

## Workshop 3c

# TUPE IN PROCUREMENT

**Speakers:** Doug Mullen & Andrew Millross (Anthony Collins Solicitors LLP)

**Chaired by:** Neil Watts (Peabody)

**Room:** Surrey room



National Housing  
Maintenance Forum

**NHMF**  
**Maintenance**  
**Conference**  
**2019**



**PRESENTATION BY**

**Douglas Mullen**

**Senior Associate**

**Anthony Collins Solicitors LLP**

[douglas.mullen@anthonicollins.com](mailto:douglas.mullen@anthonicollins.com)

0121 212 7432

**Anthony Collins**  
solicitors



**NHMF**  
**Maintenance**  
**Conference**  
**2019**

# **TUPE – what does it do?**

**Protects employee's terms and conditions from transfer related changes**

**Protects against transfer related dismissal**

**Requires information & consultation**

**Transfers liabilities**

# TUPE – who does it cover?

## Employees

**In an organised group  
whose principal purpose  
to deliver transferring  
work**

**Where assigned to that  
group**

**Some limited  
exceptions**



# TUPE – when won't it apply?

**Where change in client**

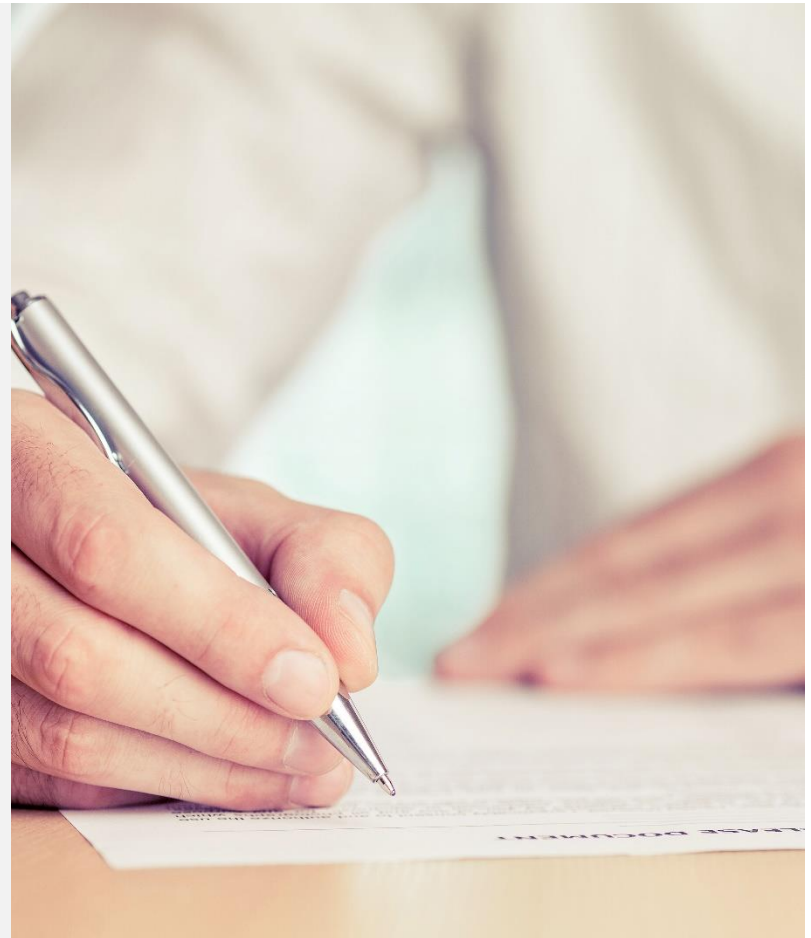
**Where work fragmented**

**Gaps between contracts**

**Supply of goods**

**Single task/short-term job**

**Different activities**





# TUPE – what are the key risks?

**Pensions**

**Redundancy**

**Equal pay**

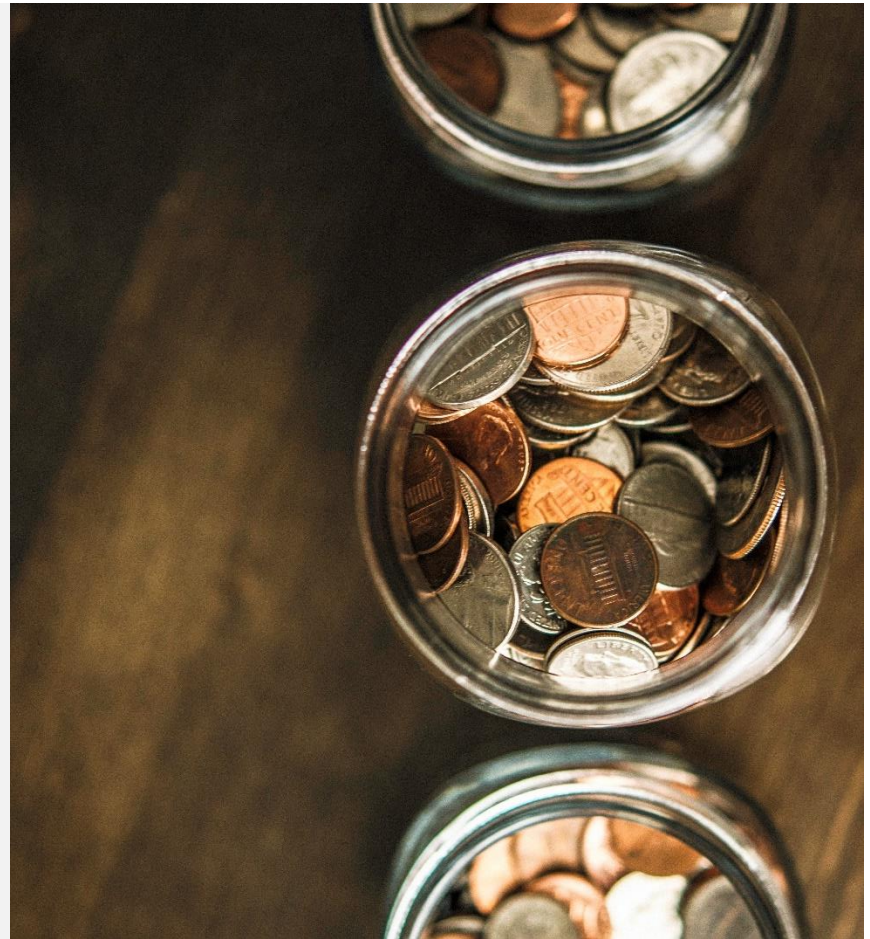
**Absent employees**

**Recent terminations**

**Additional staff**

**Equal pay**

**Local practices**



# **TUPE – what changes can we make?**

**Redundancies?**

**Re-organising the workforce?**

**Harmonizing terms & conditions?**

**Bringing new staff in on different terms?**

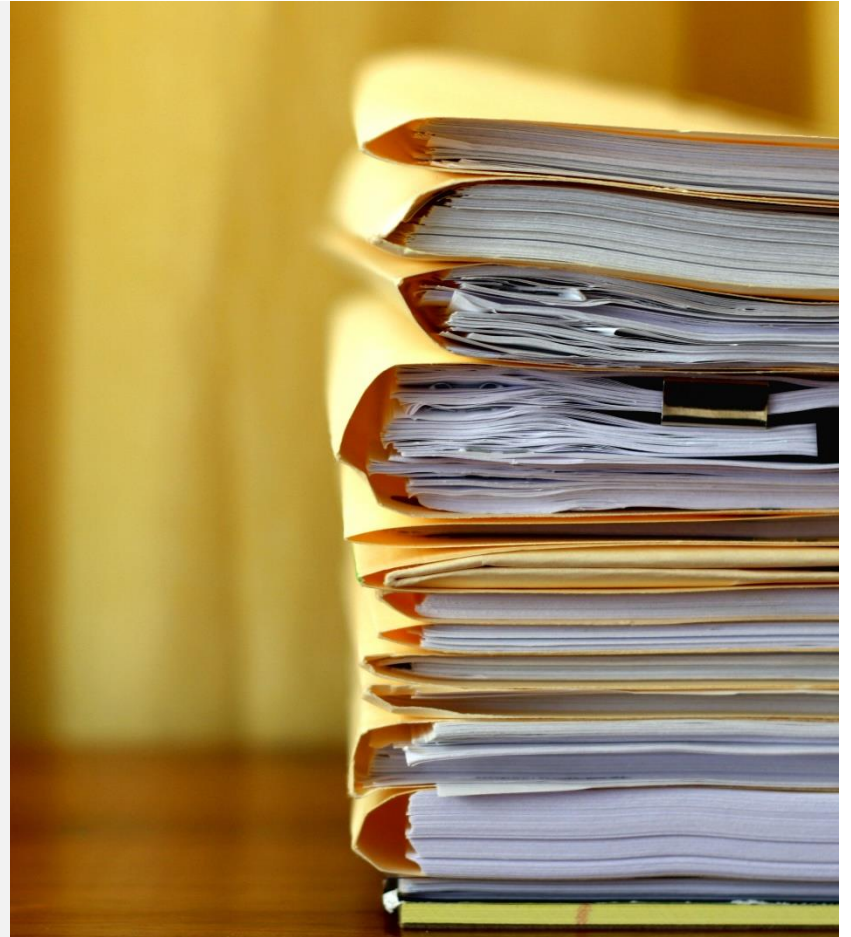
**Cutting costs?**

# Managing and assessing TUPE costs

**Get the right  
information at the  
right time**

**Get protection  
against  
transferring  
liabilities**

**Inform & consult**







**PRESENTATION BY**

**Andrew Millross**

**Partner**

**Anthony Collins Solicitors LLP**

[andrew.millross@anthonicollins.com](mailto:andrew.millross@anthonicollins.com)

0121 212 7473

**Anthony Collins**  
solicitors



**NHMF**  
**Maintenance**  
**Conference**  
**2019**

# Historical procurement law position

## *R v Portsmouth CC ex p Bonaco Builders, 1995*

- ❑ Can include TUPE costs even if tenderers differentially affected

## *European Dynamics v Commission, 2008 & Proof IT SA v EIGE, 2018*

- ❑ No need to neutralise “inherent advantage” of the incumbent through being incumbent

## *Turning Point v Norfolk County Council, 2012*

- ❑ No entitlement to TUPE information
- ❑ Failure to provide information not a breach of equal treatment



# Recent procurement laws

## Regulation 41 PCR 2015

- ❑ Must take “*appropriate measures*” not to distort competition due to “*prior involvement*” of any “*tenderer involved in the preparation of the procurement procedure*”
- ❑ Must “*communicate relevant information ... resulting from the involvement of the tenderer in the procurement procedure*” – TUPE information?

## Amplexor Luxembourg v Commission, 2018

- ❑ Contract to publish OJEU notices let as framework agreement with 3 providers using “cascade” for call-offs
- ❑ Other framework providers received 3% on top of price for “mobilisation costs” during a “transitional period”, Amplexor received 0.3% - not a breach of equal treatment
- ❑ Court said that “*must neutralise incumbent advantage to the extent that it is technically easy to do so*”



# Potential approaches to TUPE costs and risks

## Tenderer's risk

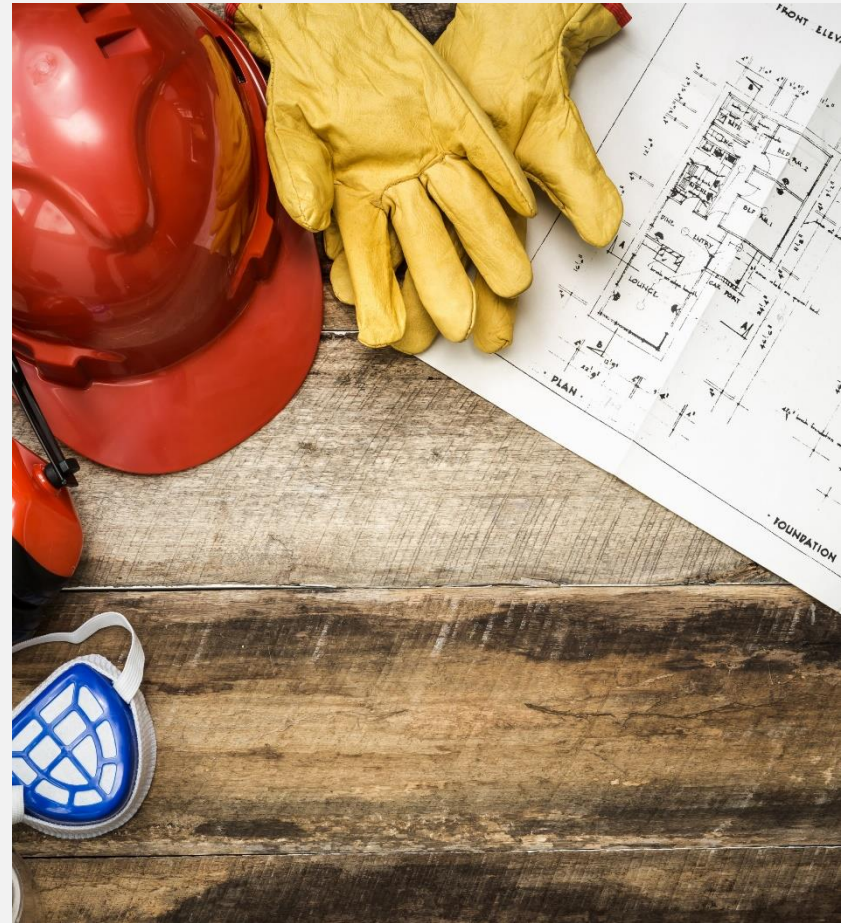
- ❑ Provision of TUPE information

## Separate payment of quantified additional costs

- ❑ Cap at tendered amount?

## Indemnity

- ❑ Assignment of benefit of indemnity from previous contractor



**See you at the  
conference!**

# QUESTIONS?

**e-briefings:**

**<https://www.anthonycollins.com/newsroom/>**

Disclaimer: The advice given in these slides is necessarily generic rather than applying to specific situations. Advice should be taken before action is implemented or refrained from in particular cases. Whilst every effort has been made to ensure its accuracy, no responsibility can be accepted for action taken or refrained from solely by reference to the contents of this presentation. This presentation is based on English and (subject to minor differences) Welsh law. Scotland and Northern Ireland are separate legal jurisdictions and different laws apply there.

© Anthony Collins Solicitors LLP 2019