

# THE MISSING PIECE



Welcome....

to the latest edition of *The Missing Piece*, the monthly legal bulletin from *In House Lawyer*. *In House Lawyer* is my individual and exclusive legal service with strong ideals and a bespoke approach.

In this issue I'll be explaining what to expect if you're selling your business \* insofar as it relates to your employees.

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TUPE is the abbreviation for Transfer of Undertakings Protection of Employment Regulations 2006. This article highlights the key points of TUPE in the context of a business purchase agreement. TUPE also sets out obligations on the seller and the buyer to consult with the employees about the transfer. This article does not cover those operational points but only the contractual aspects.

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When a company sells its business (as opposed to its shares) to another company its employees automatically transfer to the buying company. They go across on their existing terms and conditions and any claims that they have against their existing employer go across to the buyer too. So if the seller discriminated against them, the buyer is responsible for the seller's discrimination. TUPE happens automatically, there is nothing that can be put into a contract to stop it happening. What can be put in the contract though is what is going to happen to those people and more importantly who is going to pay for that and any claims.

The business purchase agreement would contain indemnities from the seller in respect of any employees that transfer. As a standard the indemnities should cover the seller's treatment of the employees up to the point that they transfer and also the obligation to consult with them about the transfer. If agreed commercially the indemnity could extend to the costs of dismissing the transferring employees. As a seller you would want to attach some strings to the indemnity, for example, so it only covers redundancies which meet the requirements of the Employment Rights Act and are actual redundancies after the proper process has been followed and where the buyer's existing workers enter the redundancy selection 'pool', and you may want to cap the amount payable for each employee. As a buyer you should also consider the impact in due course of the costs of equalizing pay if your employees earn more than the employees which will be transferring to you.

The usual considerations in respect of indemnities which I have covered in issue 3 also apply in this instance.

It's worth noting that outside of a sale process TUPE also applies to the transfer of a service from one supplier to another or when a customer outsources a service for the first time or brings it in-house. In those cases, similar indemnities will be requested to cover the start and the end of the contract. It's important to factor in these hidden costs so that you price the deal accordingly as a supplier and as a customer so you can do a proper comparison between potential providers.

Remember, you can't stop it happening but you can apportion the risks and costs of it in your contract.

THAT'S ALL FOR THIS MONTH...

Next month I'll be looking at settling commercial disputes. If you have any queries, comments or request for future bulletins then get in touch, I would be delighted to talk to you or meet at your convenience.



+44 (0) 7525 810 444



+44 (0) 1244 318 470



[edelgado@inhouselawyer.uk.com](mailto:edelgado@inhouselawyer.uk.com)



[www.inhouselawyer.uk.com](http://www.inhouselawyer.uk.com)

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