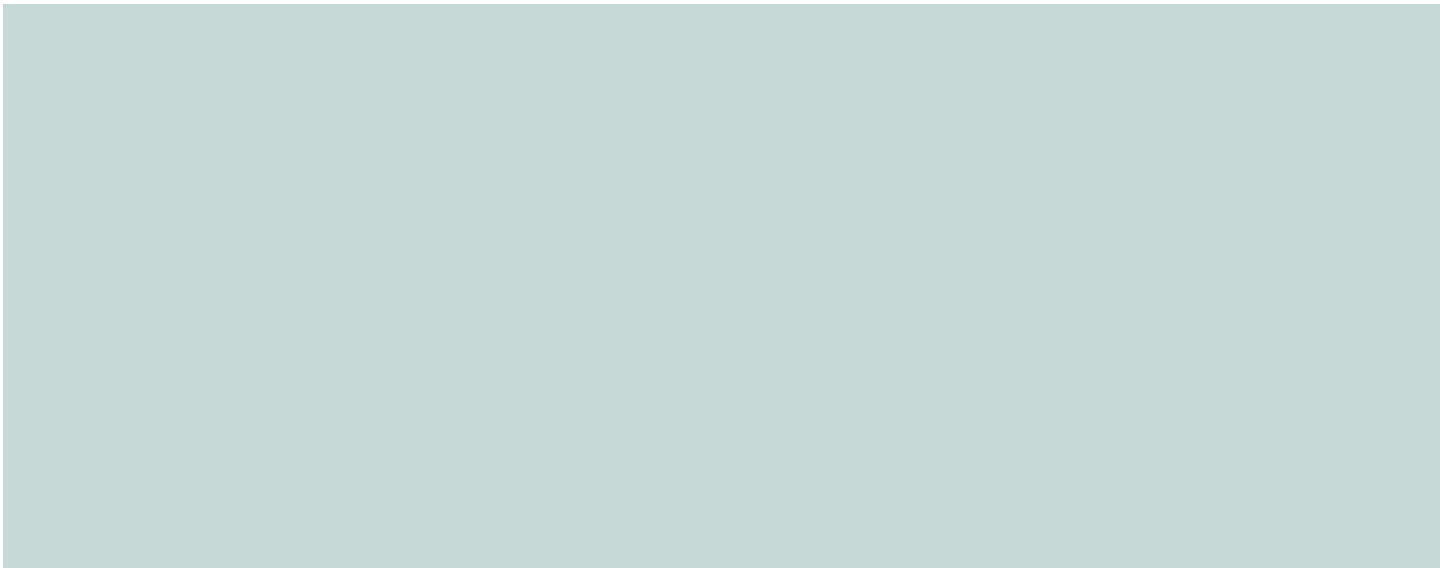


UNISON TUPE branch guidance



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Introduction

Welcome to UNISON's branch guidance on TUPE transfers. Whether you are dealing with proposals to transfer staff out of the public sector and into a private company, shift employees into a community / voluntary organisation or even the movement of staff between private sector companies, this guide will assist you in addressing the many challenges that TUPE presents.

Guide structure

The process through which an organisation passes to secure the supply of services is known as procurement and the typical components of that process are set out in the diagram overleaf. Starting with an initial needs assessment exercise, the process tends to move on to a service review and appraisal of options before the eventual placing of a service out to tender and contract award.

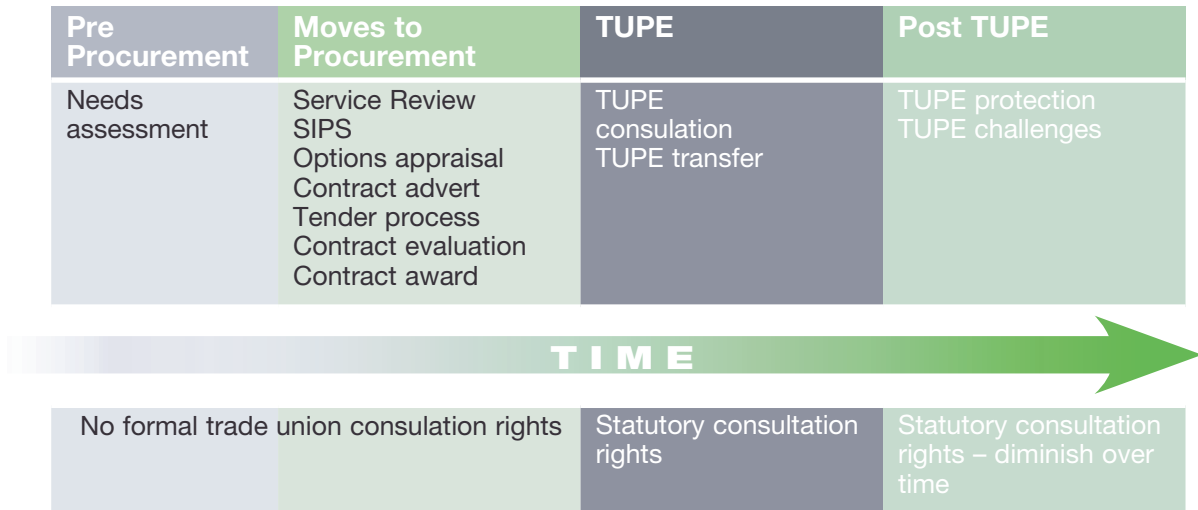
However, it is the process following the award of a contract to a new service provider that forms the principal focus of this guide. At this point, statutory consultation rights under TUPE come into effect and the branch must act quickly to ensure that the rights enshrined by TUPE are applied while building the strength to form an effective force in the organisation that takes over service delivery.

Therefore, in order to provide a handy overview, the first chapter of this guide provides a short summary of the key tasks facing branches during the move toward procurement, such as exploring the options

to avoid transfer, gathering information and influencing the tendering process. However, this dimension of the process is dealt with more thoroughly in UNISON's guide to campaigning and negotiating around the entire procurement process, entitled "From Commissioning to Contract Evaluation," which can be found at unison.org.uk/acrobat/17808.pdf

The second chapter then moves on to explain the statutory consultation rights specified by TUPE legislation, the employment rights of staff transferring under TUPE, the pitfalls and grey areas in the applicability of TUPE and the organising issues that require urgent attention as the transfer proceeds.

Finally, the third chapter assesses the post TUPE transfer landscape, the nature of the challenges to which TUPE can be exposed, the legal claims open to individuals and unions, and the practicalities of the organising challenge among the transferred workforce.



A critical organising challenge

UNISON remains vigorously opposed to privatisation of public services and powerful campaigns are conducted at national, regional and branch level to keep services in-house. However, it is an unfortunate reality that vast numbers of staff have been lost from the public sector through outsourcing over recent decades and privatisation pressures are intensifying again as public bodies are forced down the route of procuring services from a variety of providers.

It is absolutely critical to the future of UNISON that it comes to grips with the new organising challenges that this changed reality of public service provision presents

If transferred members are allowed to feel cut off from the union or develop the belief that being a member of the union is no longer worthwhile, that can only lead to an ebbing away of membership and effectiveness in representing the interests of members.

Therefore, it is this pivotal challenge and the questions it throws up of how to defend the terms and conditions of a workforce facing transfer and build bargaining strength in the long term that forms the backdrop to this guide.

1 Key Tasks Pre Procurement

1.1 Preparation

Even before any intention to put a service out to tender has come to light, branches should seek to pre-empt the tendering process by negotiating a procurement policy with their public sector employer. The policy should cover negotiations on alternatives to contracting out at the 'option appraisal' stage, when your employer is looking at how it intends to provide the service, as well as trade union and staff involvement when the decision to contract out has been made. A full checklist of issues to cover in a corporate procurement policy are set out in Appendix 2.

However, the moment you hear that your employer is intending to put a service out to tender or retender an existing contract it is vital to act quickly.

The pre-transfer period is an absolutely crucial period when the main decisions that will shape any post transfer landscape are taken. This is the time that offers the only opportunity to avert transfer, but if the transfer goes ahead it is also the time when the branch needs to seize the chance to gather information, organise the targeted workforce and shape agreements with the employer across employee rights and bargaining arrangements.

1.2 Options to avoid staff transfer

Once the intention to put a service out to tender has come to light, branches should weigh up the feasibility of the following main options for seeking to avoid transfer of staff to a new employer.

Oppose the transfer

It is UNISON policy to oppose the privatisation of public services. Branches

may want to mount a campaign against the possible outsourcing and build up support from the local community and general public. You will also need to gather arguments against the privatisation.

More information on how to campaign against privatisation can be found at unison.org.uk/getCampaigning/effectiveCampaigning.asp

For Local Government branches, the "Think Twice" guide also provides a useful tool for reminding councillors of the dangers of outsourcing, while "Fighting Privatisation in Local Government" offers advice on campaigning.

"Think Twice" can be found at unison.org.uk/acrobat/B5150.pdf and "Fighting Privatisation" can be found at unison.org.uk/acrobat/19989.pdf

In-house improvement plans and bids

Seek to avert having services put out to tender by raising the possibility at the options appraisal stage of developing an in-house service improvement plan. The Association of Public Service Excellence (APSE) has developed advice on developing such improvement plans, which can be found at apse.org.uk/briefings/10/10-56%20%20In-House%20service%20improvement%20plans.pdf

Developing shared services across public sector organisations can form a valuable option for delivering an improvement plan that achieves cost improvements without entailing job cuts or transfers. This scenario is set out in more detail for local government branches at unison.org.uk/acrobat/Branch%20Guidance%20-%20In-house%20shared%20services.pdf

If tendering proceeds, it is important to establish early on whether an in-house bid will be submitted. If a bid is being prepared then this will be done by management but it can be influenced by trade union involvement. It is good practice for an in-house bid to be submitted but this is not always possible as organisations may have already decided that the service will be outsourced.

If an in-house bid is being prepared, find out how management intend drawing up the in-house tender and insist that you are involved at all stages. The purpose of union involvement is to try to influence the in-house bid but your involvement does not mean that you agree with every aspect of it.

Involve members, talk to them about the in-house tender and how they feel about any proposals.

UNISON has summarised the case for in-house services in a guide that can be downloaded from the UNISON website at unison.org.uk/file/The%20case%20for%20in-house%20services%20-%20a%20branch%20guide.pdf

In addition, UNISON's Local Government Service Group has produced a practical guide with the Association of Public Service Excellence (APSE) on bringing services back in house, which can be found at unison.org.uk/acrobat/APSE_Insourcing.pdf

For any further advice required from APSE on trade union involvement in a bid, local government branches are advised to contact their regional officer.

Alternatives to transfer

Branches may find it useful to investigate the possible alternatives to transfer offered by

secondment and the Retention of Employment Model.

Some authorities have agreed to staff being seconded to a new employer rather than being transferred. In the case of Liverpool Direct, a joint venture company (JVC) formed between Liverpool City Council and British Telecom, staff were seconded to the JVC instead of being transferred. They remain employees of Liverpool City Council.

Guidance on mass secondments for local government branches and further case studies on their application can be found at unison.org.uk/acrobat/B5075.pdf

However, the cases of *Celtec Ltd v Astley & Ors* and *Capita Health Solutions Ltd v McLean* highlight the dangers of assuming that secondment arrangements can avoid the effect of the automatic transfer of employment on a TUPE transfer even when it is intended that the employee never becomes the employee of the transferee. The cases do not establish that all secondment arrangements are invalid, but some very clear explicit arrangements are necessary to make a secondment arrangement viable. Further guidance on *Celtec* can be found here: unison.org.uk/file/UNISON%20LG%20Secondments%20advice%20-%20final.pdf

In the past, secondment arrangements have been made through use of the Retention of Employment Model (ROEM) and, where a secondment is being proposed, failure to follow ROEM would leave members at risk of having been transferred to the new employer, by operation of the law.

The ROEM first came about as a policy implemented by the Department of Health, covering staff employed in NHS Trusts in

England, which are involved in Private Finance Initiative (PFI) schemes. Under ROEM, ancillary staff in cleaning, catering, laundry, portering and security services remained NHS employees and did not automatically transfer to the private sector. They were managed by the private sector.

In order for ROEM to apply effectively, strict conditions must be met and these are set out in appendix 3. For more information about ROEM see “PFI NHS Retention of Employment Model: A UNISON Briefing and Negotiating Guide” which can be found at unison.org.uk/acrobat/B935.pdf

In further education, UNISON and the Association of Colleges has developed a joint statement on shared services, which includes early consideration of secondment arrangements. This statement can be found at unison.org.uk/education/further/pages_view.asp?did=13906

1.3. Gathering information

In order to influence the tendering process effectively it is important to obtain as much information about the proposed transfer as possible.

There is no statutory requirement on the employer to inform and consult the workforce until a contract is awarded under TUPE. However, branches should take an early lead and try to persuade the current employer to enter early discussions and provide information. They may decline to get involved until the statutory time period, but many good employers will co-operate even if they cannot give you all of the information you need.

Find out which service(s) have been selected for outsourcing and why, what the proposed

timetable is, how many jobs will be affected and who will be transferring.

In some situations management will tell you that they are still identifying exactly which services and staff are to transfer. Even if this is true, do not let them use this as an excuse to delay giving you other valuable information.

Speak to the staff affected and gather information on their terms and conditions so that this can be cross checked with the **employee liability information** that the old employer will give to the new employer (see section 2.3)

It is important to identify the key decision makers in the process. Try to obtain the information from your employer, however if they appear to be dragging their feet then you should try to get the information elsewhere.

Procurement process information

All UK public authorities are required by law to comply with the Public Contracts (Scotland) Regulations 2006 or the Public Contracts Regulations 2006 (England, Wales and Northern Ireland). This means that all public sector contracts worth more than approximately £144,000 for services and supplies and £3.6m for works must be publicly advertised.

The authority must publish a ‘Prior Information Notice’ at the beginning of each financial year listing the contracts it intends to tender. It must then place an individual notice for each contract in the Official Journal of the European Union when it is being tendered. There are four procedures that can be used to tender contracts.

- *The open procedure* – The contract is advertised and contractors submit a bid.
- *The restricted procedure* – The contract is advertised and contractors submit an ‘expression of interest’. The authority then selects those which meet its criteria who are invited to bid.
- *The competitive dialogue procedure* – This may only be used in the case of particularly complex contracts. The authority enters into a dialogue with contractors about how the contracts can be best fulfilled.
- *The negotiated procedure* – A minimum number of potential contractors are invited to negotiate. This procedure has generally been replaced by competitive dialogue and should only be used in the ‘exceptional cases’ set out by the Office for Government Commerce at hm-treasury.gov.uk/d/competitive_dialogue_procedure.pdf

Freedom of Information

The Freedom of Information Act enables the public and trade unions to gain access to information that had previously been unavailable to them. UNISON guidance on utilising the Freedom of Information Act is available at unison.org.uk/acrobat/B1959.pdf

Company Information

Find out which companies are interested in tendering and obtain information on them and their relationship with UNISON from the Bargaining Support Group (bsg@unison.co.uk)

Bargaining information

Throughout the transfer process, the branch may find it useful to cite the code of practice on disclosure of bargaining information, which has been summarised by ACAS at acas.org.uk/CHttpHandler.ashx?id=273&p=0

The code covers access to information and statistics on pay and benefits, conditions of service, workforce breakdowns, performance, efficiency and financial information.

If an employer unreasonably refuses access to information, a complaint can be made to the Central Arbitration Committee (cac.gov.uk) which can make a declaration requiring the information to be disclosed. Continued refusal can result in the committee making an award against the employer.

1.4. Organising and recruiting

Whether the public authority has made a formal announcement to staff or they have merely heard rumours of a forthcoming tendering exercise, there will be a great deal of unease and uncertainty amongst staff. Workers will understandably be feeling insecure about their jobs and their potential new employer. Branches should get involved by organising around this issue and recruiting members and stewards to be involved in the process. Branches are more likely to recruit new members when they can see the union can influence the process.

It is also extremely important to make sure the union is communicating with the workforce, so that they can see the union has a role to play. Members should be engaged at all stages so try to hold regular workplace meetings and produce bulletins keeping members informed of the process and the developments at regular intervals.

Undertake a mapping exercise to identify members affected by the outsourcing and assist targeted organising and recruitment. Guidance on effectively mapping the workplace is set out in Appendix 4.

Begin to identify potential stewards / reps among the staff facing transfer so that the union is in a strong position to sustain organisation post transfer.

UNISON's general organising and recruitment material can be found at unison.org.uk/recruitment/index.asp

1.5. Influencing the tender process

Once you hear that a service is to be put out to tender, it is important to establish that TUPE will apply. Pointers over the applicability of TUPE are set out in chapter two, but if the employer argues that TUPE will not apply, then you should contact your regional officer to obtain legal advice.

Details of the typical contract documentation specifying the work up for tender are set out in Appendix 5.

As noted earlier, branches should seek to negotiate a procurement policy in advance of tendering. Such an agreement with your employer sets out a clear policy for trade union involvement throughout the process. A full checklist of issues to cover in a corporate procurement policy are set out in Appendix 2.

If you are able to negotiate a procurement agreement it is important to get agreement on seeing the draft contract documents. If you can influence the drafting of the contract documents before they are finalised, you will be able to exert much greater union influence on the whole transfer process.

Interviewing contractors

As good practice, branches should try to interview the potential contractors as early as possible in the tender process. Draw up a set of questions and before you go into the meeting make sure you know what you want to get out of it. The following are some key points to consider when preparing for an interview with shortlisted bidders:

- Obtain a list of the shortlisted bidders;
- Ask your regional officer or the Bargaining Support Group for information on the bidders;
- Once you know where else they have contracts, contact the relevant UNISON branch and ask them what their experience has been;
- Get together a team of reps with a range of expertise and experience;
- Ask your regional officer if they want to attend the interview with the contractors;
- Study the information you have been given by the contractors;
- Decide who will ask which questions and who will take notes.

Public Sector Equality Duty

The Public Sector Equality Duty offers a useful tool for influencing the tendering process.

The single duty was introduced by the Equality Act 2010 and replaced the separate duties that previously covered race, disability and gender.

As a result, the General Equality Duty (GED) came into force on 5 April 2011 in England, Scotland and Wales and applies to all public authorities and private bodies carrying out a

public function, such as services contracted out to the private sector.

Public authorities are now legally obliged to promote equality of opportunity and eliminate discrimination for service users and staff. They have to go beyond ticking boxes and review progress to ensure they are delivering results. If there are no positive outcomes then the public authority will be failing in their legal duties.

If your employer is proposing to contract-out or re-tender a service, make sure they comply with the new duties by examining how this would affect equality. This would apply to both the authority and any potential private sector employer. The union branch should be fully involved in this process.

Specific duties for England, Scotland and Wales go on to set out in more detail a public authority's equality objectives and its progress in complying with those objectives

The general duty does not impose a legal requirement to conduct impact equality impact assessments. However, impact assessments remain the most reliable way of demonstrating that equality issues have been given due regard prior to such a change as transfer of employment.

For further information on the equality duties, including more details of their impact on the procurement process, go to unison.org.uk/acrobat/Public_Sector_Equality_Duty_Guidance_Final.pdf

In Northern Ireland, Section 75 and Schedule 9 to the Northern Ireland Act 1998 came into force in January 2000 and requires public authorities to have due regard to the need to promote equality of opportunity. Further details can be found at ofmdfmi.gov.uk/section_75

Checklist

Pre Procurement

Be prepared for transfers by negotiating a corporate procurement policy



Evaluate options to avoid transfer

- Opposing transfer
- Develop in house bid
- Alternatives to transfer



Gather information on

- Which services are being tendered
- The proposed timetable
- The jobs that will be affected
- The key decision makers
- The organisations bidding for the contract



Organise

- Map the members and potential members affected by tendering
- Hold meetings with this group of workers
- Undertake recruitment initiatives



Influence tender process

- Engage in rigorous assessment of bids
- Interview contractors utilising comprehensive set of prepared questions

2 Handling TUPE transfer

The Transfer of Undertakings (Protection of Employment) Regulations 2006, also known as TUPE, is a piece of UK legislation which governs the transfer of directly employed staff from one employer to another. TUPE provides that any contract of employment of any person employed by the transferor (i.e. the old employer), transfers to the new employer, as though the contract was made between the employee and the new employer (or the transferee).

This section of the guide sets out the main features of TUPE consultation rights, the nature of the protections offered by TUPE, the issues to be wary of as the TUPE process proceeds and the steps to ensuring TUPE protections are carried through. To keep the information accessible, it does not seek to provide an exhaustive legal guide to every detail of TUPE, but provides links to further detailed information. If further detailed legal advice is required, branches should contact their regional officer.

2.1 When does TUPE apply?

TUPE only applies when a “relevant transfer” takes place in one of the two forms below:

- An undertaking, i.e. an organisation or part of an organisation, is transferred from one employer to another and retains its economic identity.
- A “service provision change” occurs. For example, an organisation engages a contractor to conduct work on its behalf, a contractor is carrying out a service which is then re-assigned to another contractor or work is brought back in house.

In order to decide whether there has been a transfer of an undertaking, the critical

question is whether the undertaking retains its identity and is carried on by the transferee.

The acquisition of a company through the purchase of shares in the company is not a TUPE transfer. This is because the identity of the employer remains the same, it is only the ownership of the share capital of the company that changes.

2.2 What does TUPE cover?

The Transfer of Undertakings (Protection of Employment) Regulations 2006 came into force for transfers taking place on or after 6 April 2006. They replaced the original TUPE regulations 1981 which were introduced to safeguard employees’ rights when the business in which they were employed changed hands.

The legal safeguards provided by TUPE can be summarised below:

- Individuals who are employed by the transferor immediately before the transfer automatically become the employees of the transferee from the time of the transfer on the terms and conditions they previously held with the transferor;
- The transferee inherits the transferor’s rights and liabilities in relation to those individuals;
- Protection against dismissal of any employee (whether before or after the transfer) for any reason connected with the transfer is automatically unfair unless the change is an economic, technical or organisational (ETO) reason entailing changes in the workforce, in which case the dismissal is fair if it is reasonable in the circumstances);

- Similarly, terms and conditions are protected unless a change can be justified on the basis of an economic, technical or organisational (ETO) reason. Contracts of employment setting out terms and conditions can be in written form, verbal or arise out of “custom and practice,” but the more that is written down the easier it is to argue for their inclusion in a transfer. Protected terms and conditions typically cover continuity of service, rights to pay, number of hours worked, place of work, right not to be unfairly dismissed, sick pay, holiday pay and notice periods.
 - Accrued pension rights in the pension scheme operated by the former employer are protected. All occupational pension schemes are excluded from any transfer (Regulation 10), however, this does not apply to provisions in such schemes where these do not relate to old age, invalidity or survivors’ benefits. Where employees were entitled to participate in an occupational pension scheme prior to the transfer, the new employer must establish a minimum level of pension provision for the transferred employees. This means that the transferee must match employee contributions of up to 6% of an employee’s salary into a stakeholder pension or offer an equivalent alternative (Pension Act 2004). Please contact your Regional Officer where there is any doubt.
 - Collective agreements made by or on behalf of the old employer, i.e. the transferor and a trade union, are automatically inherited by the transferee, the new employer. Therefore, any collective agreements in force at the time of the transfer are transferred to the new employer and any terms of a collective agreement that are incorporated into the contracts of individual workers are protected in the same way as other individual contractual rights.
 - Recognition of the union by the employer transfers over to the new employer. The new employer is obliged to recognise a trade union where there is a recognition agreement between the transferor and a recognised trade union (this is set out in Regulation 6(1)). However, recognition is voluntary and is unlikely to be a contractual right. Regulation 6(2) (b) says that any recognition agreement that transfers can be varied or rescinded after the transfer.
 - The transferor must inform recognised trade unions about the consequences of the transfer and the transferee must provide the transferor with sufficient information on the consequences;
 - TUPE applies to both the public and private sectors. It also applies regardless of the size of the organisation.
 - All employees who could be affected by a change of employer have the right to be informed in advance of what is happening. This includes both employees working for the old employer and the new employer.
- If the transferor is criminally liable in any way, this does not transfer to the transferee.
- Sources for further guidance on the protection offered by TUPE legislation are set out in Appendix 6.

2.3 Consultation rights under TUPE

Once a contract is awarded under TUPE, both the transferor and even the transferee must notify trade unions or employee representatives about certain information and if measures are to be taken which could affect the employees. Regulation 13 of the legislation places a statutory obligation on the transferor to inform and consult either representatives of a recognised trade union or elected representatives of the employees. These obligations are set out below.

Employers' duty to inform

TUPE states that all employees who could be affected by a change of employer have the right to be informed in advance of what is happening. This includes both employees working for the old employer and those working for the new employer.

Before a transfer takes place, the transferor must inform the trade union or appropriate representative of the following:

- The fact that a transfer is to take place;
- the reasons for the transfer;
- the date or proposed date that the transfer is to take place;
- the legal, economic and social implications of the transfer for the affected employees;
- Any measure which the old or new employer will take as a result of the transfer, or if no such measures will be taken, this should be stated.

The transferor must provide this information long enough before a relevant transfer to allow time to consult with trade unions and the appropriate representatives of any

affected employees. It must be delivered to each representative or sent by post to them and has to be sufficient to enable the representatives to perform their duties.

This information must be provided whether or not the transferor anticipates that there will be any change to the work. If it is envisaged that measures will be taken (such as a change to job responsibilities) the transferor also has an obligation to consult with the representatives, to consider any representations they make and to reply to them, stating the reasons for objection where appropriate.

Employers' duty to consult

The transferor has a duty to consult when it expects to make changes in relation to affected employees in connection with the transfer i.e. where "measures" are proposed.

Such changes are likely to include any proposed change to work practices and change of work location. Its purpose is to make employees aware of any potential changes. Affected employees can include:

- those who transfer;
- those who do not transfer but whose jobs might be affected;
- those already working for the new employer (the transferee) whose jobs might be affected.

A "measure" means an action which the transferor or transferee intends to implement and it does not include a vague idea of future arrangements (Regulation 13(2)).

If measures are to be taken by either the transferor or the transferee which may affect the employee, then the party which is to take

those measures must consult with trade unions and consider the trade union's view and seek their agreement before any final decision to implement those measures is reached (Regulation 13(6)).

This means that either the transferor or the transferee must discuss these matters with the trade unions. This must be done with an open mind and the transferor or transferee must make every effort to secure the trade union's agreement as to what is being proposed and accommodate their objections. The employer or the transferee must consider any representations, reply to them and if they are to be rejected, state the reasons for doing so (Regulation 13 (7)).

The branch needs to assess proposed measures very carefully as any ambiguity or doubt is more easily resolved at this stage and failure to clarify can blow up into problems after the transfer is complete.

For example, the special measures letter for one TUPE transfer specified that the existing pay and grading structure would be among the terms and conditions transferring without change. The letter also referred to performance appraisal, which it said would in future operate as part of the transferee's performance management framework. The branch had assumed that this related to capability procedure, but after the transfer it became clear that it was about pay and incremental progression through performance related pay. Prior to transfer, staff had received an annual pay award, with separate annual incremental progression.

Regulation 13(8) sets out the minimum facilities that the employer must provide for appropriate representatives. These include access to the affected workforce along with

such accommodation and facilities as is appropriate.

If the employer fails to inform the representatives of the material facts or if the representatives are not consulted about any measures which may be taken, then the trade union (not the individual employee) may bring a complaint in the Employment Tribunal, within three months, less one day of the transfer, for a declaration and compensation for a failure to consult.

Affected employees are likely to be entitled to the benefit of a protective award if the employer does not comply with their obligations to consult. This can amount to a sum for each affected employee (whether or not a transferring employee) not exceeding 13 weeks' pay, depending upon the seriousness of the failure and bearing in mind that the purpose of the award is to penalise the employer for its failure.

An award for a failure to comply with the duties to inform and consult can be made against either the employer or the transferee. Where an award is made against the employer, the transferee can also be liable if it fails to provide information on time regarding any measures it has proposed to take (Regulations 15 and 16).

TUPE expressly provides that both the employer and transferee can be jointly liable for a failure to inform and consult (Regulation 15(7) and (9)).

However, please note that there can be no obligation on the transferee to consult after the transfer.

Where branches are of the view that there has been breach of Regulation 13 of TUPE, they must take legal advice via their regional officer.

Employee liabilities information

TUPE Regulation 11 places an obligation on the transferor to notify the transferee of the employee liabilities that will be transferring.

Employee liabilities cover such dimensions as:

- their age and identity;
- information contained in their statement of employment particulars (ie the information required to be given to employees in writing by the Employment Rights Act 1996, section 1);
- information relating to any collective agreements which apply to an employee post transfer;
- information on any disciplinary procedure taken against an employee in the two years prior to the transfer;
- information on any grievances raised in the two years prior to the transfer;
- instances of any actual or potential legal claims
- against the transferor in the previous two years.

A failure to provide this information will result in a financial penalty for the transferor of up to £500 per employee.

2.4 Challenges to applicability of TUPE

Particularly in the current climate of cuts and squeezes on the finances of public bodies, the applicability of TUPE is coming under increasing challenge by employers. In addition, the escalating complexity of transfer proposals can also make the application of TUPE a bewildering issue.

The points below show some examples when TUPE can be vulnerable to the challenge that a transfer fails to qualify as a transfer of undertaking or change of service provision.

- Some areas of contracting have seen moves toward “framework agreements” under which companies do not receive guaranteed levels of work but are expected to deliver services as and when required. The vagueness of these arrangements can put TUPE in doubt
- The introduction of the “Any Qualified Provider” (AQP) policy to the NHS means that a huge range of different providers will be competing to provide services. Patients will choose from a list of providers for a growing number of healthcare services. AQP is constructed in a way that TUPE is unlikely to apply because there is no “transfer of undertaking.”

The employer is less likely to succeed in challenging the applicability of TUPE if there is evidence that the employer has adopted a deliberate tactic for the transfer that is not normally part of their way of operating specifically to try to frustrate TUPE.

However, all of these examples are simply indicators of when the union is on strong ground in arguing for the application of TUPE and when it is not. Every case needs to be assessed in the context of the particular facts presented by each individual transfer. Therefore, please contact your regional officer for any clarification needed over the applicability of TUPE.

Cabinet Office Statement of Practice

Legal facts will ultimately determine the applicability of TUPE in any situation. However, the Cabinet Office Statement of Practice may provide a useful aid in support of applying the principles of TUPE.

In January 2000, the Cabinet Office produced a Statement of Practice on Staff Transfers in the Public Sector (COSOP), which was updated in 2007. The statement set out a framework for all public sector organisations that offered a clear commitment to the application of TUPE. It principally applies to Central Government and the NHS, but offers guidance that branches should push employers to apply across the public sector.

Two of the most notable features of the statement are set out below:

- “Contracting-out exercises with the private sector and voluntary organisations and transfers between different parts of the public sector, will be conducted on the basis that staff will transfer and TUPE should apply, unless there are genuinely exceptional reasons not to do so.”
- “In circumstances where TUPE does not apply in strict legal terms to certain types of transfer between different parts of the public sector, the principles of TUPE should be followed and the staff involved should be treated no less favourably than had the regulations applied.”

The purpose of COSOP is to ensure that where TUPE does not apply, the principles of TUPE are honoured. This is achieved by agreement with the public authority, and those transferring are named in a Transfer

Order or Transfer Scheme, which is made by way of a Statutory Instrument. This Statutory Instrument sets out that TUPE will apply to a particular transfer.

The full statement on COSOP can be found at resources.civilservice.gov.uk/wp-content/uploads/2011/09/stafftransfers2_tcm6-2428.pdf

2.5 Objecting to transfer

An employee can inform either the transferor or the transferee prior to the transfer that s/he objects to the transfer. If so, the employee will not transfer.

The effect of objecting is that the employee’s employment will then terminate on the transfer of the undertaking, and that is the end of that employee’s employment. That termination will not usually be regarded as a dismissal by the employer (see Regulation 4(7) and (8)). So, for example, the employee will not receive a redundancy payment.

However, these circumstances could give rise to a dismissal if the employee can show that the transfer would have resulted in a substantial and detrimental change to the employee’s working conditions (Regulation 4(9)). However such a dismissal would not necessarily be automatically unfair. It will be for the employee to prove that it is unfair and this is not always easy. In addition, the employee could not bring a breach of contract claim if the employer failed to pay the employee his or her pay during the notice period (Regulation 4(1)).

Branches should seek legal advice via their regional officer if they are concerned that there is a potential dismissal claim. Claims for unfair dismissal must be brought within three months less one day of the transfer.

2.6 Organising issues

The award of a contract under a TUPE transfer should mark the stepping up of a recruitment and organising campaign among the workforce that are now clearly defined to move over to the new employer.

Under TUPE, the staff that have been identified for transfer in the affected service must transfer to the new employer. The contractor cannot pick and choose through interviewing which staff will transfer.

As noted earlier, the transfer is likely to create an atmosphere of worry and uncertainty among the workforce that can encourage staff to respond positively to recruit campaigns.

Identifying the issues that are most important to the transferring workforce and raising their profile in the transfer process can also enable staff to see the value of the union in defending their interests.

Branches should endeavour to involve existing members throughout the process through meetings and bulletins, while also encouraging new members through open staff meetings.

Identifying possible new stewards and reps is a critical task as the ability of the union to sustain activity and strength after transfer is likely to hinge on its success in developing activists among the transferred staff.

DOCAS arrangements

Maintaining membership in the wake of transfer will also be greatly eased if the branch obtains absolute clarity at this stage about the operation of the system for Deduction of Contributions at Source (DOCAS). Even if a general assurance is

obtained from the new employer that they can continue to operate a DOCAS system for automatic deduction of union subscriptions, bitter experience in numerous cases shows that checking with the new employer's payroll department is the only way of making sure that the new employer will be able to handle DOCAS files in practice.

To assist in reaching agreement with the new employer, a model Service Level Agreement on the Deduction of Contributions at Source can be found on the RMS User Information Centre at *rms_uninet/userdocumentation/Business%20Processes/Desk%20Instructions/Membership/Docas%20SLA.pdf*

In addition, a model letter to send to the new employer over DOCAS arrangements is attached as Appendix 9.

In order to provide the new employer with a DOCAS file, it will also be necessary to update RMS records. The RMS department has a procedure for updating records called the Bulk Transfer Update and this procedure is set out on the RMS website at *rms_uninet/userdocumentation*

Branches should inform the region of any contract awards that have involved the transfer of staff.

Building bargaining mechanisms

Under TUPE, union recognition arrangements transfer to the new employer. Branches should contact the transferee for an early meeting to establish bargaining arrangements. This is a good time to start to build on the relationship with the potential employer.

A model letter to assist in establishing contact with the new employer has been produced and is set out in Appendix 8.

Model recognition and facility time agreements are available on the Bargaining Support website at unison.org.uk/bargaining/model.asp

As noted earlier under section 2.2, recognition is voluntary and is unlikely to be a contractual right. Regulation 6(2) (b) says that any recognition agreement that transfers can be varied or rescinded after the transfer. It is extremely important that branches seek reassurances from the employer that recognition of the union will continue as there are examples of bad employers seeking to revoke recognition after transfer. It is also important to push the new employer to apply any recognition agreement to new starters and staff across the contract.

UNISON may already have national recognition with the transferee, so it is important to inform the Bargaining Support Group of all contract awards through bsg@unison.co.uk

If the transferee is among those listed on the UNISON website at unison.org.uk/privatecontractors as a target company then a forum will have already been established to represent members working for the organisation and arrangements can be made for a representative from your branch to attend the forum meetings. If the transferee is not one of the target employers, advice can be obtained through the Bargaining Support Group on how to establish a structure.

A listing of the key points to cover in a meeting with the new employer during this phase of the TUPE process is set out in Appendix 7.

Negotiating TUPE Plus agreements

TUPE preserves an employee's rights when transferring from one employer to another. UNISON branches involved in negotiating employee transfers can build on the basic protections afforded under TUPE to negotiate transfer terms that enhance and extend these rights – known as a TUPE Plus Agreement (this is not a legal term but simply a negotiating tool). Such agreements also seek to provide rights for workers who do not have protection under the TUPE Regulations, such as new starters who join the organisation after the transfer. Many UNISON branches have negotiated TUPE Plus agreements which apply to the whole length of the contract and extend to cover new starters.

For examples of TUPE Plus agreements, contact the Bargaining Support Group (bsg@unison.co.uk).

2.7 Additional protections that supplement TUPE

TUPE protects the pay and conditions of existing staff at the point of transfer. However, when a transfer is announced, branches should seek to take advantage of any additional protections offered by the codes and principles set out below and incorporate them within agreements with the new employer.

Do not assume that employers will include the code, protocol or agreement in the documentation or that they will be enacted, as these are unlikely to be contractual rights.

UNISON has experience of a number of transfers where it has become clear after the transfer has been concluded that the relevant codes have been ignored.

Withdrawal of two-tier workforce codes

Following years of campaigning by UNISON, a code was introduced to address the inequities of a two-tier workforce and require contractors to offer new starters broadly comparable terms and conditions to those received by TUPE transferred staff.

However, in December 2010 it was announced that the Code of Practice on Workforce Matters in Public Sector Contracts, known as the “two tier code,” was to be withdrawn in England and this was followed by the withdrawal of the local government code in March 2011.

The withdrawal of the codes by the coalition government represents a major threat to TUPE protection post transfer. In their place, the government published a set of “Principles of Good Employment Practice,” which are voluntary and far less rigorous than the former codes.

Scotland and Wales have their own regulations on the two tier workforce (the workforce code in Wales and the PPP protocol and section 52 in Scotland – which still remain in force). Northern Ireland did not have similar regulations in place.

However, the withdrawal of the codes in England enable public sector organisations to no longer apply the codes in most circumstances. The applicability of the code is set out below

- For **existing contracts**, negotiated whilst the codes were in place, the code will continue to apply
- Where an **existing contract** is extended without a re-tender, the code will continue to apply, unless it is agreed

between the commissioning body and the supplier that the Code will no longer apply.

- Where a **supplier continues** to provide a service following a re-tender, suppliers will be free to offer different terms and conditions of employment to new starters working on public sector contracts.
- If a contract is **renegotiated**, it is possible for the two parties to agree that the code will cease to apply. Terms and conditions for existing staff will be unaffected unless suppliers negotiate with the staff.
- For **new contracts**, the transferee will be free to offer different terms and conditions of employment to new starters working on public sector contracts.

A copy of the code can be found at webarchive.nationalarchives.gov.uk/+/cabinetoffice.gov.uk/workforcematters/code.asp

The loss of the two tier codes can be expected to intensify pressure on staff who have transferred under TUPE and raise the possibilities of challenge to TUPE by the employer.

Principles of Good Employment Practice

The Principles of Good Employment Practice are *voluntary* and cover a variety of matters including employee benefits. The principles are far less rigorous than the old codes and should not be considered an adequate replacement for them.

Although there is no formal mechanism for enforcing the principles, it does at least provide some basis for branches to argue against procurement processes that become a “race to the bottom” with regard to terms and conditions of employment for contracted out workers. Branches should seek to ensure that the principles are formally included in contract documentation if they are unable to secure a continuing commitment to enforce the provisions of a two-tier code.

The elements of the principles which are of greatest value are set out below.

- Central government should encourage contracting authorities and suppliers to promote good workforce practices in the delivery of public services.
- Suppliers will be able to demonstrate that staff have appropriate training, qualifications and access to continuing professional development as befits their role; and that staff are supported to develop their skills and grow their experience in line with any future roles that maybe expected of them.
- Where there is a recognised trade union, suppliers will consult on workforce training and development issues.
- Where a supplier employs new entrants that sit alongside former public sector workers, new entrants should have fair and reasonable pay, terms and conditions. Suppliers should consult with their recognised trade unions on the terms and conditions to be offered to new entrants.
- All suppliers delivering public services should have regard to good industrial relations practice on dispute resolution. This includes treating employees fairly and ensuring compliance with the law on trade union membership.
- Where an employee has a right to be represented by a trade union, the employer will work with the employee and recognised trade union representative in resolving any dispute.
- Government recognises the premise that engagement between employee, employer and a recognised trade union where appropriate can be a key to unlocking productivity and creating a motivated workforce that feels respected, involved, heard, is well led and valued by those they work for and with.

The principles can be seen in full at cabinetoffice.gov.uk/resource-library/principles-good-employment-practice

Fair Deal for Pensions

In June 1999 the then government introduced the “Fair Deal for Staff Pensions.” This code called on contractors running public sector services to offer “broadly comparable” occupational pensions to transferred staff.

Fair Deal requires the alternative pension arrangements to be certified by an actuary as being broadly comparable and transferred employees must be given the option to transfer their accrued pension rights to the new employer’s scheme without disadvantage.

“Fair Deal” was an appendix to the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector and further

guidance on Fair Deal published by the Treasury in 2004 can be found at hm-treasury.gov.uk/d/pensions_bta_guidance_290604.pdf

Members of best value authorities in England & Wales have statutory pension protection in the event of being TUPE transferred through the protection offered in the Best Value Authorities Staff Transfers (Pensions) Direction 2007. This requires that all “best value authority staff” (covering local government, police and fire authorities) in England and Wales must be provided with a broadly comparable pension scheme in line with the requirements of Fair Deal. Admitted Body Status provisions in the Local Government Pension Scheme (LGPS) allow for contractors to offer transferred staff continued eligibility for the LGPS.

In Scotland, the Statutory Guidance to Local Authorities on Contracting currently requires broadly comparable pension benefits for future service to be provided and that past service be protected for transferring staff.

The withdrawal of the two tier codes in England does not mean that Fair Deal has come to an end, but the future of Fair Deal was yet to be settled at the date of publication of this guide, as discussions on the future of public sector pensions were ongoing.

However, under proposals for a new NHS Pension Scheme from 2015, an employee TUPE transferred to another employer would be able to remain in the NHS Pension Scheme, even if they were outsourced again and again. In addition, there was a commitment for a Partnership Review to consider widening NHS Pension

Scheme access to “Any Qualified Providers (AQPs) including non-NHS AQPs delivering NHS services and social enterprises. These terms represent an improvement on Fair Deal. A full outline of the proposed new NHS Pension Scheme can be found at unison.org.uk/acrobat/20733.pdf

In addition, under proposals for the Local Government Pension Scheme (LGPS) from 2014, all compulsorily transferred staff who are eligible for the LGPS at the time of transfer would be provided with access to the LGPS by their new employer post transfer. The full proposals under consideration are set out at unison.org.uk/acrobat/20840.pdf

However, for the latest update on the terms of pension schemes, go to unison.org.uk/pensions/

National and sector specific agreements

The following additional issues should be considered for employees facing transfer in Scotland, Wales, local government, health and education.

Public Private Partnerships in Scotland

In December 2002, the Scottish Executive signed a protocol ensuring that in all future public private partnerships workers would receive ‘fair pay’ and rights over pensions, holiday and sick pay commensurate with colleagues in the public sector.

The UNISON commentary on this protocol can be found at unison-scotland.org.uk/briefings/pppprotocol.html

The protocol itself can be found at scotland.gov.uk/Resource/Doc/1069/0005205.pdf

Section 52 of the Local Government in Scotland Act 2003

Section 52 provides similar protection to that given by the PPP protocol to all local authority contracting in Scotland.

The Act can be found at legislation.gov.uk/asp/2003/1/contents

Wales Code of Practice on Workforce Matters in Local Authority Service Contracts

The Code of Practice on Workforce Matters in Local Authority Service Contracts came into force in Wales in April 2003. Unlike in England, it has not been revoked.

A copy of the code can be found at: webarchive.nationalarchives.gov.uk/20100807034701/http://archive.cabinetoffice.gov.uk/opsr/workforce_reform/code_of_practice/index.asp

Section 31 Partnerships

Section 31 of the 1999 Health Act created an enabling power to allow the establishment of “partnerships” between health and social care agencies. The applicability of TUPE to any specific Section 31 Partnership proposal faced by a branch should be checked with the relevant regional officer.

A UNISON report covering the employment issues raised by Section 31 Partnerships can be found at unison.org.uk/acrobat/16149.pdf

Education

Academies. Sixth Form Colleges, Further and Higher Education institutions were exempt from the Best Value Code of Practice Code on the grounds that their institutions are independent of government. Some local agreements have been negotiated to create a level playing field

between directly employed and contractor staff.

School staff are employees of the local authority, unless they work in a self governing school or an academy. Any National Joint Council or local agreements on the two-tier workforce therefore apply to them. For further advice contact education@unison.co.uk

Checklist

Handling TUPE Transfer

TUPE information and consultation rights

- Ensure rights are initiated at earliest opportunity
- Gather key data from employer



Ensuring TUPE protections

- Scrutinise special measures provided by employer to ensure clarity on terms and conditions incorporated into contracts
- Obtain early meeting with employer to address key issues of recognition agreement, bargaining mechanisms and DOCAS arrangements
- Ensure that any additional protocols offering protection to new starters are incorporated within agreements
- If there has been a failure to inform and consult, note that there are 3 months (less one day) from a transfer for the union to bring a claim against the employer(s)



Organise

- Step up recruitment and organising campaign and encourage potential stewards among transferred *members*

3 After Transfer

Once a transfer has been completed under TUPE, it is important to recognise that the process does not end there for the union. Transfer completion needs to mark the beginning of an ongoing campaign that encompasses rigorous monitoring of compliance with TUPE, building an organisation and recruitment campaign within the new employer and fending off any challenges to TUPE.

3.1 Monitoring compliance

Following transfer, monitoring procedures need to be put in place for checking on the organisation's compliance with TUPE as well as any further codes, principles, agreements or equality duties that apply to the transfer.

Pick out the key dimensions of terms and conditions that are protected and the core points from employment agreements with the new employer and ensure that the branch network of members can provide feedback on any variations from these agreements.

These procedures will enable the branch to raise issues of concern and advance an appropriate case when a contract comes up for re-tender

3.2 Organising and recruitment

Once transfer has taken place, it is vital to the strength and effectiveness of UNISON that the organisation and recruitment campaign that began with the announcement of the intention to tender continues just as vigorously post transfer.

Developing activists in the organisation to which the staff have been transferred will be a critical success factor. This may place an

added burden on a branch in the short term, but the aim must be to build activism among members working for the new employer to the point that they can sustain the organisational workload in the long term.

Keeping communications channels to transferred staff open will be a key factor in retaining and building membership, and careful consideration needs to be given to the key issues of importance to staff in the new workplace so that a campaign can be built around the issues that matter to them.

It is also at this point that the benefits begin to accrue of agreements established with the employer prior to transfer that facilitate recruitment and organising, as well as allowing access to new starters through the organisation's induction programmes. Having such arrangements in place makes it much easier for new activists to begin developing the union's strength within the new organisation.

3.3 Challenges to TUPE

The escalation of transfer activity and the financial squeeze taking place across the public sector is encouraging an increasing number of challenges to TUPE after transfer.

The basis for many of these challenges can be the argument that economic realities render TUPE "unaffordable."

The points below provide some broad guidance as to when the union is liable to be on strong ground in its defence of TUPE and when it is weaker.

- Attempts to change terms and conditions simply out of a desire to harmonise terms and conditions across employees will not be accepted as a

valid reason to vary TUPE agreed terms, unless there is an economic, technical or organisational reason entailing changes in the workforce, or if it is unconnected with the transfer.

- The passage of time alone cannot be used as an argument for changing terms and conditions as there are no time limits on TUPE protection.
- Changing economic circumstances can be accepted by the courts as valid reasons to vary TUPE agreed terms in certain conditions. For example, an employer claimed that austerity inspired cuts imposed by public sector bodies on numerous contracts had hit its revenues to the point that it now faced insolvency. The employer was able to demonstrate that other dimensions of its costs had been minimised following review and the court accepted that its actions to reduce terms and conditions was not done simply to harmonise rates but to ensure economic viability.

However, once again, all cases need to be examined on the basis of the facts prevailing in any particular situation and the examples below provide outlines of how key legal cases have been determined. If an employer is seeking to challenge TUPE terms and conditions after transfer, please contact your regional officer for advice.

Legal cases on changes to terms and conditions

TUPE protects employees where the transferee varies the terms and conditions of employment of the employee. Any variation of contract will be void where the sole or principle reason is the transfer itself or a reason connected with the transfer that is not an economic, technical or organisational reason (ETO) entailing changes in the workforce (Regulation 4(4)).

An employer can argue that changes to terms and conditions are for an ETO reason, but they then have to go on to show that this has resulted in changes in the workforce, such as redundancies.

In the case of *Daddy's Dance Hall*, the European Court decided that harmonisation of terms and conditions can be achieved if it has nothing to do with the transfer or if it is done to comply with the law.

The question to ask a transferee then is, why are they harmonising pay?

Are they doing it so that the people coming over can harmonise to their existing terms and conditions. In those circumstances, harmonisation is not likely to be permissible. In *Berrimen v Delebole Slate Limited* [1986], the new employer required the transferred employee to lose 25% of his pay. Mr Berrimen resigned and claimed constructive dismissal. The new employer gave no other reason for harmonisation, so it simply wanted harmonisation for harmonisation's sake.

The court found that Mr Berriman had been unfairly dismissed as his dismissal was connected with the transfer.

Where an organisation wishes to harmonise terms and conditions because of a cut in funding it is likely to be permissible. In these circumstances, the employer would be expected to ask all staff to vary their terms and conditions, including those that had not been TUPE transferred. These changes cannot be restricted to the TUPE transferred staff.

It is also permissible to vary terms and conditions post transfer for equal pay reasons i.e. to equalise pay. For example, if a male employee's pay is brought down to the same level as a lower paid female employee who does work of equal value.

Another example of the use of the ETO defence could be seen in the recent case of *Hardy & Ors v Meter*. In this instance, the Employment Appeal Tribunal (EAT) had to look at the ETO defence in unusual circumstances. UNISON members, Mr Hardy and his colleagues, worked for G4S as meter readers. G4S lost their Scottish Power contract to Siemens, which immediately sub-contracted the work to Meter-U. Meter-U run a franchise system, which meant that they engaged employees for an initial four month training after which employees are dismissed. The individuals were then invited to "convert" to being "self employed" under a franchise system. Our members argued that the self employment looked in reality to be very much like employment. The members were dismissed, by reason of redundancy after

their "consultation" process, and were given redundancy payments.

The Employment Tribunal (ET) agreed that the members had been unfairly dismissed, because there could be no ETO entailing changes in the workforce to assist the employer. Meter U Ltd's franchise arrangements appear to be unlike any other, as each franchise has only one employee, who is committed to conduct work for Meter U Ltd and Meter U Ltd alone. Therefore, the changes in the workforce were like for like and there had not been a reduction in the workforce, which meant that the employer could not rely on this defence.

However, the EAT was swayed because Meter U Ltd had ensured that the overall number of people doing the work had not changed, but the overall number of employees that it employed had changed. Therefore, they were able to use the ETO defence. Overturning the findings of Unfair Dismissal, the EAT held that the term 'workforce' in Regulation 7 (2) TUPE 2006, which is not defined either in TUPE or the Acquired Rights Directive, did not include limited companies such as a franchise, performing services for the employer. Accordingly, it deemed that the members who were now franchises were not part of the workforce, and so Meter U succeeded in the ETO defence. This case has been remitted to the ET to consider if indeed the contracts were a sham.

Branches should seek legal advice via their regional officer if they are in any doubt as to whether a new employer is using a valid ETO reason.

3.4 Summary of legal claims

Following a TUPE transfer, a variety of different types of legal claim may be open to employees. Several of these have been touched upon in earlier sections of this guide, but they are summarised in Appendix 10 for ease of reference.

Checklist

After Transfer

Monitoring

- Establish monitoring procedures for compliance with TUPE and any other applicable codes



Organise

- Maintain communication channels with transferred workforce
- Build campaign around key issues facing transferred workforce
- Develop activists to sustain organisation in new employer over the long term

Appendix 1

Checklists at a glance

Pre Procurement

Be prepared for transfers by negotiating a corporate procurement policy



Evaluate options to avoid transfer

- Opposing transfer
- Develop in house bid
- Alternatives to transfer



Gather information on

- Which services are being tendered
- The proposed timetable
- The jobs that will be affected
- The key decision makers
- The organisations bidding for the contract



Organise

- Map the members and potential members affected by tendering
- Hold meetings with this group of workers
- Undertake recruitment initiatives



Influence tender process

- Engage in rigorous assessment of bids
- Interview contractors utilising comprehensive set of prepared questions

Handling TUPE Transfer

TUPE information and consultation rights

- Ensure rights are initiated at earliest opportunity
- Gather key data from employer



Ensuring TUPE protections

- Scrutinise special measures provided by employer to ensure clarity on terms and conditions incorporated into contracts
- Obtain early meeting with employer to address key issues of recognition agreement, bargaining mechanisms and DOCAS arrangements
- Ensure that any additional protocols offering protection to new starters are incorporated within agreements
- If there has been a failure to inform and consult, note that there are 3 months (less one day) from a transfer for the union to bring a claim against the employer(s)



Organise

- Step up recruitment and organising campaign and encourage potential stewards among transferred *members*

After Transfer

Monitoring

- Establish monitoring procedures for compliance with TUPE and any other applicable codes



Organise

- Maintain communication channels with transferred workforce
- Build campaign around key issues facing transferred workforce
- Develop activists to sustain organisation in new employer over the long term

Appendix 2

Corporate procurement agreements

The key features of a corporate procurement agreement are set out below.

Agreement for staff and union involvement:

- ✓ In the option appraisal stage
- ✓ Where there is a decision to outsource

Trade union involvement in the tendering process to include:

- ✓ Trade union consultation on contract documents
- ✓ Trade union involvement in the interviewing of short-listed bidders
- ✓ Trade union and staff involvement in the selection process of contractors
- ✓ Requirement on contractors to negotiate with trade unions on terms and conditions for new starters
- ✓ Trade union recognition by the contractor for new starters as well as transferred employees
- ✓ Full disclosure of workforce information
- ✓ Model contract clauses

Where appropriate:

- ✓ Implementation of TUPE
- ✓ Implementation of the Best Value Code of Practice/AfC
- ✓ Alternative dispute resolution
- ✓ Arrangements for monitoring implementation

Appendix 3

Retention of Employment Model

In order for the Retention of Employment Model to operate effectively, the following steps must be met:

1. There is a relevant transfer under TUPE.
2. Employees of the transferor object to employment with (i.e. a transfer to) the transferee.
3. Where an employee exercises this right, the automatic transfer of employment will not operate, because “the protection that the Directive [or TUPE] is intended to guarantee is redundant where the person concerned decides of his own accord not to continue the employment relationship”¹[1].
4. This in turn terminates employees’ contracts of employment with transferor.
5. But employees are then re-engaged by transferor under a contract which includes a secondment term which places them under the control of transferee i.e. employees will be offered a new contract of employment, the terms of which provide that s/he will remain in the transferor’ employment but be seconded to work for transferee.
6. The effect of this approach is that the objection results in the employee’s existing contract of employment coming to an end but s/he immediately enters into a new contract, the terms of which enshrine the new arrangement, and continuity of employment is not broken because there is no material break in his or her continuous employment.

The transferor may meet with its employees to explain this process. However, the steps above must be met in order to avoid the automatic application of TUPE. As a result,

there will be a certain day when a TUPE transfer is to take place, the employees that want to transfer to the transferee will then transfer to the transferee on this date and those that want to be seconded will object to TUPE on this same date. The employees that object will then be provided with new contracts that provide for secondment with the transferee. This can all happen on the same day as long as it is done in the correct sequence as above.

In *Celtec Limited v. Astley and Others*, the majority of the House of Lords held that where employees are not given the option of a direct contract of employment with the transferee and are only invited to volunteer for secondment under their existing contracts of employment, they cannot have exercised their rights to “object” to employment by the transferee under Regulation 4(7) of the TUPE Regulations, and their contracts of employment therefore transfer under TUPE.

The transferor should obtain its own legal advice, but the branch can also inform them of the correct approach to the ROEM Unless the ROEM procedure is followed, the transferor cannot simply second its own employees to the transferee to work at the transferee’s offices. This is because the TUPE Regulations would override these arrangements and the contracts of employment of the transferor’s staff will automatically transfer to the transferee on the date when the transferee continues or resumes operation of the unit in question (i.e. the date of secondment / TUPE transfer), irrespective of what has been agreed between the parties.

So far, the ROEM has been used in local government, the NHS and in the education sector.

¹ [1] *Katsikas v Konstantinidis* [1993] IRLR 179

Please note that secondees should be issued with new contracts containing a secondment clause, and the new contract should comply with s.1 of the Employment Rights Act 1996. Please note that this must be a new contract and not simply an addendum to the old contract or a court is likely to find that there has been a TUPE transfer and the secondment has failed.

UNISON would recommend that the following secondment clause is put into the new contracts issued to staff that are due to be seconded.

Secondment to **[NAME OF COMPANY]:**

1. You are employed by [CURRENT EMPLOYER] but the [CURRENT EMPLOYER] and you have agreed that you will be seconded to [NAME OF COMPANY] for the period of secondment.
2. [NAME OF COMPANY] will manage you on a day to day basis in accordance with the Secondment Agreement between [CURRENT EMPLOYER] and [NAME OF COMPANY].
3. A copy of the Secondment Agreement has been supplied to you, and any amendments will be notified to you in writing.
4. You have the right to return to your substantive post or an equivalent post at [CURRENT EMPLOYER] at the end of the period of secondment.
5. In the event of a redundancy situation, staff will be selected for redundancy from a pool of all staff employed by [CURRENT EMPLOYER] and its subsidiary companies, namely [NAME THEM].
6. In the event your substantive post is no longer available or if it has been deleted, then you will be entitled to a redundancy payment in accordance with your terms and conditions as set out in your current contract with [CURRENT EMPLOYER].

Appendix 4

Mapping exercise

When conducting a mapping exercise, the information you should gather includes:

Union membership density

It is important to know who your members are in order that stewards or people willing to act as contacts are appointed. In addition, non-members should be located and approached with a view to recruiting them. Knowing the numbers and location of staff can also help with ensuring the subscriptions are being collected.

Equality data on the workforce

Gather information on such dimensions of the workforce as ethnicity, disability, age and gender as you may establish a more accurate picture to the details that the old employer provides to the new employer. The Single Equality Duty means that public authorities and contractors have to promote equality and take into account the impact upon “protected groups” when developing services or policies. For further information on the equality duties, go to unison.org.uk/acrobat/Public_Sector_Equality_Duty_Guidance_Final.pdf

Key work locations

Knowing the key locations of the workforce means branches can target members effectively with necessary communications, holding meetings etc.

Organisation structure

Knowing the structure of the new employer’s organisation is important so that you know who to contact if a problem arises. This may produce a swift resolution.

There are several ways to get hold of information to map the workforce. You may

be able to get some from your employer. Workforce questionnaires are one method of getting this information, but longer interviews with key individuals who have an overview may also be valuable to you. **Be aware** that the process of gathering information to map the workforce may also be an opportunity to give workers information about the union, and to identify potential campaign leaders within the workforce who are curious, co-operative and responsive to the union’s message.

Appendix 5 Contract documents

The contract documents are composed of

- The specification
- The contract itself, which gives the conditions of the contract and the pricing schedule.
- Tendering exercise documents, which set out the instructions to tenderers.

Specifications are a full description of the work that has to be done. They will be incorporated into the contract documents. Whoever wins the contract will have to deliver the agreed specification.

Tightly worded specifications will deter cowboy contractors and will also enable greater monitoring of contracts.

Branches/stewards should always try to be involved in and consulted on the drafting of the specification.

Branches/stewards should also ensure that the contract documents contain a clear statement that TUPE will apply to the contract and existing pay and conditions will, therefore, be transferred with existing staff. If your employer is claiming that TUPE will not apply, then you should seek advice from your regional officer.

Appendix 6 Further guidance on TUPE

The Department for Business, Innovation & Skills has produced an official guide to the regulations which seeks to clarify some of the changes made by the 2006 in a document entitled “Employment rights on the transfer of an undertaking: A guide to the 2006 TUPE regulations for employees, employers and representatives.” This guide can be found at berr.gov.uk/files/file20761.pdf

The Labour Research Department has also produced a guide for trade unionists on TUPE and details of how to obtain the booklet can be found at lrd.org.uk/issue.php?pagid=1&issueid=1036

The regulations themselves can be found at legislation.gov.uk/uksi/2006/246/contents/made

Appendix 7

Key issues to cover in meeting new employer

TUPE

- What terms and conditions does the employer perceive to be covered by TUPE?
- What is the employer's policies for those terms and conditions not covered by TUPE?
- Who will be responsible for monitoring the contract with respect to compliance with the TUPE regulations?
- Explore opportunities for TUPE Plus
- Seek written confirmation that additional codes / protocols will apply where appropriate

Trade union organisation

- Seek assurances over continued recognition of the union post transfer and seek written agreement
- Seek agreement on facilities for trade union representatives and stewards
- Clarify whether a check-off / payroll deduction system exists for union subs (Check with Payroll Department that they will be able to process DOCAS file)
- Clarify attitude to union's access to the organisation's wider workforce and induction programmes for new starters in particular
- Clarify bargaining structures in place for resolving of employment issues

Organisational matters

- Seek confirmation of which functions/ services will transfer and which staff
- Clarify intended structure for the management of the transferred department(s)
- Clarify if all staff would remain in their present posts after transfer

- Clarify the contractor's policy regarding the transfer of staff to other sites or contracts operated by the company
- Clarify where staff will be located and what are relocation policies in the event that people will have to change location
- Clarify policy on employees who do not wish to or are unable to transfer to another location

Pensions

- Clarify the pension provision to be made available? (if Fair Deal applies, seek evidence that it is broadly comparable to employee's former scheme)
- Check whether the pension scheme is GAD certificated?

Business Strategy

- Explore the employer's risk strategy and in particular what action it would anticipate taking if the contract becomes loss making? (probe guarantees for TUPE post transfer)
- Clarify whether the employer intends to subcontract any part of the contract?
- Clarify whether the employer intends bidding for any further work from the former employer of the TUPE transferred staff?

Other

- Clarify the employer's equality policies and arrangements for complying with the Equality Duty
- Clarify the employer's health and safety policies, along with arrangements for consulting on health and safety / providing training
- Clarify opportunities for training and career development

Appendix 8 Letter on contract award

Date _____

Dear _____

CONTRACT AWARD

I understand that you have been awarded the contract

for (Service) _____

by (Awarding authority). _____

As you know, the employees on this contract will be transferred under the Transfer of Undertakings (protection of Employment) Regulations 2006 ('TUPE') and as such will have their pay, terms and conditions, collective agreements and UNISON recognition transferred with them.

Could I, therefore, request a meeting with the relevant managers of the contract, in order to discuss the new bargaining arrangements.

I look forward to hearing from you.

Yours sincerely

(Signature) _____

Branch Secretary

Appendix 9

Letter on DOCAS arrangements

Date _____

Dear _____

UNISON DOCAS Payments and Information

UNISON is currently reviewing the arrangements we have with you for the payment of UNISON subscriptions and the provision of membership information. As part of this review, I am writing to enquire whether you are able to provide us with the following:

- 1 Payment of DOCAS subscriptions by BACS directly to UNISON's bank
- 2 Monthly electronic DOCAS reports to UNISON's Head Office. This should also incorporate any DOCAS information that you may currently send to UNISON Regional Offices. We would prefer the file to be in ASCII format and to be sent as a CSV (Comma separated variable) file.
- 3 As a minimum we would like to receive the following information:

— Employer code	— Payment frequency
— Employer PAYE number	— Pay period
— Employer name	— Contribution for the period
— Employee national insurance number	— Date of first subscription payment
— Employee payroll number	— Date of last subscription deducted
— Employee surname	— Date of employee transfer
— Employee forename	— Date employee cancelled UNISON subscription
— Employee gender	— Date of leaving employer
— Date of birth	— Date payment deducted

I would also ask for any codes, with translations that identify an employee's work location.

I should be grateful if you would let me know whether you are able to meet this request. It may be advisable for UNISON officers to meet your payroll managers to discuss the request in more detail. I look forward to your reply.

Yours sincerely,

(Signature) _____

Branch Secretary

Appendix 10

Summary of legal claims

Following a TUPE transfer, a variety of different types of legal claim may be open to employees. The various possible claims are summarised below.

Discrimination claims

If an employer has discriminated against an employee before the transfer (even where the discrimination took place when she or he was employed under a previous contract of employment), liability for that discrimination will transfer from the transferor to the transferee.

Unfair dismissal

An automatic unfair dismissal under Regulation 7(1) occurs when an employee is dismissed and has worked for two years for either the transferor employer or following transfer, the transferee. To prove such a case, an employee would have to show that:

- a. The transfer was the reason for the dismissal. If so, the dismissal is unfair.
- b. If not, then consider if the reason for the dismissal was connected with the transfer? If so, the dismissal is unfair unless the employer has a defence.
- c. An employer can defend a claim by saying, yes, it was for a reason connected with the transfer but I have a defence because there are economic, technical or organisational reasons entailing changes in the workforce – the ETO defence.

Branches should note that it is not enough for an employer to say, yes it's connected with the transfer, but there is an ETO reason for this, and therefore the dismissal must be fair. The employer must go on to show that these changes entailed a change to the workforce. This means the employer has

made redundancies or changed the functions which its employees perform. So, a member is unlikely to have a claim where an employer inherits TUPE transferred staff, and makes redundancies following a genuine ETO reason.

In addition, if the dismissal is not for a reason connected with the transfer, but for a justifiable reason such as gross misconduct, it will not be automatically unfair. Further details relating to this issue are covered in sections 2.2, 2.5 and chapter three of this report.

Any claim for unfair dismissal must be lodged within three months (less one day) of the date of transfer.

Unlawful deduction of wages claims

Two examples of where a claim for unlawful deduction of wages claim can be made are as follows:

- a. Following a transfer, the transferee employer does not honour previously negotiated collectively agreed terms of the contract;
- b. Following a transfer, the new employer decides to move the transferred employees on to their terms and conditions and does not honour the terms the employees transferred over with (this is known as post transfer variation of terms and conditions or harmonisation). Further details relating to this issue are covered in chapter three of this report.

Example of scenario A

A failure by the transferee to honour a term of the contract is where, for example, an employee on local government terms and

conditions has transferred over to the transferee and, following the transfer, the transferee does not honour a term of their contract such as a pay increase awarded under the local governments terms and conditions. The transferee argues that they are not part of the negotiating machinery and so cannot be subject to pay increases determined by collective agreements.

This is what happened in a UNISON case called *Alemo-Heron & Ors v Parkwood*, which is being considered by the Court of Justice of the European Union in September 2012.

The background to this case is as follows – 24 former employees of the London Borough of Lewisham had a term in their contracts of employment which expressly entitled them to the benefit of terms, including pay increases, which were collectively agreed from time to time by the NJC.

Following their transfer from the Council (first to CCL Limited and then to Parkwood Leisure Limited in May 2004) our members continued to be paid according to the NJC pay scales.

After the transfer to Parkwood, the council entered into pay negotiations. Our members said that they were entitled to the benefit of the three-year NJC pay settlement which was agreed on the 2 July 2004. Parkwood disagreed, saying that, as it was not party to the negotiations, it did not have to honour the pay settlement.

This case considers if the “static” approach, ie freezing terms and conditions at the point of transfer, is correct as it would create certainty for transferees in order that they would be able to have control over labour costs.

However, UNISON has argued that the “dynamic” approach, which allows for changes to those terms and conditions which are dynamic in nature, protects members’ contractual rights and is the whole point of the TUPE regulations.

UNISON argued that where it is a term of the employee’s contract of employment that s/ he will be entitled to the terms of collective agreements agreed from time to time, individual contractual rights under national law are preserved by Regulation 5 (now 4) of the TUPE Regulations 2006 and therefore are enforceable against the transferee.

This position is well established in UK law. It was the position of the Employment Appeals Tribunal in a 1997 case called *Whent & Others v. T Cartledge Limited*. However, a 2005 German case called *Werhof v. Freeway Traffic Systems GmbH* decided that terms and conditions freeze at the point of transfer.

The Supreme Court has referred this case to the Court of Justice of the European Union. UNISON will argue that the facts in *Werhof* were different to those in *Alemo Heron*.

Any claim for unlawful deduction of wages must be lodged within three months (less one day) of the date of transfer.

Example of Scenario B

For further information on post transfer harmonisation / variation of terms and conditions, see chapter three of this report. Please note that any claims for dismissal or an unlawful deduction of wages following harmonisation or a variation of terms and conditions must be lodged within three months (less one day) of the date of transfer.

Breach of contract

This sort of claim can be brought post transfer where the transferee is not honouring the transferred terms and conditions.

A claim would need to be brought in the County Court whilst the employee is still in employment, and the time limit for doing so is six years from the last on-going breach. If the employee's contract is terminated, then a claim should be brought in the employment tribunal within three months less one day of the termination.

Claims that can be brought by a union

If the employer fails to inform the representatives of the material facts or if the representatives are not consulted about any measures which may be taken, then the trade union (not the individual employee) may bring a complaint in the Employment Tribunal, within three months, less one day of the transfer, for a declaration and compensation for a failure to consult. Further details relating to this issue are covered in section 2.3 of this report.

Other claims

This is not a full array of all the possible claims available following a TUPE transfer, but provides details of some of the types of claims.

Branches should seek legal advice via their regional officer if they are concerned that there are any potential claims

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