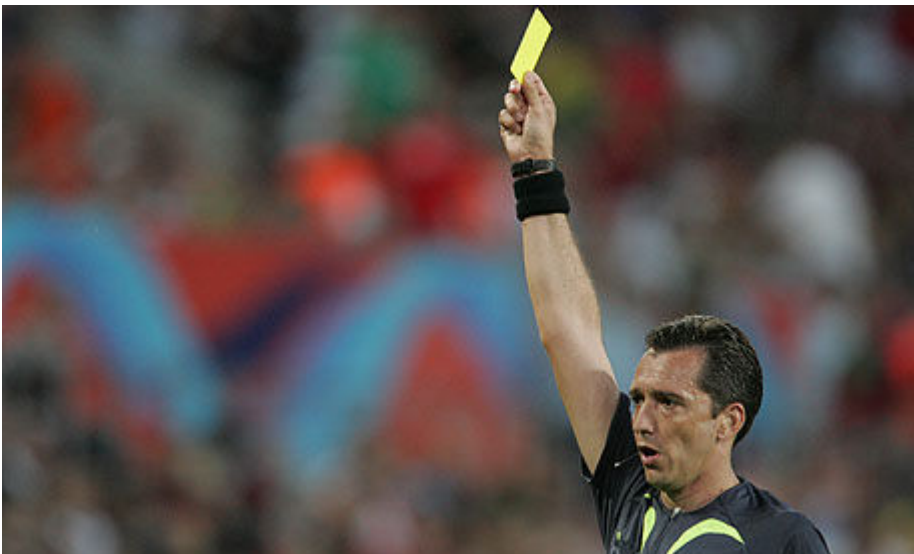


TUPE needs better leadership and more effective sanctions

Problems that arise with TUPE seem to be caused not so much by the legislation itself, but by the process of implementation

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Trying to get a begrudging organisation who've lost a contract to share TUPE liability information with the new provider requires firm mediation. Photograph: Tom Jenkins for the Guardian

One person's right is another person's liability. In the embattled arena of employment law, nowhere does that ring as true as with the TUPE legislation. As recent Twitter rows can attest, TUPE is a frightening, misunderstood and complex challenge for charities and employees alike.

What does TUPE even look like? And does it really, as naysayers claim, have the power to drive charities to financial collapse?

TUPE protects staff from redundancy in the world of competitive service delivery. As and when services move between different providers, TUPE carries incumbent staff along with the services – with their original employment and pay terms attached. TUPE – or, by its full legislative title, Transfer of Undertaking (Protection of Employment) Regulations 2006 – intends to provide safeguards and continuity to employees.

As public services continue to open up market competition, TUPE transfers become more common as services shift ever more frequently between different winning providers. As the public sector restructures with the formation of "spin-outs", the staff involved are increasingly subject to the provisions of TUPE.

What does this mean for charities? Like almost everything, it's not the legislation that seems to be the barrier, so much as the process by which it's implemented. Cost, lack of transparency, inaccurate information, and lack of leadership by commissioners are all cited as recurring problems in TUPE situations.

Speaking out about their experiences, charities are telling us of a range of challenges. Whether they are too small to take on the costs of legal advice, let alone the subsequent TUPE liabilities, or they are large multi-site organisations for whom TUPE complexities are magnified.

We've heard about the cost of legal advice on a TUPE transfer starting at £1,500 (plus VAT) for one employee, and stretching up to £10,000 for a major contract. One local charity was clear that the £6,000 legal bill they incurred has meant their trustees will simply "steer clear of anything involving TUPE" in the future. Another organisation was told they didn't have the resources to take on the TUPE liabilities and consequently the commissioner refused to award them the contract.

Aside from the prohibitive costs of legal advice, the universal complaint from charities has been of the transparency and timeliness of information about transferring staff. Former employers are expected to provide suitable information for the future providers to understand the cost and detail of these incoming liabilities: staff numbers; employment terms and conditions; any pending actions.

Yet it's shown that incoming employers regularly only receive piecemeal information, provided at the eleventh hour. Organisations have had to jump ship on the day contracts are to be signed because they weren't confident in the information they'd received, and couldn't take on these liabilities blind. In one extreme instance during the transfer of a statutory service, an incoming provider seen to be raising too many concerns was verbally threatened with having the contract award withdrawn.

How do we rectify this, so employers can be fairly empowered? Better leadership and effective sanctions improve the process and there is an argument for commissioners to play this role. Impartial, they also have the leverage (in theory, at least) to make providers follow due process. Trying to get a begrudging organisation who've lost a contract to share TUPE liability information with the new provider requires a firm, mediating hand. Commissioners, so one organisation suggests, could even be given the power to impose fines for non-disclosure, or poor-quality information, rather than leaving organisations with no other recourse than the employment tribunal. These fines could then be transferred to cover costs of both the incoming organisation and the commissioner themselves.

But managing the initial transfer is only the start of TUPE. Transferred employees will need to be settled into their new environment with new colleagues. The initial transfer of employees often leaves individuals stressed and confused. Managers being transferred report feeling disempowered and "totally lost trying to advise staff regarding employment rights". Upon arrival at the new employer, it isn't only the different terms and conditions that can be problematic with post-transfer harmonisation, but also the inevitable effects of upheaval and change. Here perhaps lies the real challenge for employers.

It is arguable that TUPE demonstrates the costs wrought on employers in the hard-won protection of employee rights. What the evidence shows, though, is that this isn't because the burden of TUPE arises from the letter of the law, but arises from the spirit in which both commissioners and providers choose to enact it.

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This article is drawn from the preliminary stages of the national call for evidence on TUPE legislation in the voluntary and community sector. All organisations are called to contribute their evidence before Friday 20 January 2012.