry pick staff and change terms and conditions</b>

<sup>9</sup> e.g. reduce salary

<sup>10</sup> Must be a trade union representative if a trade union is recognised for collective bargaining purposes by their employer in respect of any of the affected employees. In other cases, non-union representatives may agree changes but (i) the agreement which records the changes must be in writing and signed by each of the non-union representatives (or, where personal signature by a representative is not reasonably practicable, by a person authorised on their behalf); and (ii) before the agreement is signed, the employer must provide all the affected employees with a copy of the agreement and any guidance which they need to understand it

<sup>11</sup> i.e. a reduction in the number of people employed, a change in the place of work or duties of affected employees

<sup>12</sup> Regulation 4 TUPE

<sup>13</sup> Or would have been had they not already been unfairly dismissed because of the transfer (see below)

	automatically transfer under TUPE (together with normal duties & liabilities under or in connection with the contract save as modified – see ‘ <i>Non-transfer of certain debts</i> ’ above)	
<b>Unfair dismissal protection &amp; liability<sup>14</sup></b>	<p>If reason for dismissal is transfer and not an ETO reason entailing change in workforce, it is automatically unfair.<sup>15</sup></p> <p>Liability for an automatically unfair pre-transfer dismissal transfers to the transferee whereas liability for a pre-transfer dismissal which is not automatically unfair remains with the transferor</p>	No right to claim automatic unfair dismissal if because of the transfer but employees can still claim ordinary unfair dismissal
<b>Information &amp; consultation obligation<sup>16</sup></b>	<b>Applies</b> as normal	Applies as normal. If there are <b>special circumstances</b> which render it not practicable for an employer to inform and consult it must still take all such steps that are reasonably practicable
<b>Key procedure steps</b>	<p>As a client, use terms of commercial contract to determine who is assigned and their current T&amp;C’s</p> <p>TUPE process applicable largely in-tact</p>	Need to concentrate efforts on immediate provision of information required under TUPE to appropriate representatives of affected employees (including those affected by measures taken in connection with the transfer e.g. selective transfer on different T&Cs)

<sup>14</sup> Regulation 7(1) TUPE

<sup>15</sup> Employees still require the requisite two years’ continuous service to claim

<sup>16</sup> Regulation 13 TUPE

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15<sup>th</sup> April 2020