

Guidelines on the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)

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Links and Dependencies

<p>Related Resourcing Policies including: Redundancy Redeployment and Buy Out of Hours Policy Fixed Term Contract Policy Secondment Policy</p>

Content		Page No
1	Overview of TUPE	4
1.1	What is TUPE	4
1.2	When does TUPE apply	4
1.3	What does transfer	5
1.4	What does not transfer	5
2	Transfers to and from the council	6
2.1	Inward transfers	6
2.2	Outward transfers	7
3	Planning for a TUPE transfer	8
3.1	Disclosure of employee liability information and due diligence	8
3.2	Consultation and information	9
3.3	Protection of/changes to terms (Measures)	10
3.4	Objecting to the transfer and terminating employment	11
3.5	Pensions	12
	Appendices	
1	Letter to employees and TU representatives: Initial notification/start of consultation (outward transfers)	14
2	Letter to employees: Confirmation of new employer consultation and transfer out date (outward transfers)	15
3	Workflow	16

1, Overview of TUPE

1.1 What is TUPE

The Transfer of Undertakings (Protection of Employment) Regulations (called the 'TUPE Regulations' in this policy) came into force in 1981. They were amended on 6 April 2006 to encompass the amended Acquired Rights Directive and replace the 1981 TUPE regulations. They were further amended on 31 January 2014 to reduce the burdens on business, whilst still safeguarding employees.

Transfers to and from the public sector are likely to be subject to the TUPE Regulations, for example outsourcing of contracts. Transfers of administrative functions between public administrative authorities or administrative reorganisation of public administrative authorities are not relevant transfers for the purpose of the TUPE Regulations. However, these transfers are covered by the Cabinet Office Statement of Practice 'Staff transfers in the Public Sector' which guarantees TUPE equivalent treatment for effected employees.

The purpose of the TUPE Regulations is to provide protected employment rights to employees when their employment changes because of a transfer, where services are either:

- outsourced
- brought in-house
- assigned to a new employer

Its effect is to move employees (and any liabilities associated with them) from the existing employer to the new employer, with continuity of service preserved and some protection of existing terms and conditions of employment. It does not cover occupational pensions directly, however more guidance on this is provided later in this document.

This document provides guidance to all those involved in the transfer of employees either in to or out of the council. It provides an explanation of TUPE and when it applies, as well as details the duties of the new employer (transferee), the existing employer (transferor) and the rights of employees.

TUPE was adopted into domestic legislation during EU membership. The TUPE Regulations continue to form a part of domestic legislation following the UK's departure from the European Union.

1.2 When does TUPE apply

The TUPE regulations apply to a relevant business transfer or service provision change. In practice this will often happen when:

- A transfer of an undertaking, business or part of an undertaking or business, situated immediately before the transfer in the United Kingdom, transfers to another employer where there is a transfer of an economic entity which retains its identity.

- A service provision change takes place, for example, where the council wins a tender, loses a contract, or brings a service back in-house. It does not apply to the supply of goods; a service must be supplied for TUPE to apply

Legal advice should be sought on the application of TUPE. There are some instances where TUPE may not apply. These can include:

- Where the contract is for a single event/task of short-term duration only.
- The business/service/activities are not fundamentally or essentially the same, after the change.
- The business either before/after transfer would be fragmented to such a degree it would not be possible to affect a transfer.
- There is no organised grouping of employees to transfer. That could mean that the current structure of employees carrying out the work are not easily identifiable and may be working on a variety of other contracts.
- There are no employees proportionally assigned to the contract to transfer. That could mean that the current services may be carried out by a range of different employees and they are not wholly or mainly assigned just to carry out the service that is transferring.
- There is a change of client.

1.3 What does transfer

The TUPE Regulations provide that upon a relevant transfer the following legal consequences apply.

- Employees who wholly or mainly carry out work on the transferring services, will automatically transfer from the existing employer to the new employer.
- Any collective agreements made with the recognised trade unions prior to transfer will transfer. At the point of transfer, it is a static transfer. What this means is that any future collective agreements/pay awards made by the previous employer would not apply to the employees that have transferred out.
- The new employer takes over all rights, obligations and liabilities arising from those contracts of employment, except criminal liabilities.

1.4 What does not transfer

- Criminal liabilities.
- Occupational pension rights (see section 3.5). The pension position is governed by the Best Value Authorities Transfers (Pensions) Direction 2007, and is

supported by the 'Fair Deal for staff pensions 2013' (New Fair Deal) policy and the 'Cabinet Office Statement of Practice on staff transfers in the public sector' (COSOP) policy.

- Any equipment, vehicles, uniforms, tools, etc., unless agreed separately by both organisations.

2. Transfers to and from the council

2.1 Inward Transfers

Management need to ensure that approval, in accordance with the principles of delegations detailed in the council's constitution, has been given to facilitate the transfer of employees, budget allocation and service provision changes. HR Business Partners will assist managers with the inward transfer.

Legal Services advice should be sought with inward transfers, and this is essential with more complex transfers. There may be cases where the existing employer has given cause for a claim. Liability will pass to the new employer, including claims for unfair dismissal and discrimination, even where the conduct in question took place prior to the transfer

The key points to consider are:

- The existing employer will provide a list of employees who they propose should transfer. It is important to check that the employees are correctly assigned to the service, are in an organised grouping and that the list is correct and kept up to date throughout the process.
- It is likely employees transferring into the council will be on different terms and conditions, policies and pay. It is important to fully understand the employment details and request the employee's employment information as soon as possible through a due diligence process. The existing employer has a legal obligation to provide this at least 28 days prior to transfer.
- There is a legal obligation on both the existing and new employers to consult and inform the affected employees and their representatives/trade unions prior to the transfer. This should include details of the reasons for the transfer, the proposed date of transfer and any changes (measures) that will be made post transfer.
- If any posts are to be made redundant post transfer it is important to make this clear as part of the measures notification to ensure an adequate period of time is given for redundancy consultation.
- It is considered good practice to arrange at least one joint consultation meeting with the affected employees, their representatives/trade unions and both existing and new employers. The affected employees then have a chance to meet and ask any relevant questions.

- Whilst occupational pension provision is not strictly covered under TUPE legislation it is the new employer's responsibility to check what pension provision has been written into any new contract for services, and that it offers a broadly comparable pension scheme.

2.2 Outward Transfers

Transfers out can occur when a service is outsourced, or a new employer takes over provision of the service through a tender or Cabinet decision to externalise.

HR Business Partners and HR Transformation will assist managers to ensure the terms of the outward transfer are fair and any new contract for the provision of services is robust. to facilitate a smooth transition of employees from one employer to another. Details of roles and responsibilities within HR are detailed in Appendix 3. Legal and Pensions advice should be sought with outward transfers

The key points to consider are:

- It is important to clearly define which employees are affected and should transfer out. In general, this is the employees that are assigned to the particular service/contract for most of their time.
- There is a legal obligation on both the existing employer and new employer to consult and inform the affected employees and their representatives/trade unions prior to the transfer. This should include details of the reasons for the transfer, the proposed date of transfer and any changes (measures) that will be made post transfer.
- There are no legal timescales to the length of time transfer consultation takes place prior to a transfer, but as good practice a minimum of two months is recommended where possible.
- It is considered good practice to arrange at least one joint consultation meeting with the affected employees, and both the existing and new employer prior to transfer. The affected employees then have a chance to meet their new employer and ask any relevant questions.
- There is a legal obligation on the current employer to provide employee liability and employment data at least 28 days prior to the transfer to the new employer, as detailed in section 3.1. below
- Whilst future pension provision by the new employer is not strictly covered under the TUPE legislation it is the council's responsibility to ensure through the new contract for services that the employer is offering a broadly comparable pension scheme, or has requested to join the LGPS scheme through admitted body status (see section 3.5).

3. Planning for a TUPE transfer

Critical to any TUPE transfer is accurate employee liability information and due diligence as the new employer will require extensive information to determine what employment obligations are liable to transfer to them under TUPE.

This guide provides an overview of the key steps to follow when planning for an inward or outward transfer and provides template letters in the appendices.

3.1 Disclosure of employee liability information and due diligence

Regulation 11 of TUPE 2006 provides that the existing employer must provide the new employer with certain classes of information about the transferring employees. This information is known as the "employee liability information" (ELI).

A failure by the existing employer to provide the ELI within the relevant timescale would permit the new employer to bring a claim before an employment tribunal, seeking compensation of not less than £500 per employee whose information was incorrect or not provided at all. There is no maximum cap, so awards can be expensive.

Any organisation buying a business, or bidding for a contract to provide services, must undertake due diligence regardless of whether TUPE applies. Employee liability information forms part of this exercise.

This information must be supplied in writing or a readily accessible format. The information details the rights and obligations of the employees who will transfer.

The TUPE Regulations state that this information must be supplied at least 28 days prior to the date of the transfer. However, in practice, the employee information should be sought as early as possible to enable the new employer to check their understanding, set up payroll and ascertain what if any changes (measures) need to be made to affect the transfer. HR Transformation will arrange the collation and provision of the ELI for outward transfers.

The requisite employee liability information is:

- Identity (usually the name) and age of the employees who will transfer.
- Information contained in their 'statements of employment particulars', such as written statement of pay, hours of work, holidays and so on (usually contained in the employee's offer letter or contract of employment).
- Information about any relevant collective agreements.
- Details of any disciplinary action taken against an employee in the last two years.
- Details of any grievance action raised by an employee in the last two years.
- Details of any legal action (before the court or employment tribunal) brought against the employer by an employee in the last two years

- Details of any potential claims that the employer has reasonable grounds to believe that an employee may bring against the new employer arising out of the employee's employment with the current employer

Employees' consent is not required for the transfer of their personal information to the new employer, where it is necessary for the purpose of the transfer and business needs of both parties.

The UK Data Protection Act (DPA) 2018 allows this disclosure because it is required by law. However, both parties must take care to comply with data protection principles when handling this personal information and wherever possible, the employer should release information that is anonymous or, at the very least, should remove obvious identifiers.

It is important to note that when taking on a new contract to check through the due diligence process if any exit clauses have been put in place for the previous employer, or added in for you as the new employer and whether they have previously been enforced. For example, exit clauses can include that there are to be no salary increases in the last three months of the contract or that there is to be a recruitment freeze during the last month prior to transfer. This then stops an outgoing employer who may have lost the tender to put the staffing costs up for the next employer or add more employees just prior to transfer.

Legal Services can assist with this process as required.

3.2 Consultation and Information

Once it is established that TUPE applies and it is confirmed which employees are affected the transferring employees need to receive relevant information.

The TUPE Regulations place a legal duty on both the existing employer and the new employer to inform and consult with the affected employees and their representatives/trade unions. HR Transformation will support the consultation process.

Affected employees are the employees who are transferring, and may also include employees at both organisations who are not transferring but who may be impacted by changes in work, etc.

There are no set timescales for employee consultation, but the relevant information set out below must be provided to the employees and their representatives/trade unions in good time to allow for meaningful consultation to take place and to inform employees and their representatives of the following:

- that the transfer is going to take place.
- the date or proposed date of transfer.
- the reasons why the transfer is taking place.
- the legal, economic, social, and other implications of the transfer for the affected employees.

- whether the new employer intends taking any action, e.g. re-organisation, in connection with the transfer which will affect the employees.
- any changes (measures) to terms and conditions of employment. This usually includes pay date changes, changes to the new employer's policies/procedures, etc.:
- any proposed redundancies post transfer.

Consultation is also an opportunity for employees to raise any issues, find solutions together and for employees to have the opportunity to input on the decisions and how changes are implemented.

Any changes should be discussed during the consultation period with a view to seeking the agreement of the employees and their representatives/trade unions.

Employee Representatives

If the affected employees do not have trade union representatives, they must be given the opportunity to elect an employee representative(s).

Consultation can proceed without trade unions or employee representatives if the employees wish to do so, and they are clear of their rights to have a representative but choose not to.

Access and facilities for representatives

TUPE Regulation 13 (8) sets out the minimum facilities that 'the employer shall allow the appropriate representatives access to any affected employees and shall afford those representatives such accommodation and facilities as may be appropriate'.

This is likely in practice to ensure any representatives are made aware of the group of employees affected and if needed to provide access to a private meeting room for their use, computer, email, access to a noticeboard, etc.

Failure to consult

Employers who fail to inform and consult employees in connection with a TUPE could be ordered to pay a penalty not exceeding 13 weeks' pay to each affected employee. A breach of the information and consultation obligations is therefore a potentially expensive error.

Unlike many other employment tribunal awards, any penalty is based on the employee's actual gross (rather than net) pay and is not subject to a statutory cap.

Either the existing or new employer can be liable to pay the penalty, or it could be split between them.

3.3 Protection of/changes to terms (Measures)

Following amendments to the TUPE Regulations on 31 January 2014, regulation 4(5B) permits a new employer to seek agreement to vary terms and conditions incorporated into individual contracts that are from a collective agreement a year after the transfer.

An employer may also have an economical, technical, or organisational (ETO) reason to change terms and conditions that also entails changes in the workforce. TUPE does not define this but examples are:

- economic: essential cost-saving requirements, for example output has fallen to such a level that the business cannot continue trading without dismissing employees.
- technical: increased computerisation or mechanisation of activities.
- organisational: restructuring or that it is impractical for the employees to transfer to the new business because of where it is located.

Each transfer has its own individual measures (changes) depending on the circumstances. It is likely that there will be minor changes in most transfers that will require employee consultation. The TUPE Regulations do not define measures but they can include but are not limited to:

- change of pay date
- applying council policies/procedures
- change of work base

HR Transformation will support managers in communicating any measures (changes) to employees and their representative/trade unions. **If there are no measures to be taken this will also be made clear to all employees.**

Harmonisation terminology should not be used in connection with TUPE transfers and is not considered to be an ETO reason. The rule is that terms and conditions must not be varied by the existing or new employer if the only or principal reason for the variation is the transfer.

Restructuring can take place following the usual process and terms/conditions changed when certain conditions are met. Improving productivity for the future may be a consideration and in some cases is likely to have occurred whether there was a transfer or not, in response to competitor's rates and wider efficiencies going forward.

Location change has previously been a reason for TUPE not to apply, i.e. service relocates from London to Edinburgh. However, following amendments to the TUPE Regulations in 2014 this will no longer be viable and a change to location will be acceptable for TUPE to apply. In practical terms it is likely in such cases that redundancy may be an option (and a legal reason for dismissal) for employees not wishing to relocate a significant distance.

3.4 Objecting to the transfer and terminating employment

Employees do not have to transfer to the new provider, but if they refuse to do so, they will be considered as having resigned their post. Therefore, they will not be eligible for redundancy payments or to claim unfair dismissal as they have not been dismissed.

The council is not obliged to continue to employ employees in this situation or to place them 'at risk'. Employees may however seek alternative employment where vacancies exist within the organisation.

If the employees are objecting because of changes to their terms and conditions that are not permissible under TUPE, they will have an automatically unfair dismissal claim.

A dismissal of an employee by either the existing employer or new employer because of the transfer itself will be automatically unfair, unless there is an economical, technical or organisational (ETO) reason that also entails a change in the workforce numbers or substantially different duties in the future.

Redundancies post transfer are the exception to this and can be a fair and legal reason for dismissal, even if related to the transfer, as it is likely the reason would fall into an ETO reason, or a wider organisational change reason.

However, redundancies pre-transfer and for the reason of the transfer would likely be automatically unfair, as the previous employer cannot use an ETO reason.

It is important to note that the correct pool of employees is selected for any redundancy process as this is likely to also include current employees not just transferred in employees, as per normal redundancy selection rules.

It is also worth noting that for any dismissals pre-transfer the liability would transfer to the new employer. If the reason for the dismissal is not for the reason of the transfer (i.e. capability, ill health, conduct) it would not be automatically unfair.

Legal advice should be taken when consideration is being given to reducing numbers and/or changing structures and job roles of the affected employees.

3.5. Pensions

Pension rights do not automatically transfer under TUPE, but employers should maintain the transferring employees' membership of their pension scheme or provide a broadly comparable scheme.

Arrangements for employees who are members of, or who are eligible to be members of, a public service pension scheme are covered in The Best Value Authorities Staff Transfers (Pensions) Direction 2007 (the direction) which applies to Best Value Authorities in England.

A contract must provide that the employer shall secure pension protection for each transferring employee and that the provision of the pension protection is enforceable by the transferring employee.

Pension protection is secured for the transferring employee by means of providing pension arrangements through the new employer:

- which are the same as; or

- count as broadly comparable to or better than those in the previous scheme.

Pension arrangements must be determined before the contract for services is awarded. It is important that all tender applicants understand their pension related responsibilities and the related costs associated with providing pension scheme membership for transferring employees

This arrangement should require the new employer to either obtain Admitted Body Status to Derbyshire Pension Fund for participation in the Local Government Pension Scheme (LGPS), or to provide a broadly comparable pension scheme as certified by the Government Actuary Department (GAD), or by the councils' Actuary, confirming the scheme is broadly comparable. Any actuarial costs are met by the new employer.

Admitted Body status is subject to the approval of the council in its role as the administering authority of Derbyshire Pension Fund.

The LGPS is funded through the contributions of employers and employees participating in the scheme. The contributions which employers pay are valued as an estimate of what the benefits payable to scheme members are likely to cost when they are paid. These contributions, which are reviewed at a valuation every 3 years, or at other interim points if required, are invested to seek a return that can meet the benefits payable to members.

A contract must include clarification of responsibility for any funding deficit or surplus in the LGPS at the point of the employer's exit from the scheme.

The Pension Fund is managed and administered by Derbyshire County Council in accordance with the Local Government Pension Scheme Regulations 2013 (2013 Regulations). Employers should seek guidance on pension arrangements from the Derbyshire Pension Fund via pensions@derbyshire.gov.uk. The new employer should decide whether the admission agreement is 'open' or 'closed'. Open agreements allow new employees to join the LGPS, closed agreements restrict membership to only those employees who have TUPE transferred out of the council.

In the case of a transfer to an employer's broadly comparable scheme, a bulk transfer can be considered. This needs to be considered at an early stage in the process so enabling employers to better estimate the costs of a broadly comparable scheme. However, the transferring employees could elect to take preserved benefits in the LGPS up to the date of transfer.

In the case of employees transferring into the council, and already in the LGPS, a bulk transfer value will be agreed by the actuaries representing the Funds.

(Outward transfers)

Letter to employees/trade unions – notice of proposal to transfer out/initial consultation start

Private and Confidential

Name and address

Dear...

Notification of re-tendering of xxx services

I am writing to inform you that the xxxx made the decision on xxxx that the service for which you currently work, xxxxxxxx, should be subject to market testing/formal tender.

This means the tender for this service will be invited from internal and external organisations. The xxxxx will determine the successful bidder in accordance with their procurement guidelines.

What this means for you

I can confirm that should a new organisation win the tender, the Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE) will apply.

This means that all employees whose principal purpose is carrying out activities for xxxx service will continue in employment with the successful organisation in the future, without losing continuity of employment.

You will be consulted and kept informed on any proposed transfer. If you require further information, please do not hesitate to contact me or your Trade Union representative.

Yours sincerely,

Xxxx
Line Manager/Head of Service

Copy to HR & Trade Unions

(Outward transfers)

Letter to employees/trade unions – confirmation of new employer/TUPE date

Private and Confidential

Name and address

Dear...

Confirmation of outward TUPE transfer

I am writing to you following recent consultations with you regarding the outsourcing/re-tendering/ externalisation of xxx service. As a result of a Derbyshire County Council decision I can confirm that the tender process has been completed and the contract has been awarded to xxxxx (new organisation name).

As a result of this the xxxx service will transfer from Derbyshire County Council to xxxxxx on xxx.

The proposed transfer will affect xx employees who are presently assigned to the transferring contract and employed currently by Derbyshire County Council.

The reasons for the transfer are xxxxxxxx

The Transfer of Undertakings (Protection of Employment) Regulations 2006 and the Code of Practice on Workforce Matters in Local Authority Service Contracts will apply to the transfer.

This means that that the employees assigned to the transferring service will transfer to the new employer on their existing terms and conditions of employment, with continuity of employment preserved. Transferring employees will continue to pay into the Local Government Pension Scheme/ **or insert new pension arrangements.**

You will continue to be paid by the council until xxxxx date and from then onwards you will be paid by xxxx.

It is not envisaged that xxxx will be taking any measures (changes to your terms and conditions of employment) in connection with the transfer of affected employees

(or insert any measures-i.e. pay date change).

A joint meeting with the new employer xxxx has been arranged on (insert date/time/venue) to discuss the transfer. You will have the opportunity to ask questions at this meeting, but should you have any questions in the meantime please do not hesitate to contact me.

Yours sincerely

Name

Head of Service

Copy – new employer & Trade Unions

Appendix 3 - TUPE OUT PROCESS



