

TUPE or not TUPE?

Practice management consultant **Sabina Mirza** outlines the staff protection rules employers must follow when they buy or sell a practice.

Buying an existing dental practice involves detailed negotiations on the purchase price for the premises, fixtures and fittings, dental equipment, the name of the practice, and its goodwill. What can easily be overlooked during these considerations are the staff employed at that dental practice. They will automatically transfer with the business, regardless of the parties' discussions or intentions.

The same applies with a 'service provision change', which occurs when outsourcing or insourcing a service such as a cleaning contract. It can also potentially happen when tendering for and winning an NHS contract in England or Wales that was previously carried out by another specific practice.

The law covering all of this is the *Transfer of Undertaking (Protection of Employment) Regulations 2006* (TUPE). These regulations provide employees with legal protection to ensure their position does not change and that their accrued employment rights are maintained under the new employer (Table 1).

Within a practice, TUPE would apply to dental nurses, receptionists, cleaners and employed dentists. But those working under a contract for services, such as self-employed dental hygienists, associates, locum dentists and agency workers, are generally not covered by TUPE.

Before the sale

The former employer is obliged to give the

new employer written information about employees who are to transfer. This information consists of the identity and age of the employees who will transfer and their main particulars of employment. It also includes details of any collective agreements; any disciplinary or grievance procedures followed or legal claims brought in the past two years; or any potential legal action that may be brought. Remember to include any employees who are absent on maternity leave, long-term sick leave or a career break.

This information should be given at least 14 days before the transfer or as soon as is reasonably practicable. Written notifications of any changes that occur up until the actual completion of the transfer must also be passed on.

If the former employer does not provide this information, the new employer may apply to an employment tribunal for compensation. They could receive a minimum of £500 for each employee whose information was not provided or was inaccurate.

The former employer also has a duty to inform and consult with employees about the transfer and how it will affect them. The information includes when the transfer is going to happen; which employees will transfer (this will generally be everyone unless only part of a business is being transferred); the implications of the transfer; and any proposed action by the new employer that will affect them, such as a re-organisation. The new employer must provide the necessary information to enable the former employer to comply with this duty. If there is any failure to consult, the employees can make an application to the employment tribunal against both the old and new employer for a protective award of up to 13 weeks' pay for each of the employees affected.

After the purchase

The new owner takes over all the employment law responsibilities for the staff. It is therefore important that they are aware what these responsibilities will be before they complete the purchase and take them into account in their business plan. Their leeway for reorganising staff is limited. Changes to terms and conditions or redundancies connected with the transfer can occur where these are for an economic, technical or organisational (ETO) reason that entails a change in the workforce. These should, nevertheless, have been raised during the employee consultation before the transfer.

To 'entail a change in the workforce' has a specific meaning. It is more likely to apply in redundancy situations where it is the numbers and functions of the employees that are being

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considered rather than change to their status or pay. An **economic** reason could be one where the demand for dental services has fallen to such an extent that it is not feasible to run the practice without dismissing employees. A **technical** reason is where the employer wants to use new dental technology and the transferring employees do not have the requisite skills to operate the equipment, fewer employees are needed, or changes to their job roles are needed. An **organisational** reason might be where a new employer wins a General Dental Services contract from another dental practice and it is impractical for the employees to transfer to the new business because of its location.

If you do not have an ETO reason it will be unfair to dismiss employees if the dismissal is in connection with the transfer. As TUPE protection is not time limited even when dismissal takes place a number of years after a transfer, if it is related to the transfer it will automatically be unfair. The new employer can, of course, subject to following the proper procedure, dismiss employees in other circumstances, such as for gross misconduct. In this case, the dismissal is for misconduct and not for a reason related to the transfer.

Generally it is not possible to change an employee's terms and conditions for a reason related to the transfer. This means, for example, where two practices merge and the new employer is unable to harmonise the terms and conditions of existing and transferred employees in the dental practice. A change to the terms and conditions of employees for a reason related to the transfer is only possible if there is an ETO reason that entails changes to the workforce.

Legal advice

It is essential to ensure that mistakes are not made and TUPE rules are adhered to because it can often lead to costly and time-consuming claims being made by the affected employees. Buyers and sellers of practices need to ensure there are provisions, indemnities and warranties in the transfer agreement clarifying who will be responsible for any liabilities in connection with the transferring of employees. As TUPE legislation is complex, when acquiring a dental practice or winning a service contract, legal advice should always be sought from a specialist employment solicitor.

Table 1 Employees' TUPE protection

Contract

The new employer takes over the contracts of all employees who were employed immediately before the transfer. An employer cannot pick and choose which employees to take on.

Terms and conditions

The employees transfer on the same terms and conditions of employment as they had with their former employer. This includes terms relating to pay, hours of work, work pattern, place of work, annual-leave entitlement, sick-leave and pay entitlements, maternity/paternity provisions and disciplinary, grievance and other procedures.

Collective agreements

The new employer is bound by any trade union recognition agreement and any collective agreements made by the former employer.

Continuity of employment

The length of service is from the date the employee joined the old practice and it continues to accrue. This is important for calculating redundancy payments and other contractual rights dependent on service, such as sick pay entitlement.

Existing liability

The new employer takes over all liabilities for employees' pre-transfer personal injury claims, harassment, discrimination or other tribunal claims, except criminal liability and some benefits under occupational pension schemes.

Objections to the transfer

If an employee simply objects to the transfer, it is treated as a resignation and the employee generally cannot bring a claim for unfair or constructive dismissal.

Economic, technical and organisational reasons

A dismissal or change in employee terms and conditions can occur where the main reason for this is entirely unconnected with the transfer, such as gross misconduct, performance concerns, or changes imposed by legislation. It can also occur where it is connected with the transfer but it is for an economic, technical and organisational (ETO) reason that entails a change in the workforce.