

NCVO HR Conference

Mergers & Associated TUPE Issues

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The Charity Team

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Business themes

- Who is your merger partner?
- Operational and financial viability
- Common objectives/goals – vision & leadership
- Reputation
- Funding
- Communications and planning
- Culture and personalities

Key Legal Issues

- Assumption and management of risk - structures
- Identifiable benefits, outputs or cost reduction
- Management and decision making – process
- Due diligence
- Employment law / TUPE

TUPE in Summary

- Transfer of employment
- Passing of rights and liabilities
- Protection from dismissal
- Protection of employment terms
- Standard Transfer
- Service Provision Changes

Standard Transfer

Reg 3(1)(a)

“transfer of an undertaking, business or part of an undertaking or business .. to another person where there is the transfer of an economic entity which retains its identity”

Economic entity : *“an organised grouping of resources which has the objective of pursuing an economic activity whether or not central or ancillary”*

Standard Transfer

Has it retained its identity?

- The type of business
- Whether assets are transferred
- Whether majority of employees transfer
- Whether customers are transferred
- The degree of similarity
- Whether there is a cessation of activities and if so, how long?

Service Provision Changes

Reg 3(1)(b)

- Activities carried out by a person ('a client') on his own behalf are then carried out by another on that person on the client's behalf (Outsourcing or contracting out)
- Activities carried out by one contractor which are then carried out by another (tendering)

Service Provision Changes

- Activities carried by a contractor which are then brought back in-house (contracting in)
Conditions for an SPC, Reg 3(3):
- Before the change there is an organised grouping of employees whose principal purpose is the carrying out of the activities concerned on behalf of the client

Service Provision Changes

- The client intends the activities to be carried out by the transferee other than in connection with a single specific event or task of short duration
- Does not apply to one-off purchases of a short term duration nor to sales of goods

Who is Protected by TUPE

- Employees
- Consultants/casuals/volunteers if they come within the definition of employment status
- Those assigned to the undertaking or part that transfers
- Those whose applications for transfer are pending

Assignment

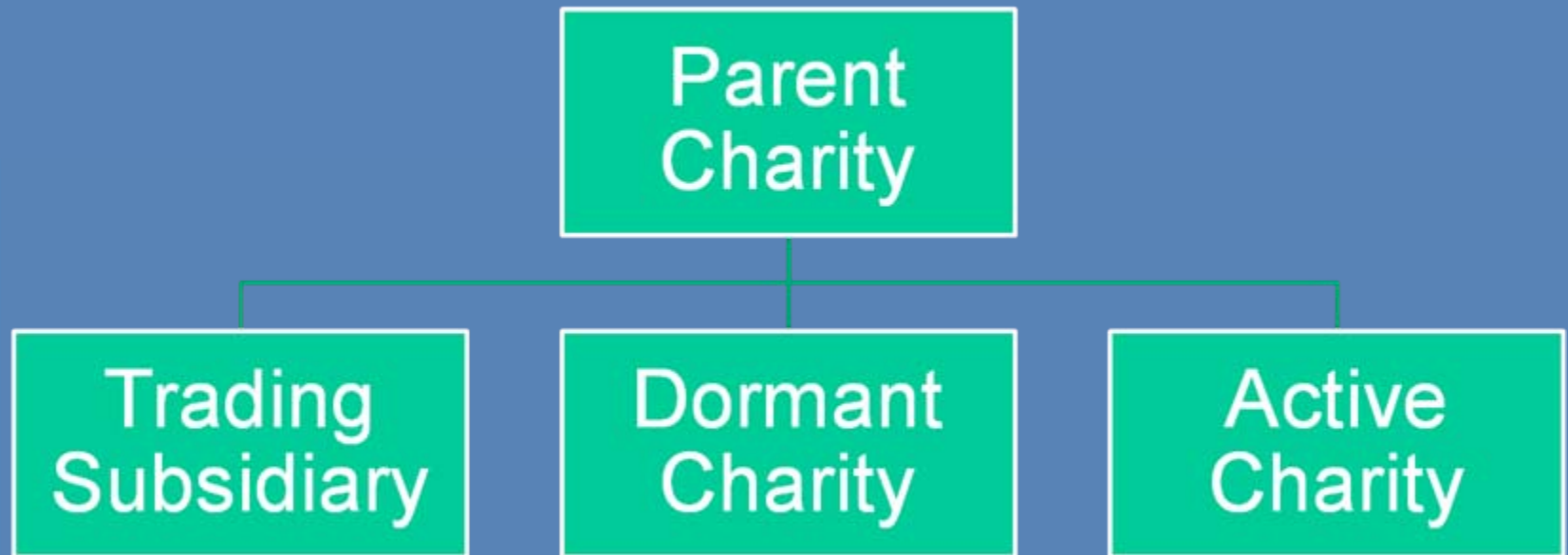
Relevant factors include:

- amount of time spent
- the value given to that time
- the terms of the employment contract
- how the employer allocates the employee's cost

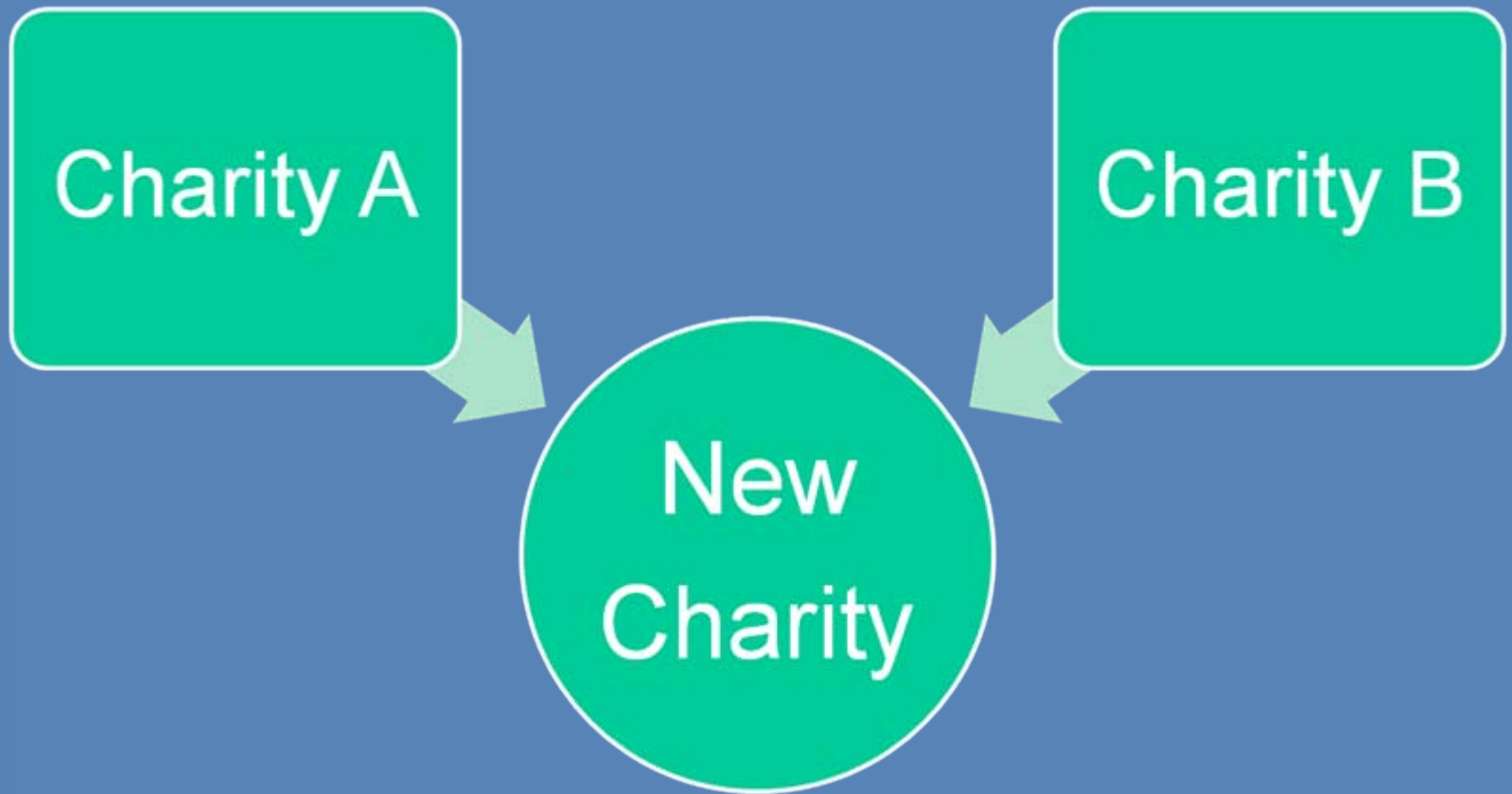
Merger - structures

- Overlapping board membership
 - strategic partnership but
 - potential conflicts of interest
- Group structure
 - Parent /subsidiary
- Full merger
 - One into another
 - New organisation
- Other options – function swap

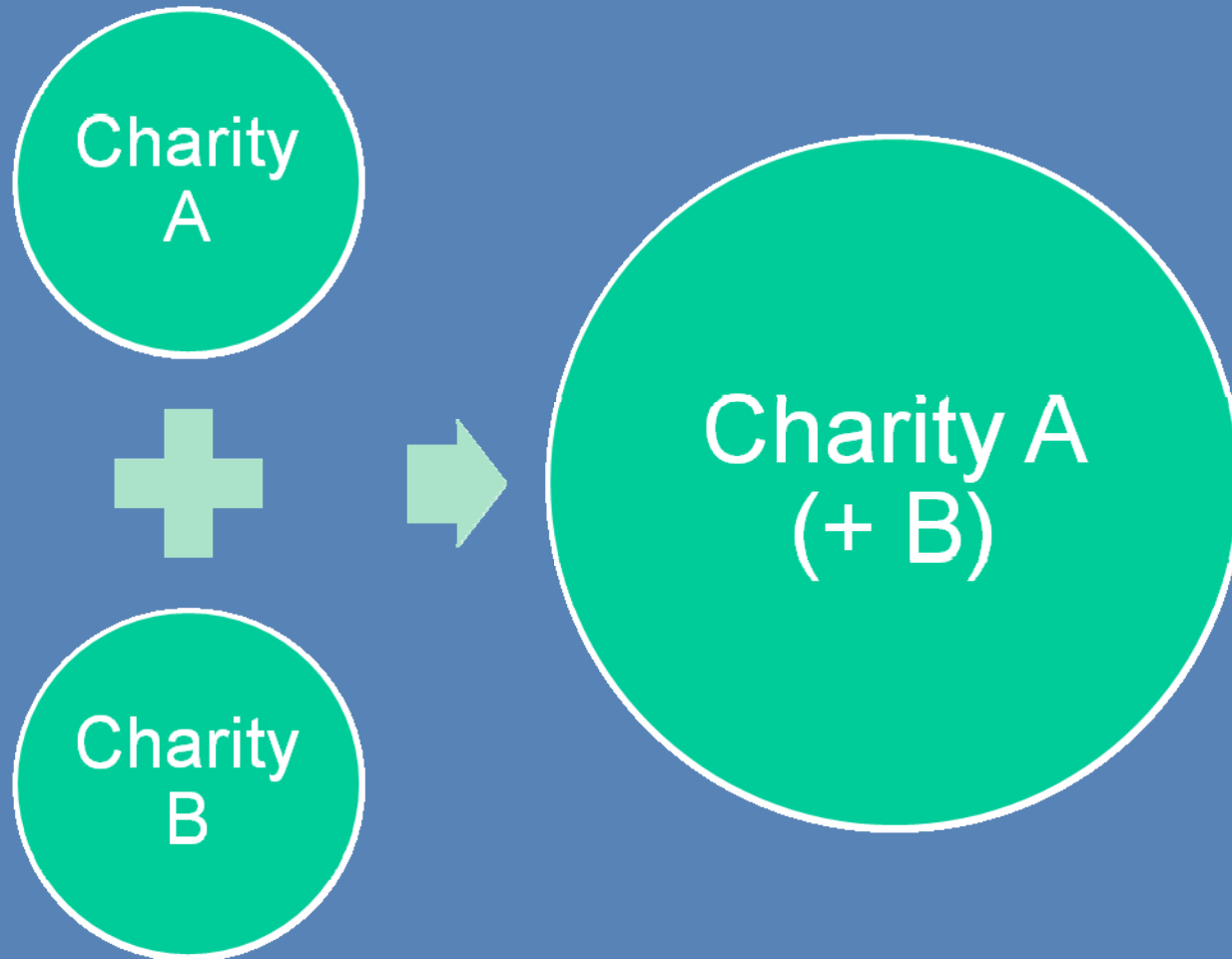
Group Structure



Merge into new charity



One merges into another



Merger - Issues and Controls

- Risk management and structures
- Barriers?
 - Chief Executives
 - Chairs
 - Culture
 - Membership structures
 - Powers and Objects
 - Charity Commission/Housing Corporation
 - Key stakeholders
 - Other third parties/regulators

Risk Management

- Due diligence
- Staff and TUPE
- Old and new funding
- Role of the transfer agreement
 - Indemnities
- Using corporate shells
- Insurance
- Funder support

Risk Management

Due Diligence

- Asset risks
 - Consents? Landlords and other third parties
- Income risks
 - Contracts
 - Consent of funders
- Past risks
- Reputational risks
- Regulatory risks
 - Objects

Due Diligence Staff Issues

- TUPE
- Varying the employment contract
- Compromise agreements
- Pensions
- Union recognition and national terms
- Self-employed, casuals and volunteers

What Transfers?

- Employment conditions
- Continuity of service
- Restrictive covenants to the extent they protect the transferring business
- Obligations in relation to personal pension schemes
- Liability for discrimination
- Liability for negligence

What Transfers?

- Liability for personal injury claims (except where the Transferor is a public sector employer)
(The transferor's entitlement to an indemnity from his insurer also transfers)
- Collective agreements if contractually binding even if the Transferee is not a party to the agreement however changes made following transfer will not bind the Transferee if not party to the agreement

What Transfers?

- Recognition agreements if the transferred employees remain a distinct identity. The agreement will not be limited to transferring employees but extends to new joiners

Occupational Pensions

- Do not transfer
- However collateral benefits such as early retirement or enhanced redundancy will
- Transferees must offer membership of an occupational or stakeholder scheme with matching contributions of up to 6%

Public Sector Pensions

- Public sector employees (other than government) covered by Cabinet Office statement on staff Transfer in the Public Sector 2000 (revised 2007). This requires transferees to provide pensions that are broadly comparable to public sector pension and continues to apply to transfers between private employers.

Public Sector Pensions

- New joiners must be offered employment terms overall no less favourable than those of transferring staff including a matching contribution to, at least, a stakeholder pension of up to 6%

Dismissals

- Dismissal because of the transfer is automatically unfair unless an ETO reason
- If because of transfer there is a substantial change in working conditions to detriment of employee then constructive dismissal

The ETO Defence

- If the reason for a dismissal is that there is an Economic, Technical or Organisational reason entailing changes in the workforce it is potentially fair as redundancy or SOSR
- Identify the reason – is it an ETO reason

The ETO Defence

- What does ETO mean in practice?
 - An economic, technical or organisational reason is not sufficient, there must be some change in the workforce.
 - Either fewer employees or employees undertaking significantly different tasks i.e. wholesale restructure
 - Simply changing Ts and Cs will not be an ETO reason
 - The transferor cannot rely on the transferee's ETO reason

Changing Ts & Cs

- Consensual variations permitted if for an ETO reason otherwise void (Reg 4(5))
- Consensual variations permitted in insolvency cases where designed to safeguard employment opportunities by ensuring the survival of the business (Reg 9)

Changing Ts & Cs Cont.

- Consensual variations favourable to the employee. However the employee will still be entitled to rely on his acquired right i.e. “cherry pick” (Power v Regent Security Services Ltd)
- All other variations are void if the reason is the transfer

Employee Liability Information

- Requirement of transferor to provide specified up to date information about employees to transferee
 - the identity and age of employees
 - information contained in the statutory written particulars
 - details of any disciplinaries, grievances or legal action in the preceding 2 years
 - any potential legal action
 - details of any collective agreement that will apply post transfer

Employee Liability Information

- Failure entitles transferee to bring a claim. Compensation will be a minimum of £500 per employee

Duty to Inform and Consult

- Employer has duty to inform and consult under Reg 13
- Only need to consult if contemplating taking 'measures'.
- No measure: No consultation

What Information

- The fact of transfer, proposed date and reason
- The legal, economic and social implications
- Any measures to be taken

When to consult?

- ‘Long enough before’
- When is the ‘relevant transfer’? Work backwards.
- No minimum period

Who to Provide Information to and Consult?

- ‘Appropriate Representatives’
- Recognised T.U. reps
- If not, and no alternative body, then election time

Election of Representatives

- Employer must make fair arrangements
- Determine the number of reps so all affected employees' interests are represented
- Determine their length of office
- All affected employees are entitled to stand and vote
- Voting should be secret and votes accurately counted

Information, Measures and Consultation

- Information must be supplied in writing to employee representatives (or to affected employees)
- No definition of ‘measures’ a “word of the widest import”
- Consult with a ‘view to seeking employee representatives agreement to the intended measures’
- No obligation on employer to consult on desirability of transfer itself or reasons for it

Consequences of failure

- Complaint to ET
- If well founded 'appropriate compensation' 13 weeks' pay maximum
- Not capped by s.227 ERA 1996
- Penal, start at 13 weeks' pay then look at mitigation

Employees who object to transfer

- Employees are entitled to resign
- No entitlement to redundancy payment
- There is no entitlement to continue to work post transfer via secondment: transfer will be automatic

Transfer Agreement

- Transfer of Assets
- Warranties
- Indemnities
- Intellectual property
- Land
- Assignment/Novation of contracts

Questions?

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