

AN ACQUIRED ATTRACTION

UK and EU law protects employees when a business changes hands.
Shelley Crofts identifies the key employment law points buyers
need to consider when acquiring an attractions business

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You've been looking to expand your UK attractions portfolio for several months now; could this be the acquisition you've been waiting for? With some strategic changes, you can see real potential. Streamline the admissions function to reduce employee overheads, get rid of that over-generous commission scheme and, before you know it, those margins will start to look on point.

Job done – or is it? Well, although post-acquisition restructuring is certainly possible, legal protections afforded to any employees you take on might limit your options and could leave you facing employment claims and unstable industrial relations, rather than the streamlined organisation you had in mind.

ACQUIRING ATTRACTIONS

The Acquired Rights Directive (the "Directive") is European Union legislation



Parques Reunidos acquired the Slagharen family theme park in the Netherlands in 2012

which protects employees in the event that the business in which they work is transferred to a new employer. This generally means that when you buy a business in the EU, any employees who work in that business transfer to you automatically. You will inherit the employees on the same terms and conditions they enjoyed pre-transfer, together with any rights and liabilities relating to their contracts of employment. The employees are also protected from being dismissed (if the transfer is the reason for the dismissal) and attempts to change their terms and conditions will be difficult.

All EU member states are obliged to comply with the Directive but each has interpreted it slightly differently. This feature focuses on business transfers within the UK but similar protective regimes apply across the EU. Some important differences in how the Directive has been

Flambards theme park in Cornwall, UK, was sold to Livingstone Leisure in 2013



EU INTERPRETATIONS - FIGURE 1

EU member states have interpreted the Directive differently – always take legal advice as some member states place obligations on the parties very early in the process with severe consequences (which can delay the transfer) if they are not followed. Fundamental considerations:

- In some EU states (for example, Italy) employees only transfer to a new employer if their current employer has a minimum number of employees.
- In Germany, consultation should take

place before you enter into a binding agreement that confirms the transfer. In Italy, you must have started your consultation at least 25 days before this binding agreement is executed.

- Most EU states will penalise parties financially for failing to comply with information and consultation requirements. However, in some member states (France, Italy and Spain) the works councils or unions can delay a transfer if such procedural failings occur, and in some EU states

you could face criminal prosecution.

- Certain transfers might need government/official consent, e.g. transfers of part of a business in France involving the transfer of a works council member must be authorised by the Labour Inspector.
- In the absence of a standing body of employee representatives some jurisdictions (e.g. Spain) permit you to inform and consult with the employees themselves, rather than requiring employee representatives to be appointed.



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Aspro Ocio acquired Linnaeushof in 2012

interpreted by different member states are given in Figure 1. The UK has adopted the Directive through the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”).*

TUPE IN THE UK

So, how does the regime work in the UK? You should generally expect TUPE to apply in the following scenarios:

1. Where there is a transfer of a business or part of a business provided that business “retains its identity” (i.e. carries out the same type of work in broadly the same way) following the transfer.

2. Where there is a “service provision change” (SPC). This usually occurs where a function – such as IT, security or cleaning services – is outsourced to a service provider or there is a change in service provider, including where the function is brought back in-house.

For an SPC to be triggered:

- there must be an “organised grouping of employees” (which can be just one person) where the main purpose is carrying out the relevant activities; and
- essentially the same activities must be continued after the transfer.

BIG TICKET ISSUES: KEY CONSIDERATIONS - FIGURE 2

Purchasing a new business

- Have you got full details about employees and their T&Cs of employment?
- How do the employees’ pay and benefits compare with the market? Are they unusually high?
- Are any benefits provided which would be difficult or expensive to maintain?
- How many employees would transfer – would you need to make any redundant?
- Is there an enhanced redundancy scheme in place? Do many employees have long service (this will increase redundancy costs)?
- Are there any outstanding employee liabilities in relation to underpaid holiday entitlement (currently a big issue in the UK)? If so, make sure you price for these.

- Are there employees with key skills that you need to transfer with the business? If so, make this clear in the commercial agreement and think about how you can retain them.
- What pension provisions are in place for the employees? Are there any expensive benefits?
- Does the employer recognise any trade unions? How amicable is that relationship? Will any collective agreements transfer?
- What are your plans for the business? Do you need to change working patterns? Your ability to do this may be restricted, so factor this into your business plan/pricing.
- Will there be any impact on your own employees? If so, inform and possibly consult with them first.

Outsourcing a function

- What are the new provider’s plans? If they’re going to run the services in the same way as you, expect TUPE to apply.
- Contract price may vary if the contractor has to take on your employees. Be prepared to answer questions about your staff so they can price accordingly.
- Clarify what will happen to employees on entry, during the lifetime and on exit of the agreement and who will be responsible for associated costs and liabilities.
- Do you have employees you would want to retain? Can they work elsewhere in the business? Would the future provider be amenable to this?
- If you plan to bring any outsourced functions in-house, consider TUPE.

*TUPE only applies when a business transfers from one legal entity to another. It does not apply if the shares in a company are transferred to a new owner.



TUPE OBLIGATIONS

So, what happens if TUPE applies? In that case, a number of obligations are imposed on both seller and purchaser (or customer and contractor) in relation to the employees. These are significant both in financial terms and in terms of timescale (see Figure 2).

'In-scope' employees transfer

On the date the business is transferred, the employees assigned to the business or function immediately before that date (other than on a temporary basis) will transfer automatically to the new employer.

Rights & liabilities come too

As the new employer, you inherit those employees (whether you want them or not) on their existing terms and conditions of employment, so pay, holiday and contractual benefits will remain the same.

On purchasing Slagharen, Parques Reunidos grew its portfolio to 72 attractions worldwide

As we will summarise below, it will be difficult for you to change those terms and conditions, certainly in the short term. In terms of knowing what you are taking on, the previous employer must provide you with certain information about the employees who are transferring at least 28 days before the date of the transfer. This information will include details of the key terms of employment, any disciplinary matters or grievances in the course of the last two years and details of any claims or potential claims an employee might have against the former employer.

You also inherit all the accrued rights and liabilities connected with those employees' contracts of employment,

such as unpaid wages or holiday pay, even if the previous employer should have paid for these. For this reason, there is often provision in the commercial agreement which will require the previous employer to indemnify the new employer for any outstanding liabilities.

You also need to be very careful in relation to existing pension schemes as some – particularly public sector schemes – will include benefits with potentially significant liabilities. If you are looking at acquiring an attraction from a local council, or another public body, be very careful to explore any associated pension risks before committing yourself.

Legal obligations

Both the old and new employer are under an obligation to inform appropriate representatives of the affected employees about the transfer and to consult with ▶



Merlin Entertainments acquired
Istanbul's Turkuazoo Aquarium
from Global Aquariums BV in 2013



There will often be wider commercial considerations as to whether to progress the deal and employment issues can take a back seat



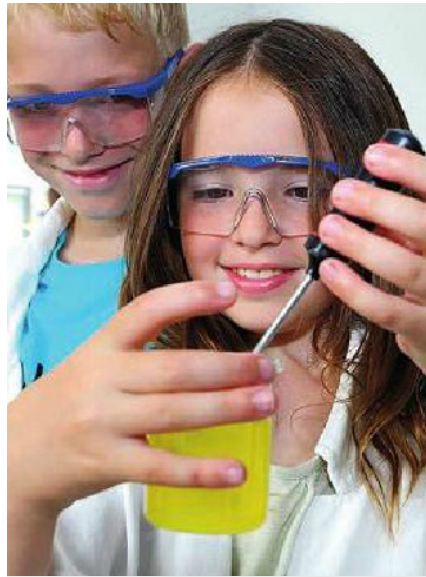
them regarding any measures that they are proposing to take. As the incoming employer, these obligations apply to any existing employees you have who may be affected (rather than the new employees).

These requirements are detailed, but bear in mind:

- The information and consultation process must be undertaken with “appropriate representatives” – appropriate representatives are either recognised trade union representatives for the relevant business/function or elected employee representatives.
- Specific information must be provided to the representatives, including: the fact that a transfer is taking place; when it is to take place and the reasons for it; the legal, economic and social implications of the transfer; and any measures (or changes) that are to be taken in connection with the transfer.
- There are no specific timeframes as to when the information must be provided but it must be long enough before the transfer to enable consultation to take place.
- Breach of these obligations could result in a penalty of up to 13 weeks’ actual pay per affected employee. This could be a significant liability. This is a joint and several liability, so claims can be brought against either or both the old and new employer.

Transferred employees – special protection

As the new employer, TUPE might restrict your ability to dismiss employees who have transferred or to change their terms



Blueprint Entertainment acquired Explorado Family Adventure Science Park from Merlin Entertainments

and conditions of employment. Where the principal reason for the dismissal is the transfer itself, that dismissal will be automatically unfair and will allow the employee to bring a claim of unfair dismissal (if they have two years’ service). However, if the new employer has an economic, technical or organisational (ETO) reason which entails a change in the workforce (essentially a reduction in headcount or change in function), it may be possible to achieve a fair dismissal. Relocation or restructuring exercises may allow for this if structured properly.

Changes to terms and conditions can only be made in limited circumstances. Changes will be void if the principal reason for the change is the transfer itself, unless there is an ETO reason (see above) or the terms of the employment contract permit the change in any event.

It is worth noting that some of these protections are relaxed when the former employer is insolvent.

UNWANTED EMPLOYEES

It is not possible to contract out of TUPE, as it will apply as a matter of law irrespective of any commercial agreement between the parties. However, parties can, and often do, negotiate indemnities to apportion any liabilities associated with the employees as part of the commercial agreement (including, for example, in relation to dismissal costs). This means that it may be possible to agree that the old employer should retain or dismiss employees and/or be responsible for employee costs.

There will often be wider commercial considerations as to whether to progress the deal and employment issues can take a back seat. However, occasionally, the cost of taking on the workforce can be critical in determining the viability and/or price of the purchase. ●

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