

# A GUIDE TO THE LAW ON TUPE

January 2012, Workforce Team

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## Introduction

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE/the Regulations) provide that where there is a 'relevant transfer' from one employer to another, the new 'transferee' employer takes over the contract of employment of the employees working in the undertaking that transfers.

This guide sets out the main points of the Regulations, and while it is not a complete statement of the law, it is intended to provide guidance to help local authority employers understand the position.

## 1 Relevant transfers: the scope of the Regulations

The Regulations apply to 'relevant transfers'. A 'relevant transfer' can occur:

- when a business, undertaking (or part of one) is transferred from one employer to another as a going concern (this is known as a 'business transfer'), or
- when a client engages a contractor to carry out work on its behalf, or where it re-assigns such a contract – including bringing the work back 'in-house' (this is known as a 'service provision change transfer').

The two categories are not mutually exclusive and it is possible that a transfer will fall into both categories.

### A business transfer

For a business transfer to take place, there must be a change in the identity of the employer and the transfer of an 'economic entity which retains its identity'. For the purposes of the Regulations, an 'economic entity' means an 'organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'. An 'organised grouping of resources' can mean tangible or intangible assets as well as employees.

### A service provision change transfer

The Regulations provide that a service provision change will occur in circumstances where:

- a client out-sources a service; or
- the service is awarded to a new contractor following a second generation tendering exercise; or
- the contract is brought back 'in-house' and is undertaken by the client itself.

The term 'contractor' in relation to a service provision transfer specifically includes sub-contractors. Therefore a transfer will occur in circumstances where the client awards a contract to a main contractor, who then in turn, awards the work (or a part of that work), to a sub-contractor whilst retaining the contract with the client.

In a service provision change, it appears to be enough that the ‘activities’ in question cease being carried out by one person and are carried out in future by another or others, as long as those changes in service provision involve ‘an organised grouping of employees which has as its principal purpose the carrying out of those activities on behalf of the client’.

This requirement is intended to confine the application of the Regulations to circumstances where the transferor has a dedicated team of employees that carry out the service activity that is to be transferred (although ‘dedicated’ does not mean that the employees must be working exclusively on those activities).

As well as capturing the award or reassignment of a service contract, the Regulations could also apply where the original contract is split, and assigned to different contractors.

### **Exceptions – ‘one-off’ basis**

The Regulations will not apply where a client buys in services from a contractor on a ‘one off’ basis rather than entering into an ongoing relationship for the provision of the service.

### **Exceptions – ‘supply of goods for client’s use’**

The Regulations are not expected to apply where a client uses a contractor to supply goods for the client’s use. The intention here is to exclude situations such as that in a contract to supply sandwiches and drinks to a staff canteen, where the client then sells on the goods to its employees. However, a contract to run the client’s canteen would not be caught by the exception and the Regulations could apply.

## **2 Staff transfers within public administrations**

Under the Regulations, the reorganisation of a public administrative authority, or the transfer of administrative functions between public administrations, is not a relevant transfer within the meaning of the legislation.

However, the Cabinet Office Statement of Practice on staff transfers (commonly referred to as ‘COSOP’) provides that such transfers should follow TUPE principles. Such transfers will therefore normally take place either by a statutory order applying the requirements of TUPE or more arguably, by a consensual agreement that COSOP applies and that the principles of TUPE will be adhered to.

## **3 Withdrawal of two-tier code**

The local government two-tier code (the Code of Practice on Workforce Matters in Local Authority Service Contracts) no longer applies as it was withdrawn on 23 March 2011. The code, which formed part of [ODPM Circular 03/2003](#), required local authorities to specify in tender contracts that employees hired by the successful contractor had to be provided with terms and conditions “no less favourable overall” to the transferred ex-public sector employees they would work alongside. The announcement withdrawing the code is available at at

<http://www.communities.gov.uk/statements/newsroom/openpublicservices>.

However, some pension protections still apply to employees transferring from an authority on a contracting out (see 5 below).

## **4 Who and what transfers**

### **Who transfers?**

All of the transferor's employees assigned to the organised grouping that is transferring will transfer. The definition of employees in the Regulations includes apprentices.

Where an employee works across two or more parts of the transferor's organisation and only one part is transferring, the question of whether the employee is assigned to the part that is transferring is determined by assessing where the employee predominantly works. This is a question of fact in each case and relevant factors will include:

- the amount of time the employee spends in the transferring part;
- the value and importance the employee has to the transferring part;
- what the terms and conditions say about the employee's role; and
- how the employee's costs are distributed across the different parts.

### **Exclusion of 'temporarily assigned employees'**

The Regulations do not apply to employees who are only temporarily assigned to the organised grouping that is transferring. Whether or not an employee is deemed to be on a temporary assignment will depend on a number of factors, including the length of the assignment and whether or not the employee has a date to return to a part of the transferor's business that is not transferring.

### **Employee objection**

Employees can object to transferring. If they do, the employee's employment is deemed to have terminated by operation of law, not by dismissal. However, if the objection is because the transfer involves or would involve a substantial change to the employee's terms and conditions to their material detriment, the objection will amount to a dismissal.

### **What transfers: contract of employment**

The basic underlying principle of TUPE is that when a relevant transfer occurs, the transferee takes over the contract of employment of the transferring employees. Terms that will typically transfer under the contract include:

- pay scales and rates and pay intervals;
- hours of work;
- place of employment;
- continuous service;
- annual leave entitlements;
- sick leave and sick pay schemes;
- maternity provisions;
- part-time or flexible working arrangements;

- other time off arrangements; and
- disciplinary, grievance and other contractual procedures.

### **Transfer of trade union recognition agreements**

As a general principle, the transferee inherits any voluntary trade union recognition agreements that are in place at the time of the transfer that relate to the transferring employees. However, the Regulations include an important exception. The transferee will only be required to recognise an independent trade union, if the organised grouping of transferred employees for whom the trade union is recognised maintains an identity distinct from the rest of the transferee's business. If the transferring employees do not retain a separate identity, the trade union recognition agreement lapses and it will be up to the transferee and the trade union(s) to renegotiate a new agreement, or amend an existing agreement if the transfer introduces a new trade union into the transferee's business.

The exception should prevent disruption to existing industrial relations arrangements when a group of workers are transferred into an existing group of workers who are represented by a different trade union. There is nothing to stop the transferee amending its existing arrangements to include the new trade union, but the exception means it is not compelled to upset the status quo if it would be too disruptive.

## **5 Pensions**

Under the Regulations, the provisions of an occupational pension scheme, as defined by the Pension Schemes Act 1993, are excluded from transfer. However, it is specifically provided that provisions other than those relating to old age, invalidity or survivors' benefits are not treated as being part of the occupational pension scheme, and are therefore liable to transfer.

### **Pensions Act 2004 and Transfer of Employment (Pension Protection) Regulations 2005**

Aside from the Regulations though there are some pension protections under the Pensions Act 2004 and Transfer of Employment (Pension Protection) Regulations 2005 which apply to employees who transfer and were in, or eligible to join, or in a qualifying period to join, the relevant occupational pension scheme. This means the new employer must offer either membership of an occupational pension scheme or a stakeholder arrangement as follows:

Occupational Pension Scheme:

- a money purchase scheme with the employer matching employee contributions up to 6% of basic pay; or
- a non-money purchase scheme (generally a final salary or cash balance scheme) providing either:
  - a final salary scheme that meets the "reference scheme test" for contracting out of the state second pension (generally providing a

pension of 1/80 of contracted-out earnings for each year plus provisions for spouses); or

- a scheme that matches employee contributions up to 6% of basic pay; or
- a scheme that entitles members to benefits worth at least six per cent of pensionable pay (defined in the schemes rules as the pay that is used to determine the amount of contributions and benefits) per annum, plus the value of the employees' own contributions (and in this case, employees cannot be required to contribute in excess of 6% of pensionable pay per annum)

Stakeholder Pension Scheme:

- a scheme that matches employee contributions up to 6% of basic pay.

### **Public sector transfers (excluding local government): Fair Deal**

The Fair Deal policy (its full name being Staff Transfers from Central Government: A fair deal for Staff Pensions) applies to the public sector, except for local government. It requires the provision of a broadly comparable pension to employees who transfer within the public sector and out to the private sector. However, HM Treasury is reviewing the Fair Deal policy and is considering a range of options for future policy, which run from keeping the policy in its current form, to removing it altogether.

### **Contracting-out transfers from local authorities**

Unlike the rest of the public service, the Fair Deal pensions policy does not apply to local authorities. However, the Best Value Authorities Staff Transfers (Pensions) Direction 2007 provides that on a contracting out from a Best Value Authority in England or a Police Authority in Wales to a service provider, the transferring employees must be provided with continued access to the LGPS (via an admission agreement) or to a broadly comparable pension scheme.

## **6 Changes to terms and conditions**

The Regulations set out the circumstances in which an employer and employee can agree to change terms and conditions of employment of transferred employees. They make it clear that the employer must never vary the contract of employment where the sole or principal reason is:

- either the transfer itself; or
- for a reason that is connected to the transfer that is not an economical, technical or organisational (ETO) reason entailing change in the workforce.

Any attempt to vary a contract of employment in these circumstances will be rendered void by the Regulations.

[The Department for Business, Innovation and Skills' \(BIS\) guidance](#) on TUPE seeks to clarify some contentious issues that arise from case law.

### **By reason of the transfer or in connection with the transfer?**

The BIS guidance differentiates between an action that is by reason of the transfer itself and one that is for a reason connected with the transfer. A change that is *by reason of* the transfer itself is one where there are no extenuating circumstances linked to the reason for the proposed change in terms and conditions. Conversely, where the reason for the change is prompted by a knock-on effect of the transfer, such as the need to re-qualify staff to use different machinery used by the transferee, then the reason is *connected to* the transfer and a variation will be valid if that reason is also an economic, technical or organisational reason.

### **An ETO reason**

There is no statutory definition of an ETO (economic, technical or organisational) reason, but the BIS guidance suggests it is likely to include:

- a reason relating to the profitability or market performance of the transferee's business (an economic reason);
- a reason relating to the nature of the equipment or production processes used (a technical reason); and/or
- a reason relating to the management or organisational structure of the transferee's business (an organisational reason).

### **Circumstances where a variation may be agreed**

The employer and employee can agree to vary the terms and conditions of employment where the sole or principal reason is unconnected with the transfer, or is connected with the transfer and is an ETO reason entailing changes in the workforce. The Regulations do not define what is meant by 'entailing changes in the workforce' but the courts have interpreted it to mean that the employer must change the job functions performed by the employees or change the number of employees making up the workforce.

Employers should remember, however, that the normal employment law rules governing variations to contracts of employment continue to apply, and an employer cannot unilaterally change contractual terms.

### **Post-transfer harmonisation**

The BIS guidance emphasises that the courts have interpreted that a proposal to vary terms and conditions to achieve harmonisation will be seen as being by reason of the transfer itself. Therefore, an employer cannot rely on an ETO reason that would potentially validate the variation.

## **7 Unfair dismissal**

The Regulations provide that where, either before or after a transfer, an employee of the transferor or transferee is dismissed, the dismissal is automatically unfair if:

- the reason is the transfer itself; or
- the reason is connected with the transfer that is not an ETO reason entailing changes in the workforce.

Where there is an ETO reason entailing changes in the workforce, then the dismissal is not automatically unfair but is subject to the normal requirements on unfair dismissal.

## **8 Redundancy**

Under normal circumstances, redundancy will be an ETO reason for a dismissal in a TUPE situation, and therefore potentially a fair dismissal (subject to the normal rules on unfair dismissal).

## **9 Notification of employee liability information**

The Regulations require the transferor to provide the transferee with a specified set of information that will enable the transferee to understand the rights, duties and liabilities in relation to the transferring employees.

The information required is:

- the identity of the employees who will transfer;
- the age of those employees;
- information contained in the 'statement of particulars' for those employees (the information required by s.1 of the Employment Rights Act 1996);
- information relating to any applicable collective agreements;
- instances of disciplinary action within the preceding two years taken by the transferor in respect of those employees in circumstances where the [Acas Code of Practice on disciplinary and grievance procedures](#) applies;
- instances of any grievances raised by those employees within the preceding two years in circumstances where the Acas Code applies; and
- instances of any legal action taken by those employees against the transferor in the previous two years, and instances of potential legal action that may be brought by those employees where the transferor has reasonable grounds to believe such actions might occur.

### **Timing of the information**

The information should be given at least two weeks before the transfer takes place. In special circumstances where it is not reasonably practicable to meet this deadline, the information must be supplied as soon as is reasonably practicable. The information may be given in instalments, as long as all of the information is provided and the two-week deadline is met. The information can be given by a third-party, for instance a local authority could pass the information from the existing contractor to the new contractor in circumstances where the contract is awarded to a new employer following a second-generation tender.



### **Information must be in writing**

The information must be provided by the transferor in writing, or in other forms that are accessible to the transferee. This would include electronic data, such as e-mail, so long as the transferee can access the information.

### **Changes to the information**

If any of the information changes between the time it is originally provided and the date of the transfer, the transferor is required to give the transferee written notification of the changes.

### **Remedy for failure to notify transferee**

If the transferor does not provide the employee liability information, the transferee can complain to an employment tribunal. If the complaint is upheld, a declaration to that effect will be made and the transferee will be awarded compensation for any loss that it has incurred because of the failure to provide the information. The level of compensation will be at least £500 for each employee for whom the information was not provided, unless it would be just and equitable to award a lower sum.

## **10 Informing and consulting with the affected workforce**

Both the transferor and transferee are under a duty to inform and in circumstances where “measures” are proposed to also consult with the appropriate representatives of the affected employees. The affected employees may also include employees who are not transferring, if the transfer will impact on them.

### **Measures**

The Regulations do not define ‘measures’ but they are normally taken to include proposals that the employer proposes to put in place, such as redundancies or a change in the workplace, even if the change does not result in a change to employees’ terms and conditions.

### **Employee representatives**

Where the employer recognises a trade union in respect of the affected employees, the representatives will be the trade union representatives. Otherwise, the representatives will be other employee representatives already in place or representatives elected for the purpose of informing and consulting under the Regulations.

### **Informing**

Long enough before the transfer to allow consultation to take place with the employee representatives the employer must inform the representatives:

- that the transfer is going to take place, when it is proposed to take place and the reason for it;
- of the legal, economic and social implications for the affected employees;

- any measures that are proposed in connection with the transfer, and if none are proposed of that fact;
- the total number of agency workers working temporarily for and under the supervision and direction of the employer;
- the parts of the organisation in which they work; and
- the type of work they are carrying out.

### **Consulting**

The Regulations provide that consultation must take place with a view to seeking the employee representatives' agreement to the intended measures. The employer must consider and respond to representations made by the representatives, and if they are rejected give the reason why.

### **Liability**

The transferor and transferee will be jointly and severally liable in respect of compensation awarded for any failure to inform and consult employee representatives.

Further details of the informing and consulting duties are in the [BIS guidance](#) to the Regulations.

## **11 Employers' liability compulsory insurance**

In circumstances where the transferor is either not required to, or is exempt from, holding insurance under the Employers' Liability (Compulsory Insurance) Act 1969 (the 1969 Act), the transferor and transferee will be jointly and severally liable for any personal injury liability that arises from an employee's employment with the transferor prior to a relevant transfer.

Under the 1969 Act, public bodies do not have a statutory duty to hold employers' liability insurance and, in circumstances where the transferor is a public body that does not carry such insurance, this provision means that a claimant who is injured before the transfer can choose whether to bring a claim against either the transferor or the transferee.

## **12 Legislation**

EC Acquired Rights Directive 2001/23/EC  
Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246).

## **13 Sources of Information**

### **BIS guidance**

The Department for Business, Innovation and Skills (BIS) has published general guidance on the Regulations. Although it should not be regarded as a complete statement of the law, it does provide practical guidance to help employers and

employees understand the provisions. For guidance to the regulations governing the transfer of undertakings please see the BIS website at:  
[Employment rights on the transfer of an undertaking: a guide to the 2006 TUPE regulations for employees, employers and representatives](#)