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## Transfer of undertakings (TUPE)

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The Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') have far reaching consequences for buyers in a business transfer.

TUPE is an important area of employment law relating to how employees should be treated when a business goes through a change of ownership. Under TUPE, employees of the seller automatically become employees of the buyer, under the same terms and conditions and with full continuity of employment. It is as if the buyer had always been their employer.

If a transfer results in an employee's terms and conditions being substantially changed, to their material detriment, then they have a right to resign and claim constructive dismissal. What amounts to 'substantial change' and 'material detriment' will depend on the circumstances but it is important to note that they do not have to establish that there has been a fundamental breach in the contract of employment.

Onerous conditions are also stipulated for consultation with employee representatives prior to the transfer taking place. If employees are not represented by a union then suitable representatives will have to be elected (although consultation on an individual basis may be more appropriate for small businesses). Failure to consult properly entitles those affected to compensation of up to 13 weeks pay each, so prior planning is essential to make sure adequate time is allowed.

In addition, if there are any dismissals resulting from the transfer of a business then they will be deemed to be automatically unfair. This means that if a claim is made, the burden will be upon the buyer to prove that the dismissal was for a genuine economic, technical or organisational reason.

When undertaking due diligence a buyer must pay careful consideration to the current status and deployment of employees and how that might be affected by any plans they have to alter the business. If 'substantial changes' to the 'material detriment' of employee terms and conditions are anticipated, or if dismissals are expected, the buyer may wish to negotiate for the seller to make these changes prior to the transfer. However, TUPE will still take effect (because the changes or dismissals are as a result of the transfer, whether they happen before or after) and put the legal burden on the buyer. Therefore the buyer will need a contract which will enable them to claim back any compensation losses from the seller.

If you have any further queries contact Steven, Tom or Philip who will be happy to provide advice or visit [www.gardandco.com](http://www.gardandco.com).

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