

Insight: Employment & Benefits

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Employment aspects of property-related transactions

There are a variety of employment issues which can arise in a property-related transaction. If the property forms part of a going concern, then the buyer of the business will need to be prepared for the transfer of any employees employed or engaged by the seller in the business which is being bought. If the transaction concerns a change in contractor on a long-term building development project, then the incoming contractor may also become the employer of the employees previously engaged by the outgoing contractor on the project. Where a property owner or developer engages a managing agent to arrange maintenance services at a property or portfolio of properties, then the replacement of that managing agent may also result in the transfer of the staff engaged in those maintenance services.

When does TUPE apply?

A business transfer occurs under TUPE on an asset sale rather than a share sale where there is a transfer of an economic entity which retains its identity following the transfer. This would be the case upon the acquisition of a property which forms a going concern, for example a data centre or a sports stadium.

A service provision change occurs under TUPE where activities cease to be carried out by a client on its own behalf, or by a contractor on a client's behalf, and are carried out instead by another person on the client's behalf. This will apply where a service is initially outsourced by the client, when the contract is retendered or when it is taken back in house, and could apply to services such as cleaning, maintenance and security at a property. Two further conditions must be satisfied: (i) immediately before the service provision change there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client; and (ii) following the change it is not intended that those activities shall only be carried out in connection with a single specific event or task of short-term duration.

Provided the conditions for a TUPE transfer are satisfied, the employees of the seller (in the case of the business transfer) or the outgoing contractor (in the case of a service provision change) are entitled to transfer automatically to buyer/the incoming contractor, and the employment liabilities associated with those employees also transfer. There are requirements for information and consultation with those employees (or their representatives), and in general terms they are protected from dismissal and from changes being made to their terms and conditions of employment before or after transfer.

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The case of *McCarrick v Hunter*¹

The recent Court of Appeal decision in *McCarrick v Hunter* has confirmed that a service provision change under TUPE will not apply where the activities carried out before and after the change in service provider are carried out on behalf of different clients. This decision is highly relevant to buyers/developers as it gives them much greater scope to replace incumbent managing agents/subcontractors and their staff immediately upon completion of the purchase if, for example, they are concerned about the cost or quality of service. This is helpful as it is often difficult to get a clear picture from the seller as to the current arrangements with its managing agents and subcontractors and their staff, and the transfer of employees under TUPE is an unattractive prospect for any replacement managing agent/subcontractor given the transfer of historic liabilities and the difficulties of harmonising terms and conditions of employment after transfer.

There are, however, two notes of caution for buyers/developers. Firstly, even if there is no service provision change upon the purchase of a property, there could be a TUPE transfer under the business transfer definition. This is more likely to be the case where staff are employed directly by the seller, and effectively form

a self-standing economic entity which is integral to the property itself. Secondly, if the buyer/developer continues to engage the incumbent managing agent/subcontractors even for a short transitional period after the completion of the purchase, it is likely that a subsequent change of managing agent/subcontractor will fall to be judged under the service provision change rules.

Future developments

Whilst these cases are helpful in showing that the Courts are not willing to take a purposive approach to TUPE which is at odds with the literal meaning of the legislation, much greater changes are afoot in respect of the service provision change rules. The UK Government has published a consultation paper on changes to TUPE which include the proposal to repeal the relevant sections of service provision changes. As such, this would be likely to lead to much greater flexibility in the property industry for changes to property managers, managing agents and their subcontractors, which spells good news for property owners and developers but bad news for the managing agents and subcontractors who may be concerned about being stranded with unwanted employees in the event that a client decides to replace them at a property for which they have previously been responsible.

TUPE and commercial property transactions – useful tips for owners, sellers and buyers

Owners and sellers

- Check existing property management agreements: there may be specific provisions included in property management agreements or service agreements dealing with employees, particularly upon termination of the contract. For example, the managing agents may have included provisions requiring the seller to procure that any replacement service provider will become responsible for the employees of the managing agent (or its subcontractors) engaged at the property.
- Require the managing agents to move employees between properties from time to time if they are responsible for a property portfolio so as to avoid employees forming an “organised grouping” which has as its principal purpose the carrying out of activities at a specific property.
- Negotiate with the buyer to take over the current property management contract so that the activities continue uninterrupted despite the sale and purchase of the property.

Buyers

- Due diligence: employment due diligence by the buyer will be necessary. This should cover:
 - the identity of any employees connected to the business carried on at the property, or providing services to the property, whether or not those employees are to transfer.
 - the terms and conditions and any other liabilities attaching to the contracts of employment.
 - any contractual relations with any managing agents or other service providers pursuant to which employees could allege that they are the subject of a TUPE transfer.
- Indemnities: if the buyer wishes to change managing agent and subcontractors, seek an indemnity from the seller for any liabilities in respect of employees who claim to transfer under TUPE. The benefit of this indemnity can then be passed on by the buyer to the new managing agent. If the buyer accepts that some employees will transfer, then it should seek indemnity protection to apportion pre- and post-transfer liabilities between the seller and the buyer’s managing agents respectively.

¹ *McCarrick v Hunter* [2012] EWCA Civ 1399