



The Work Couch

NAVIGATING TODAY'S TRICKY PEOPLE CHALLENGES TO
CREATE TOMORROW'S SUSTAINABLE WORKPLACES

Episode 3 – TUPE (part 1) with Kelly Thomson and Patrick Brodie

Ellie

Hi and welcome to the Work Couch Podcast. Your fortnightly deep dive into all things employment. Brought to you by the award-winning employment team at law firm RPC we discuss the whole spectrum of employment law with the emphasis firmly on people. Coming up in this episode we kick off our three-part series on TUPE. In our first instalment we'll be looking at why TUPE is so important, when it applies and the legal implications of a TUPE transfer.

My name is Ellie Gelder and I am a Senior Editor in the employment, equality and engagement team here at RPC and I'll be your host as we explore the constantly evolving and consistently challenging world of employment law and all the curveballs that it brings to businesses today. We hope by the end of the podcast you'll feel better prepared to respond to these people challenges in a practical, commercial and inclusive way.

Today we're diving into a notoriously tricky topic which remains relevant as ever in today's business world and with the ongoing economic crisis. Yes, it is the often complicated but essentially well-meaning law of TUPE which is designed to protect the rights of employees in a business transfer. And I am delighted to be joined on the Work Couch today by our very own resident TUPE gurus. Head of RPC's employment equality and engagement team Patrick Brodie and employment Partner and the firm's ESG lead Kelly Thompson.

Now, Kelly, it has been known at RPC for our employment lawyers on occasion to utter the words "I heart TUPE". Yep, it is a true story, I even heard that badges have been worn.

So, can you sum up very briefly, then, why should we be embracing the TUPE love?

Kelly

Thanks Ellie I actually found one of these gold dust badges in a drawer the other day so perhaps we can upload a picture to the website so people know you are not making it up and I'll take the highest bid for that final badge. I have got no shame there.

So, yeah I actually do heart TUPE and I have come to terms with that over the years. I think there is lots of reasons actually why we should all have a bit of TUPE love. If you are kind of a bit geeky and academically inclined, from that point of view, it is a really lovely mix actually of European policy and domestic law which are sometimes in harmony and sometimes in conflict and I find that personally pretty intriguing that kind of interplay. But, I think there is also a really remarkable sort of practical effect that TUPE has which is to essentially make what would otherwise be a purely commercial, sort of, transaction or change it makes a business focus on the people implication of that and I think that is quite, quite, remarkable in terms of that mindset that it puts organisations in because the whole point of TUPE is to protect people right? If we didn't have it then what would essentially happen when businesses changed hands would be that nine and a half times out of ten all the people assigned to that business would lose their jobs, become unemployed and that is obviously not attractive socially or commercially in lots of situations it is not viable, you know, in our businesses we rely on people to do the work so I think rather than thinking of TUPE as a really complicated bit of legislation that's a pain, that gets in the way of commercial transactions, I think the better approach is to say well look, ultimately it's about protecting people, it doesn't have to be complicated, it doesn't have to be a legal headache as long as we start thinking about it and planning it early in the process and I think a lot of the issues arise not because of TUPE but because of having not really engaged with TUPE early enough in the process.

Ellie

Sure, and we'll come onto that later about the importance of the timing of engaging with it. So that's really looking at the purpose of it which I think is a nice way to start off but Patrick, can you just give us a quick overview of the legal background of TUPE? So, how long has it been around and where does it actually derive from legally?

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- Patrick** Of course, thanks Ellie. The employee safeguards that Kelly mentioned have been, they have been around in the UK now for over 40 years. TUPE and the Acquired Rights Directive from which TUPE arose they are there to protect and safeguard employees in circumstances where for reasons entirely out of their control they might otherwise be out of jobs. So, to understand that a little bit better I think it is worth just going back briefly to the mid 70's, it's a period that predated TUPE and it's, and just see what the world was like then. So, in the mid 70's, and that reflects our common law principles, if assets of a company were bought and sold an employee would only remain in the role if the new employer offered that person a role. And that was because the employment contract is, it's a contract for personal services, which means that that contract, the employment contract itself can't be transferred unilaterally to another employer. Now that position is, it was a position that was common across Europe, so on, and there's something beautiful about this day, something very genuinely beautiful about this day, so it was on Valentine's Day 1977, Europe stepped in and put forward the Acquired Rights Directive and after a huge amount of political fighting and resistance the UK eventually gave way to Europe and it was in 1981 that we the UK agreed to transpose the Acquired Rights Directive into our laws. That gave birth to TUPE. And equally our arguments with Europe about the imposition of regulations even when they safeguarded jobs have continued to rage on. There's a certain irony here because our TUPE rules are stricter and broader than those across much of Europe.
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- Ellie** Thank you, Patrick, that's a really helpful potted history of TUPE and the journey it has been on. So, can you just sum up in a nutshell what is the effect of that legislation? How does it actually protect employees?
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- Patrick** Yes, of course I can. In my world you, in effect, you can distil the safeguards and protections into six principles. First, employees follow their work, they bring with them their employment contracts and other than in relation to certain occupational pension scheme rights, all the historic rights, obligations and liabilities travel with them. It's almost as if the new employer steps into the shoes of the old employer. Second, it's difficult but not impossible to change terms and conditions of employment. Third, reflecting the challenge in changing terms and conditions of employment there are similar limitations and restrictions in dismissing employees. Fourth, the existing employer has to provide the incoming employer with information about the employees who will transfer. The fifth principle is that both the existing and future employers have to talk to their employees via employee representatives about the transfer and the effect of the transfer on employees. And the final principle, you can't contract out of TUPE rights. And that's the case even if everyone, and by everyone I mean even if all employees and the employers agree otherwise, you can't contract out of TUPE. In many ways that is the ultimate safeguard in relation to the regulations.
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- Ellie** So, a whole range of protections there for employees which we'll go into in a bit more detail later in the podcast, but essentially getting caught out by those provisions exposes the parties to a business transfer, so most likely the transferee to various potentially very costly employment tribunal claims, so can you just set out what those potential claims could be?
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- Patrick** Of course. I'm just going to reflect on two of the more common claims. The first is there is always the risk of unfair dismissal claims. Now, these commonly arise in two scenarios. The first scenario is when the incoming employer refuses to take on employees who might have the right to transfer. And the existing employer refuses also to employ those employees. So, they should transfer. Now here if the employers can't resolve that impasse the employee will sue both employers for unfair dismissal. Now the second unfair dismissal scenario is when the incoming employer dismisses employee which might be to restructure, or it might be to change terms and conditions. Here the employee will bring, what's known as an automatic unfair dismissal claim. Now, it's worth bearing in mind and this is particularly relevant when a dismissal is there to achieve a change in terms and conditions of employment, that an employee can, rather than looking for a financial award, look for a remedy where that remedy is a reengagement on their old terms. The second frequent claim is for a failure to inform and consult with employee representatives where those representatives are a recognised union or if there isn't one, elected employee representatives. Now the cost of that claim can be significant, awards can be up to 13 weeks' pay uncapped per affected employee. So, in other words, that's a quarter of the annual payroll of those employees.
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- Ellie** Fantastic. So, that's the legal background and we can see why TUPE often crops up right at the negotiation stages of a commercial transaction because of those potential legal risks that Patrick mentioned. So, let's delve into the detail now. Kelly, can we look first at how to identify a "relevant transfer" for the purposes of TUPE? So, first of all, when will the sale of a business be in scope?
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- Kelly** So, good question Ellie. Ultimately, what we are really talking about here from a business transfer perspective is whether or not you've got an economic entity in the hands of the transferor, so the current owner that passes over to the transferee, the buyer, the new owner, and retains its identity, so does that economic entity retain its identity. It's a nice little rhyme. And the key kind of differentiator that comes up time and time again in these sorts of transactions is the difference between a business sale which can trigger TUPE and is the kind of archetypal TUPE transfer situation versus a pure share sale which in and of itself, if there is nothing else happening around the edges of that share sale won't trigger TUPE because what you've got there is a change in the ownership of the shares of the company which operates the business. Not a change in the ultimate ownership of the business. The business is still owned by the same company, it's just who owns the company has changed, so it's kind of one step removed. I think that's quite an important distinction to remember. So, really, the key piece of this is an economic entity that retains its identity.
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- Ellie** So, what does the law say then on how you determine whether that economic entity that you mentioned has retained its identity? What sort of factors should employers be taking into account?
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- Kelly** Yeah. So, unfortunately it's not as simple as taking a checklist and going down it and ticking them off, and there's never going to be one size fits all which makes sense because every single business is different even businesses within the same sector of a similar size are kind of different in the way they operate. Having said that, it's very clear from the caselaw that there are – there is a sort of list of common factors that we should be kind of looking at. I suppose what I'm saying is the balance and the weight of each of those factors will vary from case to case. But the sort of thing that we'd be looking at are whether any tangible assets have changed hands between transferor/transferee, you'd be looking at the specifics of the type of business we're talking about and thinking like logically how would we identify what that means as an entity, what would need to stay in place for that to still be the same entity on the other side of the equation as it were. Also looking at intangible assets recognising that, you know, kit and stock is not the only value in the business but obviously IP, good will etc is equally and often more valuable. Looking at whether the majority of employees have transferred but that doesn't give a get out of jail card, you can't just say oh we sacked everybody therefore there's no TUPE transfer, it doesn't quite work like that. Looking at, as well as whether any customers have transferred, and then a kind of general sense of like how similar are the activities of this business in the new world versus what they were in the old world and does it look like it's kind of retained its identity on both sides of the line. And sometimes there is a pause or a sort of interruption in activity at the point of a transfer. Especially if there is any changes that need to be kind of implemented, systems or processes or operations or otherwise. That pause or interruption in and of itself won't defeat a TUPE transfer. Certainly not if it's a short-term interruption, but if there's a kind of, if there is a sort of suspension in activities you would also be looking as one factor at how long was that and does that duration mean that ultimately the business has ceased to exist. So it's kind of about building up a picture and the absence of any one of those particular factors won't necessarily in and of itself mean there is no TUPE transfer, it's a bit of a kind of sniff test in reality. You're not looking for necessarily a kind of carbon copy of the business but there does come a point where something might be so changed or so fractured that it actually no longer retains its identity in the hands of the new owner.
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- Ellie** So that's how TUPE applies to a business sale, but more often than not it's also going to apply to a change in service provider. So that could be, for example, where an organisation already engages a third party to provide say, security services, but then decides to appoint a new contractor.
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- Kelly** Yeah, that's absolutely right, so what we were talking about just there was around business transfers, kind of old-style TUPE transfers, that's your classic merger acquisition type scenario. And you are absolutely right, more and more a lot of what we deal with in practice, a lot of where questions around the application or the implications of TUPE arise are the sort of service provision change. So, the kind of quintessential example of that is what you just described there, say you're a law firm, you decide, you know what, we're not going to employ our own catering function, we're not going to do that in-house, we're lawyers, we're not catering experts, we're going to bring in an expert catering company. That outsourcing of that service may well constitute a service provision change which triggers TUPE. And that, what I just described there, would be what is called a first-generation outsourcing, it's the first time that activity has left our four walls and gone out into the world, into a new provider. It will also apply, that service provision change, kind of TUPE transfer, in every sort of, potentially in every subsequent generation of that so if we decided after a period of time, hmmm, that catering provider is not value for money anymore, we are going to go out to tender and if we appointed it to a new provider then there's potentially what is called a second generation transfer from the incumbent provider to the new one. And so on and so on and actually you find particularly in a public sector kind of environment you might have many, many, many subsequent generation transfers which brings its own challenges and interesting sort of implications in the public sector which we haven't got time to go into today
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but maybe on a future episode. And it also applies, TUPE and service provision change also applies in relation to an insourcing, so let's say ten years down the line we decide actually we have, we have built up an expertise in catering we want to do it ourselves, we think it will be value for money etc then we could terminate that contract, bring the service back in house, and that would also potentially be a service provision change. And actually we're quite lucky in the UK in that, coming back to something Patrick mentioned earlier, the kind of irony in a way that our domestic legislation in TUPE is in many ways broad and more generous to individuals than the Acquired Rights Directive, the reason I say that here is because, it used to be the case that we didn't have a specific provision in TUPE for outsourcing/in-sourcing scenarios like I've just described, we didn't have service provision changes, that's what has been referred to as gold plating of the acquired rights directive. What we used to have to do was a bunch of gymnastics essentially trying to apply business transfer, economic entity retaining its identity principles to outsourcing situations and we got to the point through caselaw that we said yeah, that pretty much, we know it can cover outsourcing but actually having the clarity of its own set of provisions within TUPE is actually really helpful for businesses as well as for individuals, we know that we are in TUPE territory with an outsourcing now.

Ellie So a whole host of scenarios then which Kelly has outlined could trigger those TUPE protections. But Patrick, there are some caveats to those aren't there?

Patrick You're right Ellie there are, or to put it another way, there are arguments that can be put forward to say that there hasn't been a service provision change. And it's, sadly it's at this point that my brain does go a bit wobbly. Because the rules on understanding a service provision change are different to those that apply to understanding a old school, standard TUPE transfer test. And that is because when the courts decide whether there's a service provision change they give the words that describe the transfer, they give them their literal meaning. So every word in the definition has to have some purpose it holds particular meaning. Just bear with me on this it will make sense, let me take you into the definition of the service provision change test. Broadly there are two limbs to the test. The first limb is, it's a bit of a mouthful, it says that there must be an organised grouping of employees which has as its principal purpose the carrying out of the activities concerned on behalf of the client. I'll come back to that. The second limb is that the transferring activities must, when they are in the hands of the new provider, be, this is the important word, fundamentally the same as when they were with the original provider. So, reflecting these two limbs and holding those in mind, I'm going to just look at those in turn to see how an incoming provider so the transferee might argue that isn't a service provision change transfer, that's the caveat. I'm going to focus on the first limb first. So, that limb requires that there is a group of employees who are deliberately and intentionally organised to deliver the activity on behalf of the client. So, if the workforce that works on the activities is temporary, it changes regularly, or isn't organised by reference to a particular client then this defeats the service provision change. So that's the caveat one. Just looking at the second limb, now the second limb as I said needs the activities before and after the transfer to be fundamentally the same. So I'm going to look at it. I'm going to look at it in my, think of it as my replacement dog test, that's what I'm going to call it, my replacement dog test. So, the activity is replacement dog. Is this replacement dog fundamentally the same as the original dog? Now, if I wanted it to be fundamentally the same then I'm likely to give the dog a, I'm going to give it a general description, the original dog was a dog, it had four legs, it had a tale, a body and a head. And look, my replacement dog has those. So, it must be the same, it's got a tale, it has a body, it has a head and it's a dog. Now, that seems a little unfair. And that's how the courts look at the activity test, they say when describing the activities you can't give them a general description because that otherwise mean all replacement activities will be fundamentally the same, they fall within that general description. So, going back to my replacement dog, how about giving the dog a more specific description.

Patrick I could say my original dog is a border collie with one white leg and a spot on one flank. And this replacement dog might be a border collie, but it has all black legs and no spots. This is a really different dog. Again, that seems a little unfair. And the courts when looking at the transferor activities and whether they are fundamentally the same would agree. And what the courts say is that the description of the services shouldn't be too narrow, they shouldn't be pedantic and they have adopted the language of they shouldn't be excessively detailed. Otherwise that would mean that few activities would be fundamentally the same before and after a transfer. So, instead the definition which has been put forward by the courts is saying you have to take when observing the activities before and after the transfers, you have to take a holistic approach. Neither too broad nor too narrow. You are weighing relevant facts and evidence in the round. So, thinking about my replacement dog. I had a border collie and I again have a border collie. They are fundamentally the same. That feels about right. And look, I love border collies. Or more precisely in my case, a border collie whippet greyhound Bedlington terrier cross called Ash.

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- Ellie** I think that's probably the first TUPE dog example out there, so thank you very much for that Patrick. But it's a really helpful example of showing how those caveats actually work because there is a lot to get your head around and unpack in the caselaw there.
- And Kelly, as lawyers, just going back to the timing of actually looking at all these various factors, as lawyers you obviously see first-hand the rather painful consequences of failing to look at those questions early enough on in the transaction process.
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- Kelly** Yeah, the timing point it's, yeah, it's really, really important Ellie. And it's not uncommon for issues to arise and I think part of what, so what Patrick was outlining there, if you think of all the different sort of nuances and how specific some of these considerations are to the particular arrangements of any transfer. It kind of stands to reason that the more time you give yourselves to consider each of those and understand them the more options you give yourselves as organisations and individuals to kind of plan and to deliver the transfer smoothly. And I think in terms of engaging with that thinking you can't really engage early enough, that's not me saying you have to start informing and consulting three years before the transfer at all, what I'm saying is the kind of planning and strategic side of what does this look like, what are the potential people implications and how are we going to manage that, that's something that the more time the better. What we see quite often is something like a kind of high level commercial agreement around this topic so, we will provide the usual in TUPE indemnities or the customer will give TUPE cover to the supplier or the buyer will share redundancy costs or something like that that kind of sounds on one analysis kind of commercially sensible, makes sense, sounds straightforward, people probably felt they had the same understanding of what they meant perhaps in those initial pricing or commercial discussions. But the challenge arises when you actually come to try and nail those concepts down, draft them in the agreement, communicate the implications to employees and representatives in a meaningful and understandable way, you often find that everyone has a slightly different idea about what they meant. You've got your pain in the backside employment lawyer like Patrick or me saying actually if that is what you meant that's really expensive, or that's really legally quite risky. And then, I think the only way to avoid those sorts of situations is to build into your processes the ability for somebody to have a bit of a people/TUPE hat on in those early discussions because often there isn't an HR person in the room, there isn't somebody who has that nuanced understanding of the sorts of considerations we have been talking about. And then at least what you're not going to do is sort of give away the crown jewels inadvertently in an early negotiation. You know, you're better off reserving some of that stuff even until you can check with an expert and I think that, if organisations and commercial and procurement teams could do that I think that would save a lot of headache and potential costs later down the line.
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- Ellie** Absolutely. So, given those high risks, there is naturally going to be disputes Patrick, where the transferee just refuses to accept that TUPE applies at all and that they don't have to accept that the transferor staff will transfer across. So, what sort of arguments legally might they raise to support that position?
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- Patrick** Thanks Ellie, I think probably the easiest way to answer that is almost to go back to the caveats to a transfer I've mentioned earlier. So, the options available would be that transferor B might say that their existing workforce that works on the relevant activity is temporary, it changes regularly and isn't organised by reference to a particular client. So that takes the fundamental element that there needs to be an organised grouping of people whose principal purpose is performing an activity on behalf of a client, that qualifying condition ceases to exist given the temporary change in nature of the employee workforce. So that's one route through which is available to the transferee to say that there isn't a transfer, bearing in mind I'm looking very specifically at service provision change test. The transferee alternatively might obviously run the argument that the activities in their hands are very different from those previously provided by the transferor. So that's taking me back to the, the replacement for dog test, yes, back to border collies. And I guess within that there's a footnote because one of the most obvious ways to change the activity, so change its nature, is to break the activity up and fragment it and in effect transfer small parcels of those activities to a portfolio of transferees and that fragmentation if significantly, if significant, has the consequence that there is a change to the activities, they cease to be fundamentally the same. There is a further footnote, then there definitely is a further footnote, please don't do this to dogs.
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- Ellie** Okay, thank you for that.
- Okay. So, Kelly, can you just run us through your sort of top tips or do's and don't, for those who might be listening to this podcast who are new to the topic of TUPE but who nevertheless find themselves, perhaps reluctantly being tasked with managing a service provision change. What are the key things they need to bear in mind at the very outset?

Kelly

Well, assuming that you can't get out of it by sort of that annual leave that you meant to book, I think you've got to embrace it, put on your I heart TUPE badge. So I'm just going to repeat myself and sound like a broken record initially but the earlier you can get down to really get into the nitty gritty of what is happening on the ground and working out what the potential TUPE implications are of whatever project you are planning, both in terms of where people might move and how and why and what the challenges might be in that but also the potential liabilities where they might rest as between the different parties, how you going to document that, timing etc, etc. There's no thing as too early from a planning perspective. I think oftentimes this gets missed, this next point, in, at least at early stages of a process, but in particular when you are talking about not a first-generation outsourcing, so you're talking about the movement of activities that have previously left the building so to speak. You will almost certainly have something already in place in terms of documentation, now it might not be a perfect commercial agreement, it might be a bells and whistles one, but whatever it does it will often dictate or inform what happens when you then re-tender and move those services, both in terms of the practicalities but also really importantly in terms of the obligations you have and the rights you have as well against the kind of existing organisation and that can be really useful or really challenging depending on what it says or doesn't say but knowing that almost gives you your sort of blueprint for the next negotiation and I think that sometimes gets left. What you don't want to do is end up inadvertently promising if you are the customer, say the new provider, all sorts of protections and then you look back at your existing agreement and you find actually they just don't marry up so you're left with a really, a really uncomfortable position where you've got two sets of obligations to two different organisations that kind of don't fit nearly together so that's quite an important exercise to do early on really. But I think, the most important thing for me is the kind of human element of the whole thing in reality. You have to flow that through all of your TUPE planning ultimately what we're talking about here is the movement of people, the movement of their jobs, it's a really fundamental part of a person's life who they work for and the job that they do so even in the most simple straightforward of TUPE transfers where nothing else is changing, you're talking about people getting a new employer, that's a huge upheaval, even in the best case scenarios, so I think remembering that and remembering the fact that people don't like surprises, we're creatures of habit, most humans, so the extent to which we can allow people time to process what is happening to ask questions to be suspicious and process and then have the conversation and go okay, that's fine actually, I get that now, the better for them as individuals at the human level but also the kind of smoother the process will ultimately be.

Ellie

Finally Patrick, and just picking up on the fact that the TUPE regulations should be interpreted in light of the Acquired Rights Directive which you mentioned earlier, so that's an EU directive. In your view what is the impact of Brexit on TUPE legislation? We are quite limited for time but I just wanted to get your view on whether you think TUPE is going to go anywhere soon?

Patrick

Sure Ellie, it's funny isn't it how history has a habit of repeating itself. So, in many ways it's almost full circle. I mentioned right at the beginning where we'd started off with the sense of a political battle in the 70s with Europe over our domestic resistance to regulation and interventionist social policies. Bizarrely even if it was good for people and the economy and we returned to this same debate 40 years later, my view remains that TUPE will be retained, I can't see it being sent to the scrapheap of EU derived laws. Economic, political and societal considerations in my mind all support the retention of TUPE, the rules are well known, the rules give certainty and rather brilliantly TUPE allows for fair competition. And indeed without it many markets including those which deal with the provision of public services would be closed to some companies. Economically that doesn't make sense. As I say, politically, societally, it doesn't make sense. It's also worth bearing in mind that TUPE safeguards employees in circumstances where but for the regulations those employees would be jobless. And then you can move into the arena where representative bodies for employers, the unions and past governments and that's both Labour and Conservative have supported TUPE so I struggle to see any sensible argument for its removal. It might be modified but it won't go.

Ellie

Well Kelly and Patrick, thank you so much for giving us such a clear and pragmatic overview of why TUPE matters and when it can crop up. And as I mentioned do look out for the next part of this podcast miniseries on TUPE, when we'll take a closer look at the practicalities of the TUPE journey itself when Kelly and Patrick will talk us through employee liability information, when and how to inform and consult with affected employees and the interplay between collective redundancy consultation. If you would like to revisit anything we discussed today you can access transcripts of every episode of The Work Couch podcast by going to our website www.rpc.co.uk/theworkcouch. Or, if you have questions for me or Kelly or Patrick or perhaps you've got a suggestion of a topic you'd like us to cover in future then please get in touch by emailing us at theworkcouch@rpc.co.uk, we'd really love to hear from you. And finally, if you enjoyed this episode we'd be really grateful if you could spare a moment to rate, review and subscribe and please do spread the word by telling a colleague about us. Thank you all for listening and we hope you will join us again in two weeks.



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