

## TUPE

In-house design teams are not always as cost-effective as they appear, and outsourcing them to an external agency can be an instant way to reduce overheads. It may also be the case that the designers themselves prefer the agency environment to the corporate one, and that the agency can introduce processes that can lead to greater efficiencies and better results for the client company.

If you are considering such a move, you are likely to discover that TUPE legislation applies to the approach that you take and dictates the way you will have to organise the transfer. There are a number of key elements that you will need to agree with your selected agency, such as hourly rates, volumes and scope of work, exclusivity arrangements and key performance indicators, but you'll find that TUPE legislation provides the legal framework within which you will both operate.

TUPE (pronounced 'chu-pee') stands for "Transfer of Undertakings (Protection of Employment)". It is a European law created to protect any employee from losing their job when the team they work for is transferred to another employer (i.e. if the work goes elsewhere, the employee comes as part of the package). TUPE only applies in cases where a defined economic entity, i.e. a complete business function rather than a large piece of work, is transferred.

Before the transfer one or more of the team members has to be elected as an Employee Representative to liaise between the company and the agency. A full consultation period is then required to ensure the employees being transferred are fully informed of the legal, economic and social implications of the transfer and enable all of the negotiations to be seen through to their conclusion. TUPE states that each remuneration package has to be matched in full (with the possible exception of terms relating to occupational pension schemes) by the new employer and that any dismissal connected to the transfer will be automatically considered unfair. It's a legal minefield with potential claims possible for discrimination or personal injury and both parties will need detailed advice from experienced solicitors. Because it is a relatively new law there are vagaries in its interpretation and as the consequences of making an error can be very costly it is a good idea to check the legality of your process at every step. The only way to ensure you complete the transfer with no repercussions is to do everything by the book, and it's a big, highly complex book.

For all of the restrictions and protocol that it enforces on you, I have found that the TUPE process enables both parties to discuss and agree the nature and detail of the transfer from the start, including the ongoing working relationship. This goes a long way to ensuring neither company nor agency have any unpleasant surprises after the contracts have been set in stone and that no claims can be made by those transferring.

TUPE dictates that the contract of employment is not terminated when the employee transfers, and that the employee is not 'selected' by either the client company or the recipient agency. Any indication of trimming the team down or even of changing the detail of a person's role will give rise to claims of unfair practice, and this is one of the most sensitive aspects of the transfer as even if you are playing fair it might appear that you are not. For this reason it is vital to have an experienced personnel manager to steer the consultation process and ideally keep records of all decisions and formal conversations between the two companies and the employees.

With the TUPE transfer of the Boots Design Team to Jupiter (involving us taking on 29 employees) we each relied on our own teams of solicitors and personnel advisers. The meetings were often long and extremely detailed and an enormous amount of ground had to be covered in order to stay within the TUPE guidelines. However, this investment has proven to be very worthwhile as the resulting transfer was very smooth and there has not been a single issue resulting from it. Both parties are enjoying a number of benefits from the transfer and are able to focus on creating excellent design solutions that deliver business results for the client, without the need to return to distracting discussions on the legalities of the transfer.

### **Efficiencies of an internal design studio**

At the mercy of every client  
Time wasted on non-essential projects  
Ad-hoc briefing process  
Too many people in meetings  
Too many discussions/meetings  
No control on hours spent on a job  
Client making endless amends  
Senior players changing brief at end

### **Efficiencies of an independent design agency**

Client relationship managed  
Only approved work undertaken  
Formal briefing process  
Only key people in meetings  
Strict deadlines never missed  
Tight grip on time allocated  
Amends managed from the start  
Processes to prevent dabbling

**Direct costs of an  
in-house design team**

Wages  
Computer hardware and software  
Desk/floor space  
Furniture  
Art materials

**In-direct costs of an  
in-house design team**

Pensions  
Company cars  
Sick pay  
Maternity/paternity pay  
Recruitment  
Training  
Christmas party/socials  
Redundancy payment

**All you need to know about TUPE**

- You have to follow their process at every stage
- You cannot cherry-pick the team that's transferring
- You have to consult fully with those being transferred
- It helps to ensure the long term success of the transfer

**When a TUPE transfer is likely to work**

- If the client is genuinely intending to improve its design function
- If the client and agency are both prepared to make concessions
- If the client ensures every brief (within the scope) goes to the agency
- If clear KPIs are monitored and maintained for both the client and the agency

**When a TUPE transfer is likely to fail**

- If the agency cannot assimilate the transferred designers into their culture
- If the client doesn't deliver the level of work to cover their overheads
- If the agency cannot control their processes and efficiencies
- If the people transferring cannot deliver quality design solutions

Detail:

Mark Shaw is the MD of Jupiter Design Ltd.

On August 1<sup>st</sup> 2004 29 graphic designers, account managers, graphic artworkers and packaging artworkers were TUPE transferred from Boots to Jupiter. There have been no personnel issues since the transfer and the new team has assimilated seamlessly into the existing business.

mark.shaw@jupiterdesign.co.uk