

# TUPE explained

## What is TUPE?

Markel have seen numerous instances where policyholders are confused as to what TUPE actually is and how to handle issues that arise after a transfer of staff from another organisation.

The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) protects employees' terms and conditions of employment when a business is transferred from one owner to another. Employees of the previous owner when the business changes hands automatically become employees of the new employer on the same terms and conditions. It's as if their employment contracts had originally been made with the new employer. Their continuity of service and any other rights are all preserved. Both old and new employers are required to inform and consult employees affected directly or indirectly by the transfer.

## Protecting against TUPE issues

Most insurers exclude TUPE issues. Markel gives this cover providing the policyholder involves the Markel employer helpline whenever TUPE issues could arise. An example of a situation that could lead to TUPE issues would be a policyholder successfully winning a tender to take over services from another company including the transfer in of staff.

All calls to the helpline are logged and providing the policyholder follows the advice given by the helpline staff there should not be any issue should a claim arise. Brokers must stress the importance of gaining advice as soon as possible, not wait until a claims situation is likely. The helpline is free for policyholders and we encourage them to use it as much as is necessary, to help them avoid issues escalating and damaging their business.

## **Markel's policy wording makes it clear that the employer helpline must be used for any case where TUPE issues could arise.**

This applies irrespective of the expertise of the policyholder in handling such issues. An extract of the relevant policy wording is set out below:

INSURING CLAUSE 3 – EMPLOYMENT LAW PROTECTION  
CONDITIONS APPLICABLE TO INSURING CLAUSE 3  
(1) TUPE

As a condition precedent to Your right to payment or indemnity under this Insuring Clause You shall, in any matter to which the terms of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) or any amendment or re-enactment thereof apply, consult and follow the advice of the Markel Employer Helpline.

## Employer helpline

Our employer helpline is provided by specialist employment law solicitors, LHS solicitors LLP, giving our employment law protection policyholders direct access to an expert.

Assistance is available for any employment law dispute that could lead to a claim under the employment law protection section of the policy.

- To contact the helpline call: 0845 230 0110
- Or email: [markelhelpline@lhs-solicitors.com](mailto:markelhelpline@lhs-solicitors.com)
- Information required: policyholder name, certificate number, contact details, plus brief details of the situation or advice needed.

## Employer guides

Available via the policyholder services section on the Markel website, our employment law protection policyholders can download a vast selection of employment law fact sheets and precedent documents drafted by LHS Solicitors LLP. There are over 70 fact sheets and over 300 precedent documents to choose from and they cover all of the key areas of employment law, including:

- Annual leave, absence and working time
- Conduct and behaviour
- Contracts of employment and changing terms and conditions
- Disciplinary and grievance procedures
- Discrimination
- Dismissal and resignation
- Pay and benefits
- Recruitment and appointment
- Redundancy
- Sickness absence
- TUPE
- Work and parents

## Further information

To ensure up to date advice on TUPE issues is given to clients, brokers can recommend the use of the **Department of Business Innovation and Skills** website.

**ACAS** run regional courses to help employers understand how to recognise TUPE situations and practical sessions on due diligence, warranties and indemnities and information to and consultation with employee representatives.

## Case studies

The case studies below reveal that TUPE can be a complicated area for policyholders.

### Case example 1

A policyholder notified Markel of a claim made against them and two further parties for unfair dismissal by reason of redundancy and a failure to inform and consult in respect of a TUPE transfer. The policyholder provided instructions to the solicitors appointed to submit a defence on their behalf denying that a TUPE transfer had taken place. The policyholder later made an unequivocal statement in another context that contradicted a central part of their defence!

Had the solicitors been made aware of this information at the relevant time, a much more robust approach to the defence could have been adopted on the basis that there had been a TUPE transfer and thus all liabilities passed to another party. In view of the clear denials recorded in the defence, this was not an avenue open to the insured.

Indemnity was declined because the policyholder had irrevocably prejudiced the position by not disclosing the proper facts. The policyholder did not contact the helpline during the TUPE process or prior to the claim being submitted to the tribunal. Had they done so, the solicitors would have advised them throughout the process and would have been able to provide an effective defence to the tribunal claims. In short, the position would not have been prejudiced had proper advice been taken.

### Case example 2

A claim was brought against Markel's policyholder and another party by an employee for constructive dismissal. At the time of being instructed it was not clear that the claimant's role had TUPE transferred to another jurisdiction. Later it emerged that the claimant had not been informed of the transfer until some 4 months after the transfer had taken place. There was a lack of understanding of the TUPE process on the part of the policyholder and they did not appreciate the ramifications of a TUPE transfer at all. The helpline

would have provided assistance throughout the transfer and ensured that all employees were fully consulted, minimising the risk to the insured and managing the costs appropriately for the insured and Markel alike.

### **Case example 3**

A claim was issued against Markel's policyholder and a third party by 5 claimants, who were TUPE transferred in from another organisation. The claims were for unfair dismissal (redundancy post transfer) and failure to properly consult under TUPE. The solicitors appointed were able to utilise the policyholder's files and their own helpline notes to reconstruct the build up to the TUPE transfer, including the communications with the staff, enabling an effective defence to be made.

In this instance, the policyholder used the helpline throughout the transfer process which helped to ensure there was a clear record of events involved in the transfer. The claims were successfully defended showing the benefit and importance of using the helpline service.