

**CIVIL LITIGATION DEPARTMENT
EMPLOYMENT LAW
APRIL 2011
TUPE UPDATE**

**ABOLITION OF “TUPE PLUS”
IN LOCAL AUTHORITY TRANSFERS**

Where a business or undertaking, or part of one, is transferred to a new employer, this can constitute what is known as a “relevant transfer”. Where there is a relevant transfer, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) apply. The Regulations ensure that employees’ pre-existing terms and conditions transfer across to the new employer (save for rights under an occupational pension scheme that do not relate to old age, survivors’ or invalidity benefits). Many public sector transfers have had additional protection (“TUPE plus”) in the form of Codes of Practice which allowed transferred staff to have broadly comparable pensions after transfer and also protected new joiners.

On 23 March 2011, the Secretary of State for Communities and Local Government, Eric Pickles, announced an immediate revocation of the Code for local authority transfers. Local authority employees and new joiners working alongside ex local authority employees will no longer have the “TUPE plus” protection after transfer.

TUPE IN INSOLVENCY OR ADMINISTRATION CASES

If a company is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of a company, the contracts of transferring employees to the new employer are not protected under TUPE (**complete exemption**). The case of OTG Limited v Barke has clarified that an administration can never qualify for this **complete exemption**. What this means is that, if the business is being sold as a going concern (e.g. a management buy-out under a ‘pre-pack’ procedure), it will be subject to the TUPE rules allowing for automatic transfer of employees’ rights under their contract to the new employer.

To assist the rescue of falling businesses, the TUPE Regulations also allow for **limited exemptions** where the old employer is subject to insolvency proceedings, including allowing greater scope for the new employer to vary terms and conditions after the transfer takes place. They also ensure that some of the old employer’s pre-existing debts to employees do not pass to the new employer, but are paid for out of the National Insurance Fund. These **limited exemptions** only apply where the insolvency proceedings are not with a view to the liquidation of the assets of the old employer. However, whilst the ‘pre-pack’ in OTG was *not* with a view to the liquidation of the assets, OTG were *still* not entitled to rely upon the **limited exemptions** from TUPE because the debts due to Mr. Barke were still in existence at the date of transfer.

**If you require any advice or assistance about an employment matter,
please contact Julie Granger or Daniel Crook in our Civil Litigation
Department.**

Disclaimer

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