

TUPE and immigration

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1. We recently represented two individuals, instructed by Paragon Law, who had been sponsored migrants under a Tier 2 (General) visa. The company at which they worked underwent a TUPE transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006. The TUPE transfer was a routine one. The part of the company in which the employees worked was split off to create a new company, and, as a consequence of TUPE, the employees automatically became employed by the new company. The newly created company obtained a sponsor's licence, and it should have been possible, straightforwardly, to transfer over the employees' sponsorship to the new employer. That proved not to be the case and the case highlighted a series of difficulties with the Home Office's "Tier 2 and 5: Guidance for Sponsors" as it applies to TUPE transfers.
2. The Guidance provides that where there has been a transfer of employees the new employer must make a valid application for a sponsor licence within 20 working days of the transfer. That part is unproblematic. The Guidance then states at paragraph 13.18 that, also within 20 working days, the new employer must report the transfer via the Home Office's Sponsorship Management Scheme ("the SMS"). The problem is that some employers will not be on the SMS within 20 days of the transfer (especially if they apply towards the end of the 20 day period). Even if the new employer is on the SMS in time, the transferred employees will not have an SMS record on which the transfer can be reported. Indeed, the next paragraph of the Guidance (which deals with reporting on matters such as a transferred employee being absent from work for more than 10 consecutive working days) appears to expressly recognise that. There are further difficulties. In what appears to be the Home Office's standard letter following an application for a sponsor's licence, requests are made for further information on a TUPE transfer including "certified evidence of TUPE." No explanation is provided as to what that means. TUPE operates automatically as a matter of law to transfer employees' contracts of employment when an "economic entity" is transferred. It is not clear what it means to require "certified evidence" of that occurring.

3. Our case was eventually resolved but only after the Home Office had curtailed leave (with one of the employees only learning of this at port, on returning from a trip abroad) and half a day of a contested trial challenging those curtailment decisions. Until then the Home Office had accepted that it had been told of the transfers, just not in the right format or in the correct terms.
4. A number of points arise. First, and most immediately, given the difficulties with the Guidance, and the obvious desirability of avoiding these potential consequences – these individuals had the advantage of an employer willing to litigate on their behalf – if others are involved in cases of transfer of TUPEd workers, it is worth getting in touch with the Home Office immediately to find out exactly what information they want, in what format and sent to whom.
5. Second, it is to be hoped that the Home Office will examine its Guidance with a view to clarifying it.
6. Third, in terms of the wider picture, all this happened on the basis of the law as it is. With Brexit there will almost certainly be vastly more decisions of this kind, on vastly more uncertain law. One has to wonder, with Brexit looming, about the business implications if matters such as these cannot be dealt with straightforwardly and efficiently.