



**MONTHLY BREAKFAST BRIEFING**

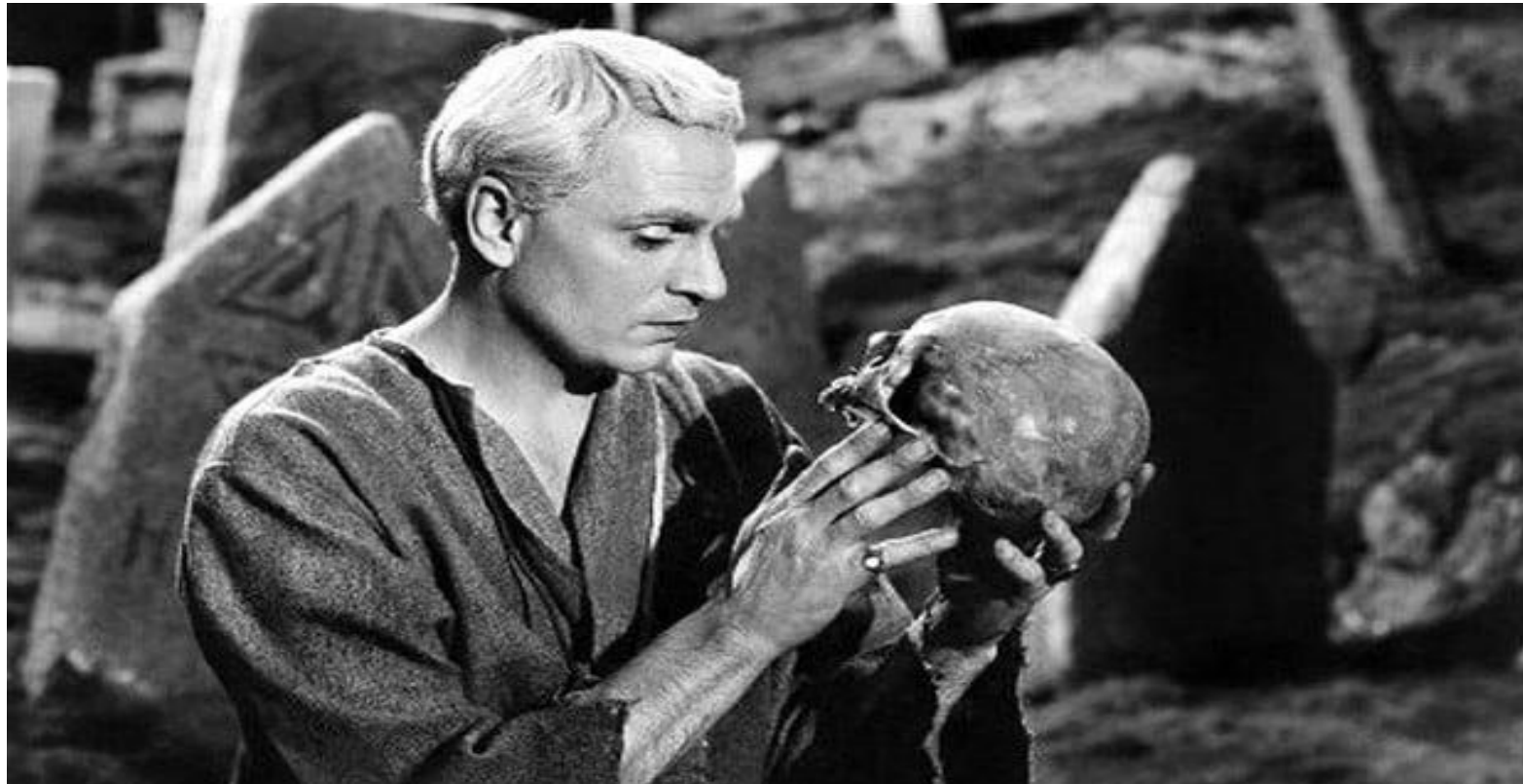
**TUPE**

**Presenter – Kevin Duffy**

**Wednesday 3 November 2021: 08:00 – 08:30**

**(First Wednesday of every month)**

# TUPE or not TUPE? That is the question.



# What is TUPE?



- [The Transfer of Undertakings \(Protection of Employment\) Regulations 2006](#)
- Enacted into UK law in 2006 to comply with EU law.
- Updated the previous 1981 TUPE Regs.
- Two main objectives of TUPE:
  - Employees (along with their T&Cs) transfer from old employer to new employer
  - Old and new employers inform/consult with employee reps about the transfer

# AGENDA



- Terminology
- When does TUPE apply?
- Who transfers?
- TUPE protections for employees.
- Information & consultation.
- Practical points.

# Terminology



- Transferor: old employer.
- Transferee: new employer.
- Employee.
- Relevant transfer:
  - (a) Business transfer.
  - (b) Service provision change.

# When does TUPE apply?



## **(a) Business transfer**

A transfer of a business, undertaking or part of a business or undertaking where there is a transfer of an economic entity that retains its identity. Three essential elements:

- an economic entity;
- a transfer of that economic entity; and
- the economic entity retaining its identity following the transfer.

[Regulation 3\(1\)\(a\), TUPE](#)

# When does TUPE apply? (continued)



## **(b) Service provision change**

Client engages a contractor to do work on its behalf, reassigns such a contract or brings the work 'in-house':

- Outsourcing.
- Re-outsourcing .
- In-sourcing.

# When does TUPE apply? (continued)



## (b) Service provision change

- Activities must be *"fundamentally or essentially the same"*.
- Supply of goods and *"one-off buying-in of services"* are excluded.
- Not single specific event or task of short-term duration.

[Regulation 3, TUPE](#)



# Who transfers?



- Employees who haven't objected.
- Employees employed by the transferor and *"assigned to the organised grouping of resources or employees that is subject to the relevant transfer"*.
- Applies to all employees who were employed in the grouping immediately before the transfer, or who would have been so employed if they had not been dismissed by reason of the transfer. Unless that reason was an economic, technical or organisational reason (ETO reason) entailing changes in the workforce.
- This is the **'automatic transfer principle'**.

[Regulation 4, TUPE](#)

# TUPE protections



## Economic, technical or organisational (ETO) reason

No statutory definition. Likely to include:

- a) a reason relating to the profitability or market performance of the transferee's business (i.e. an **economic** reason);
- b) a reason relating to the nature of the equipment or production processes which the transferee operates (i.e. a **technical** reason); or
- c) a reason relating to the management or organisational structure of the transferee's business (i.e. an **organisational** reason).

# TUPE protections (continued)



## Dismissal

- Dismissals will be automatically unfair if the sole or principal reason for the dismissal is the transfer itself, unless ETO reason entailing changes in the workforce involved.
- If ETO reason, transferee still has to show general reasonableness/fairness.

[Regulation 4, TUPE](#)

# TUPE protections (continued)



## Changing T&Cs

Changes to terms of employment will be void if the sole or principal reason for the change is the transfer itself, unless either:

- The reason for the variation is an ETO reason entailing changes in the workforce.
- The terms of the contract permit the employer to make the particular variation.

# TUPE protections (continued)



## Changing T&Cs

Although...

- Some of the fundamental TUPE employment protections are relaxed where the transferor is insolvent. This is designed to facilitate the rescue of failing businesses by reducing the burdens on buyers of insolvent businesses.

# Information & Consultation



- Transferor and the transferee.
- Inform and (if appropriate) consult.
- Recognised TU, or elected employee reps (if no TU).
- Employees who may be affected by the transfer or any measures taken in connection with it.

[Regulation 13, TUPE](#)

# Employee Liability Information



## **ELI:**

Transferor must provide transferee with certain information about transferring employees (ELI) not less than 28 days before the relevant transfer takes place.

[Regulation 11, TUPE](#)

# Summary



## Practical points

- TUPE is not optional!!
- Companies have tried complex routes to avoid TUPE, with limited success.
- Courts/tribunals take a 'purposive' approach.
- Don't forget to inform/consult.
- Indemnities?
- Call ScotEng for legal advice.



# ANY QUESTIONS?



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- Thank You