



The Work Couch

NAVIGATING TODAY'S TRICKY PEOPLE CHALLENGES TO
CREATE TOMORROW'S SUSTAINABLE WORKPLACES

Episode 9 – An introduction to TUPE (Part 2) with Kelly Thomson and Patrick Brodie

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- Ellie** Hi and welcome to the Work Couch Podcast, your fortnightly deep dive into all things employment. Brought to you by the award-winning employment team at law firm RPC, we discuss the whole spectrum of employment law, with the emphasis firmly on people. My name is Ellie Gelder. I'm a senior editor in the employment equality and engagement team here at RPC. and I'll be your host as we explore the constantly evolving and consistently challenging world of employment law and all the curve balls that it brings to businesses today. We hope by the end of the podcast, you'll feel better prepared to respond to these people challenges in a practical, commercial and inclusive way. In the second part of our mini-series on TUPE, we're going to look at the TUPE journey itself, specifically the practicalities of the due diligence exercise, as well as the obligation to inform and consult with affected employees, and how this interacts with any collective redundancy obligations that are triggered in the event that the transferee decides to make redundancies. Once again, I am thrilled to be joined on the work couch today by our very own resident TUPE gurus, Head of RPC's Employment Equality and Engagement Team, Patrick Brodie, and Employment Partner, and the firm's ESG Lead, Kelly Thomson. Hi both, thank you so much for joining me again.
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- Ellie** Let's kick off with the due diligence process and the information that the transferor, that's the entity that the employees are transferring from, needs to pass onto the transferee. What does the law say that they absolutely have to hand over and how?
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- Kelly** Yeah, so the law is pretty short and concise on this and actually previously, a number of years ago, you didn't have anything kind of dealing with this. So, regulation 11 of TUPE now deals really specifically with the information that the transferor has to hand over to the transferee and that is called employee liability information. And basically, this information is about any employee who is assigned to the organised grouping of resources or employees that is the subject of the relevant transfer. So, anyone in the scope of transferring the information has to be about them and it has to be their identity and their age, the written employment particulars that the transferor, the employer has to give under s.1 of the Employment Rights Act, so that's sometimes called the s.1 statement, and it's the basic terms that have to be provided to all employees and oftentimes this will be satisfied in practice by providing kind of copies of employment contracts. Information on any disciplinary procedure taken in relation to any of those employees or grievance procedures that they have taken in the previous two years and the statute refers, TUPE refers to those being the processes in relation to which the ACAS code of practice on disciplinary and grievance procedures applies but in practice again, we find organisations don't sort of tend to make that distinction so much, it's about, you know, what live or recent grievance and disciplinary processes have we got for this group. Information about any court or tribunal cases, claims, actions that the individual employee might have brought against the transferor again within the last two years, or any court tribunal case claim or action arising out of their employment which we have reasonable grounds as the transferor to believe they might bring. So, if you think a claim is in the offing, you know, you've had perhaps ACAS early conciliation or somebody has left in the midst of a grievance or an investigation then that would have to be disclosed as well, and you can understand why the incoming employer wants to get a sense of the level of risk and attrition etc in that staff group. And then information about any collective agreements, so any sort of agreements with unions around collective bargaining that will have effect after the transfer in relation to the employee. So, I said it's got to be, in relation to people who are in scope to transfer but it's also got to include anybody who was employed and was assigned, so was in scope to transfer, but they've been automatically unfairly dismissed. So, if you have a situation as a transferor where you have made some redundancies "because of a transfer that is upcoming" you might find yourself in a situation where those people won't transfer because their employment would have ended, but their dismissal would be automatically unfair. They have to be covered in employee liability information. Provided, as I say, it's one of those situations where the dismissal would be automatically unfair.
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Ellie	But the law doesn't actually require that information to be provided to the transferee until relatively near to the date of the transfer.
Kelly	That's right, and that's why its usefulness is limited in practice, certainly in transactions, because it used to be even shorter but now it's no later than 28 days before the transfer and there's also a sort of special circumstances caveat and where this is not reasonably practicable, then it's got to be provided as soon as it is reasonably practicable, but you're going to be talking about situations there where a transfer happened with kind of less warning than 28 days.
Ellie	Yeah.
Kelly	Because that's a short time period even in the most simple of transactions just to sort of assess that data and get your payroll up and running even if there is not much more beyond that. That's still quite tight. So, in practice, especially in commercially negotiated transactions, you tend to find transferees doing a fuller due diligence exercise, so seeking more information than that list I mentioned. And also looking to do that much earlier in the transaction and asking specific questions that require much more detailed information, you know, whether it's about can I actually see your policies and procedures so I can understand a little bit more than just, you know, the nuts and bolts of the employment deal, I actually want to understand a little bit more about the way in which that work has been appraised, has operated, has been performance managed, the culture etc and that's all, that can only be done by a negotiation, TUPE doesn't give that element of information as a requirement.
Ellie	And so just picking up on that point then about policies and procedures, so we really need to bear in mind don't we that the whole purpose behind TUPE is to protect people and you mentioned asking about the transferor's policies and procedures, and I guess a key aspect of this is going to be the transferor's approach to equity, diversity and inclusion which is going to feed into any, the cultural nuances that need to be factored in when the transferred staff move across. Is that something you are seeing more frequently now?
Kelly	You'd think so wouldn't you, I think that would be a reasonable assumption when actually, interestingly, those sorts of questions are not infrequently asked at the kind of bid stage of a procurement process, you know, getting an understanding, certainly from the supplier about their approach to these things. But in terms of the flip of that and kind of an understanding from the supplier about the existing, from the customer or, you know, the sort of incumbent supplier's approach to these things, less so, and it's not commonly making its way into the sort of contractual matrix, you definitely see it in public sector transactions, public sector outsourcings, we've always seen that but that's because there are specific duties, public sector equality duties which kind of drive the requirement that the public sector will flow down to suppliers and sort of drive that dialogue around expectations broader than, you know, as you say the nuts and bolts of the employment relationship and going beyond into the sort of cultural piece. I think, if I did some crystal ball-gazing I wouldn't be surprised if we see it coming more to the fore in the future now that, you know, DEIB and ESG sort of issues more broadly are making their way up the agenda for organisations but also for employees, for their representative bodies for investors, for other stakeholders, you know, money talks. And so, if those sorts of considerations are becoming much more a requirement or an expectation of all business decisions including things like outsourcing arrangements etc then they'll become more front and centre of more and more commercial contracting decisions then it stands to reason you would expect to see them playing out in the contracting process but as of yet, limited impact interestingly.
Ellie	That is interesting and we'll watch this space to see if it becomes more of a feature going forwards in commercial contracts. So, Patrick, another important aspect of the TUPE journey is informing and consulting the people who are affected about the transfer, so can you just summarise if you can, what are those obligations when it comes to informing and consulting?
Patrick	Thanks Ellie, and actually those obligations in terms of the conversations which employers, in this case a transferor, has to have with its employees or more specifically appropriate representatives of its employees where the employees themselves are affected employees is just so critical for the delivery of the project. And I don't mean that simply in terms of the timing of the project and how quickly it can be concluded, but also the quality of the project in relation to how individual employees or groups of employees feel in relation to what is going to be a material upheaval in their working lives. For many people they have worked with a particular organisation for months, indeed years, longer, and they are then going to move to an organisation who they never chose to work with, may not have wanted to work with, and has never met and never engaged with. That is such a fundamental change to people's outlook, to their careers, to their futures. So, the obligation on the transferor is very real in a human sense, moving beyond the pure legal obligations of the process. And sometimes when organisations simply look at an information consultation exercise merely as a process to be undertaken then completed within a defined time period where that is a limited time period. They are really

	<p>missing a trick because establishing a facility which enables individual employees to feel as if they have engaged and participated in a conversation leading to ultimately a change in their careers because it's a change in their employers, is so important. And that's where the information consultation exercise is key. There is always an obligation on the transferor to inform representatives of employees that there is going to be a transfer but that must happen and that information will also include information about when the transfer will take place, why it is taking place and attached to it will be, and this is, really is Euro-speak, is you have to describe the legal, economic and social implications of transfer. And ultimately so very many people look at those three words, wonder what they mean and simply move to a position that that phrase would embrace things like changing pensions, changing employer, but we typically don't look much beyond that. And then, and this is a critical element of the information exercise because it then drives the quality of the consultation and equally the time period over which the consultation has to take place, which is what are the measures that both the existing employer envisaged taking in respect of its employees. And so those are not just the employees who will be transferring but those employees who will stay behind with the organisation but whose roles, jobs, duties, may be impacted as a result of that transfer. And then the transferor will also have to provide information about the measures the transferee, so the incoming employer, envisaged taking in respect of the transferring employees. And it's that forum of consultation, which is designed to encourage a sharing of information, a facility whereby people can put representations, make comments, on the proposed changes and measures. Bearing in mind that consultation is undertaken in good faith and it's with a view to reaching agreement as between the employer body and the representatives of the employees. But it's with a view to reaching agreement. The agreement does not have to be reached, in effect it is to show that representations made by employee representatives acting on behalf of the employees are considered, thought about, reflected on and then reasonable responses offered up. And it's quite possible that an employer organisation might end up in an arena where they don't accept the counter representations put forward by the employee bodies but at least what they have done is explain why they have adopted a particular position.</p>
Ellie	I guess from the point of view of those wanting to drive the transaction forward this can be rather frustrating if it holds things up, so what would you say to that?
Patrick	Yes, a real challenge actually because it's, there is almost a conflicting contradiction in outcome because if I go back and reflect on the answer earlier which is, just the importance of engaging with employees to properly describe to them what the change in their employer means, is really critical to the ultimate quality of the project once it has been executed because new employers in effect is the language of engagement, participation, feeling part of the new organisation and that is what employers are seeking in terms of their employee groups. Which is why it's, often as an employment lawyer working on projects, the pushback in terms of do we really need to inform and consult, is quite an interesting one. Partly because the timetabling needn't hold up the transaction if it has been properly contemplated in advance of the transaction being implemented. And equally, the importance to the new organisation in taking on board employees who really understand what it is that they will be doing when they move to the new employer body. And that's why, I think, in so many of our projects being able to properly facilitate the information and consultation exercise does make the difference between a 'that's an okay transaction' to 'that's moved ahead really smoothly and effectively'.
Ellie	Which ultimately benefits all the parties. And we are talking about collective consultation as opposed to consulting on an individual basis. But it's crucial, Kelly, to make sure that those representatives actually have sufficient authority from the group of affected employees.
Kelly	Yeah, absolutely. Otherwise, you do all this hard work on an information and consultation process and technically it's going to be non-compliant, so that doesn't mean you can't use a standing body of representatives, but before you do it's always really important to check their mandate, you know, for what purposes were they elected. We always say you can't have a standard body, you know, that was kind of put in place to debate which milk to have in the canteen and then say, sure, you've got authority for a TUPE consultation. They just don't. And so, to prevent that you're going to want to build in, factor in some time for the employees to elect representatives rather than using that body.
Ellie	Yeah, sure. But are there ever circumstances where you can consult just directly with individual employees?
Kelly	Yeah. Absolutely, there's two. There's a microbusiness exception which is basically where an employer has got fewer than ten, note that's not ten or less, that's nine or fewer.
Ellie	Okay.

Kelly	Then you can consult directly with employees in relation to transfers if you don't have existing appropriate reps or recognised union, there's no need to sort of elect reps or, and that's where the employer has fewer than 10, not where the impacted group is less than ten. The one that comes up more frequently than that I find is where employees are offered the opportunity to elect representatives so there isn't a union. And they are offered the opportunity to elect reps, a reasonable time period elapses and actually the employees decide, you know what, we're quite happy to be consulted with as a body of all of us. And that sometimes happens particularly where you've got a small number of employees who are impacted.
Ellie	And the government has recently announced as part of its policy paper called Smarter Regulation to Grow the Economy, that it's going to consult on getting rid of the requirement to elect employee representatives for those employers that have fewer than 50 employees and transfers that affect less than 10 employees.
Kelly	Yeah, that's right. And essentially what that would mean is that employers will be able to consult directly with the affected employees in those situations. So, it's essentially extending that micro business exception that we talked about. And the government's view is they say this will save businesses red tape, it will improve engagement with workers, simplify the transfer process, whilst ensuring that rights continue to be protected.
Ellie	So where those exceptions don't apply, you are gonna need to elect employee representatives, which can obviously take time. So, in terms of time scales, when should you ideally be getting the ball rolling when it comes to employee consulting?
Kelly	That is a million-dollar question. You need to factor it in early on and it's really interesting because as, I think, Patrick mentioned earlier, there's always an obligation to inform in any TUPE transfer, there is sometimes, and I'd go as far as to say usually, a consultation obligation but that consultation obligation only kicks in where there are measures envisaged in connection with the transfer. And so, it stands to reason that the kind of more measures that are envisaged, proposed or the more significant those measures are, and if you substitute the word measures for changes for these purposes, I think it's a little bit easier to conceptualise. So, you know, the more changes that are going to happen, the bigger those changes are, the more time you're going to need to talk to people and their representatives to get them on board, to get them understanding, to deal with any, any challenges to that, to kind of rethink plans etc. So, if you then took that to its logical conclusion it would be a reasonable assumption to think well if there are no measures, and there is no consultation, this is a pretty quick process, can't we just give people the information the minute before they transfer. Or let's be kind and give it to them the day before the transfer and we're fine aren't we. It's not as simple as that. There is a case that says that even if, even if there are no measures you kind of have to start the information-only process as early as you would if there were measures. Which is a little bit tricky because as I've just said, how long you would have to start it sort of depends on the complexity of the measures. So, what I would say is if you are, if you have got a really simple transfer, there are very limited changes, you've got reps on board, it's all pretty amicable, you don't envisage any issues. You're still going to be wanting to leave a few weeks at least. If you've got redundancies, if you've got people who are spread around the country, if you've got different shift patterns, if you've got a lot of people who are on long-term sick, on maternity leave that you've got to think about. All of those complicating factors will expand the timetable if you want to do consultation properly.
Ellie	And getting it wrong, or just failing to inform and consult at all is potentially a really costly mistake, isn't it?
Kelly	It is. So, the penalty for a failure to inform and consult is a protective award. Which is up to 13 weeks' gross pay per affected employee. And it's practically quite an interesting one because you just need one successful claim and then all affected employees can basically kind of enforce that award, go and collect their cheque essentially, you don't need each employee to have brought a claim because ultimately, it's a collective claim brought by the representatives. And that can be really complex and challenging in practice as well because, if say a claim does arise, you often end up with these tripartite tribunal claims of like transferor, transferee, individual employee or representatives, and then you've got a commercial agreement that's probably got some indemnities in and then you have a separate commercial negotiation between the different corporate entities. And it all just becomes really complex, and you've got a ton of management time, cost, faf on, the kind of commercial piece of the jigsaw, if it's an outsourcing in particular and you've got two organisations who are sort of meant to be in partnership. So, for all sorts of reasons it's much more commercially sensible to try and get it right than to have the fight after about who got it wrong.
Ellie	Absolutely. Patrick, can we have a look at the situation where the transferee wants to make some of the transferring staff redundant, how do the rules on collective redundancy consultation, which have very specific timescales, interact with the TUPE informing and consulting obligations? Can they operate alongside each other?

Patrick	That's a very good question Ellie, not least because there wasn't an answer to that until 2014. I appreciate that's a few years ago for very many people.
Ellie	Relatively recent.
Patrick	For employment lawyers that just feels like yesterday, nine years ago. And prior to that, there had been real concern around the extent to which a transferor organisation could engage in collective consultation with, or in respect of its employees, when those employees were going to face restructuring headcount reduction, not with them but in the hands of the new incoming employer, the transferee. And there wasn't a definitive position on that. Inevitably what happened was, as with all good solutions, which is an ideal solution, it was fudged. Given that uncertainty and the challenges, what was introduced in 2014 was what is referred to as pre-transfer collective redundancy consultation. And in effect what that change in the legislation does is it brings forward what would otherwise be collective redundancy consultation which would take place post-transfer to enable it to happen, it being the collective redundancy consultation to take place pre-transfer. And the route to that outcome is the transferee in effect speaks to the transferor to say this transfer is going to take place, we know that at least one, and it needs to be no more than one, at least one of your transferring employees when they arrive will be impacted by a redundancy situation and restructuring. Where that restructuring is going to impact at least 20 of the transferees' employees in any one establishment. So that's classic collective redundancy consultation trigger conditions. 20 or more employees who are at risk of redundancy over a 90-day period in one establishment. And there is a machinery which then follows that collective redundancy consultation. Now that machinery is then picked up and dropped and it is then undertaken when the employees are with the transferor, and in effect the transferee takes over from the transferor in respect of that collective redundancy consultation. So, they lead it, they drive it, they direct it, they being the transferee having the conversations with the individuals, the employees impacted where those employees are with the transferor, and they are engaging with elected employee representatives or trade unions. It is an effective form of collective consultation. The difficulty with it, and it's a commercial difficulty as opposed to a legal conceptual one, the commercial challenge is the collective redundancy consultation is either going to be 30 days or 45 days in advance of the transfer. But the parties to the arrangement which will facilitate or leads into a collective redundancy consultation will always want to have commercial certainty that the deal which will lead the restructuring is a deal that they have agreed. And where you often therefore end up is in effect the parties agreeing the deal, signing off on it, not completing but completion is then subject to moving through more effectively and finalising collective redundancy consultation, that is completed, the deal for the transfer is then effective at that point.
Ellie	And we often talk about golden rules in employment law, so what would your golden rules be when it comes to engaging with the people who are going to be affected by a TUPE transfer?
Patrick	Three words. Talk to them. Such a critical, it almost goes without saying but it has to be said, there's a really peculiar moment because the conversations that we have on a day-to-day basis with organisations, I said earlier, is about engaging with employees. The participating of employees because they feel as if they are part of the fabric of the organisation, part of the organisation's DNA, they have a voice, a place, there's a diversity, there's an inclusion, they feel as if they belong within that organisation. And then the transfer itself is an event over which they have no control. And in effect the individuals impacted by the transfer are being told that they will be moving to a new organisation. An unknown organisation. And when I'm in that position, on an entirely personal level, would be, I'm worried, I'm concerned, what does this mean. I had my future mapped out with my existing employer who I know, who I like, I value, and I'm going to another entity who I've never met before. So, I will have questions, concerns, worries, excitement. So, the discussion, which is engaged between transferee and transferor, all parties, is so important to maintain that level of motivation. So, talk to employees.

Ellie

Well Kelly and Patrick, thank you so much for talking us through the key people challenges that a TUPE transaction presents. And please do look out for the concluding part of this podcast miniseries on TUPE where we'll explore the legalities of harmonising the terms and conditions of transferring employees and associated pitfalls. If you would like to revisit anything we discussed today you can access transcripts of every episode of The Work Couch podcast by going to our website www.rpc.co.uk/theworkcouch or if you have questions for me or Kelly or Patrick, or perhaps suggestions of a future topic you'd like to hear us discuss on The Work Couch please get in touch by emailing us at theworkcouch@rpc.co.uk we'd really love to hear from you. And finally, if you enjoyed this episode, we'd be really grateful if you could spare a moment to rate, review and subscribe and please spread the word by telling a colleague about us. Thank you all for listening and we hope you will join us again in two weeks.



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