

COVID-19

# COVID-19 and TUPE: All Your Current Questions Answered

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# Introduction

- The Transfer of Undertakings (Protection of Employment) Regs 2006 (“**TUPE**”):- Key Principles
- Service Provision Changes
- Furlough and TUPE
- Contractual Variations:- Key Principles
- The impact of Insolvency / Administration
- Questions

# TUPE:- Key Principles

## When does TUPE apply?

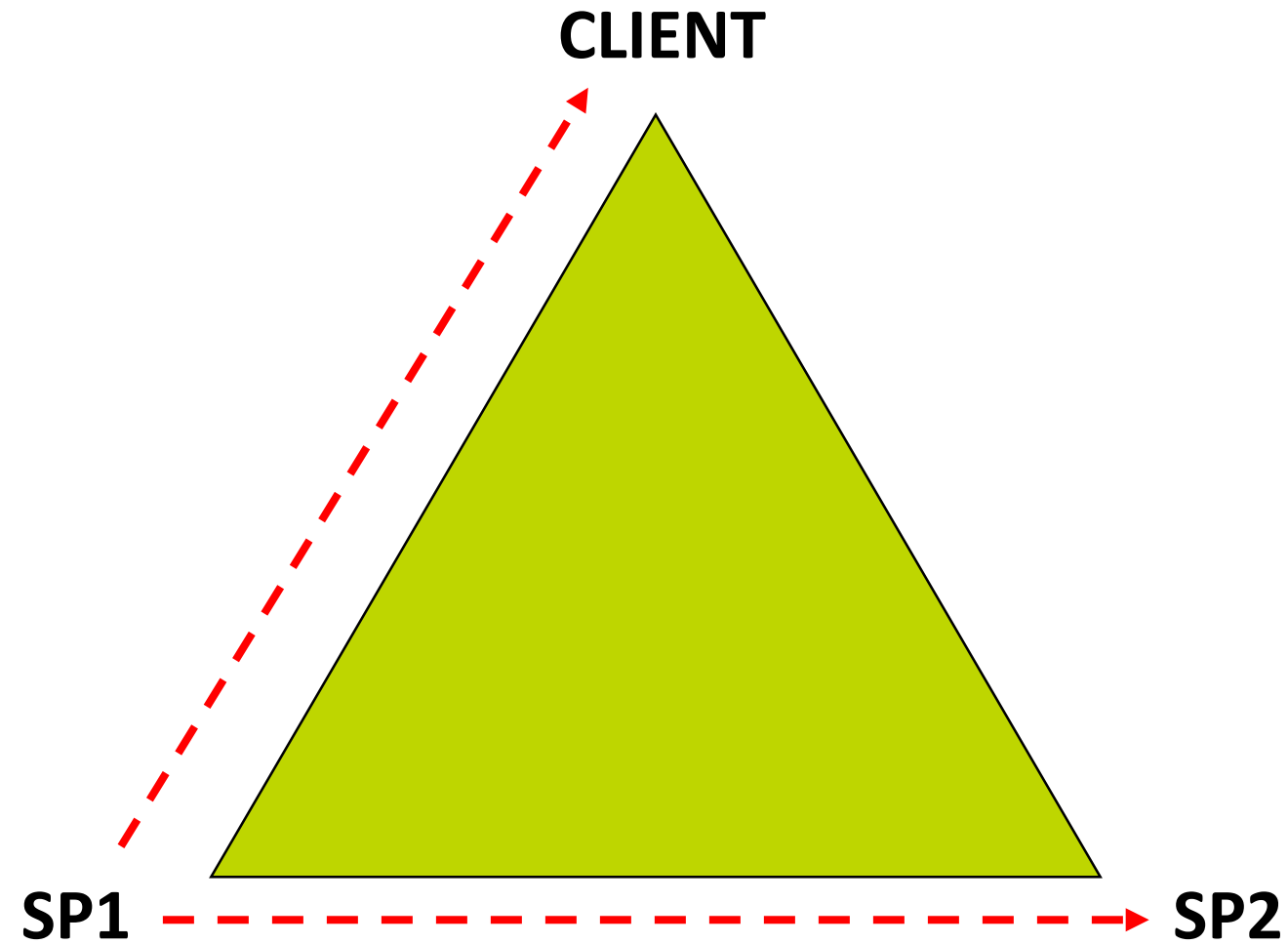
- Business transfer
  - Transfer of a business, undertaking (or part) involving a transfer of an economic entity that retains its identity
- Service Provision Change
  - A client engaging a contractor to do work on its behalf, reassigning such a contract or bringing the work “in-house”

# Key Principles

## Effect of TUPE applying

- Automatic Transfer Principle
- Restriction on Changing Terms of Employment
- Enhanced Protection from Dismissal
- Obligation to Collectively Inform and Consult
- Obligation to Provide Employee Liability Information
- Relaxation of Principles in Insolvency Situations

# Service Provision Change



# Likely challenges

**Transferees may seek to avoid inheriting staff arguing:**

- Service provision will be delivered differently
- Employees are not “assigned” to the service

# TUPE and Furlough

- Business transfers only or service provision changes also?
- Can Transferee continue the existing arrangement with furloughed employees?
- Can Transferee put inherited employees on furlough?
- Can Transferee bring employees back to work?

# What is inherited?

- On TUPE, employees transfer on existing terms and conditions
- If Transferor topped up to 100%, will Transferee inherit?
- Depends on what was expressed by the Transferor in any agreement regarding furlough



# Consultation while furloughed

## Consultation - TUPE and redundancy

- With Union or Employee Representatives can take place
- Plan logistics and technology solutions
- How will the reps access those they represent?

# Restriction on Changing Terms of Employment

- Pre-TUPE changes
- Effect of TUPE:-
  - contractual variation void if sole or principal reason for the variation is the transfer
- Examples:-
  - Changing terms because of transfer; reason for change is transfer
  - Extenuating circumstances; whether sole or principal reason for the change is the transfer will depend on circumstances
  - Harmonising terms; transfer will be the reason for the change

# Permitted Changes to Terms of Employment

- Sole/principal reason for variation is “**ETO reason**”
- Employment contract permits the variation
- Terms incorporated from a collective agreement
- The transferor is subject to “relevant insolvency proceedings”

# Effecting Changes outside of Permitted Changes

Dismissal /  
re-engagement and use of  
settlement agreements

Changes linked to non TUPE  
related reason

# The impact of insolvency – does TUPE still apply?

- Key question: is it a “terminal” or “non-terminal” insolvency?
  - Non-terminal proceedings
  - Terminal proceedings
- This determines which key aspects of TUPE do and don't apply
- But be careful – often only disappplies some of TUPE not all, examples:-
  - Limitations of pre-transfer payments not transferring
  - Information and consultation requirements

# Pre-pack sales and acquiring part

- What is a “pre-pack”?
- Acquiring “part” of the business out of a pre-pack sale
  - Risk of inheriting claims from the other “part” not taken
  - Tricky assignment questions
  - Tribunals look at the overall picture when deciding the reach of TUPE
  - Likely to be limited indemnity protection available
- Furlough guidance refers to position on Administrations

# Changing Terms and Conditions – Insolvency and TUPE

- Flexibility where changes are to safeguard employment:-
  - Changes must be agreed with employee representatives
  - And be agreed in writing
  - Affected employees must receive an advance copy of what's proposed
  - Permitted changes are only changes made because of the transfer
- This is a substantial departure from the usual TUPE rules
- Not a commonly used exception – very prescriptive and impractical

# Special protection against dismissal

- Special dismissal protections still apply but not in a terminal insolvency
- Principal or sole reason for dismissal = transfer
  - ETO reasons – should be easier to establish in an insolvency
  - Reported cases around pre-sale dismissals show care must be taken



# Questions

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