

ERU checklist guide to . . .

## Handling the TUPE process

This checklist, for senior managers, personnel professionals and line managers, sets out key messages in handling a transfer under TUPE (the Transfer of Undertakings (Protection of Employment) Regulations 2006).

### General

- The current employer e.g. the Local Authority will be required to consult with affected staff and seek information from the new employer about the transfer including any changes to terms and conditions that are proposed.
- Transfers under TUPE will usually mean that staff move across on their current terms of employment including collective agreements. Terms are protected and may only be changed in limited circumstances under the TUPE regulations.
- Current case law has indicated that changes to collective agreements agreed after the transfer will not automatically apply to transferred staff. Be wary of any contractual clauses or of giving any undertakings that automatically apply amendments to collective agreements to staff contracts after the transfer date.
- Proposed organisational changes or staffing reductions may need to be considered in the context of the TUPE regulations. There are narrow grounds for making such changes but if a new employer steps outside of those they may face unfair dismissal claims or even automatically unfair dismissal claims.
- In relation to the transfer of maintained schools to academy status, staff will have rights under TUPE, however, the Department for Education suggests that consultation can commence once the Secretary of State has given approval.

### HR Strategy must ensure that:

- a mechanism is in place to keep staff fully informed and involved in the process from the outset
- staff are provided with the appropriate advice and assistance at all key stages
- TUPE will apply save in exceptional cases, see [Staff Transfers in the Public Sector: Statement of Practice, January 2000](#)
- a senior manager is designated as responsible for communication

- equal opportunities policies and principles are upheld at all stages of the process
- steps are taken to ensure that the change process is as smooth as possible by producing a transition plan or TUPE protocol which sets out responsibilities and key objectives.

### **Informing and consulting the trade unions**

- notify the trade unions that the service will be subjected to a review
- ensure that the statutory consultation process is planned and managed and that specialist advice is sought, if necessary
- enter into full and proper discussions with the trade unions with a view to achieving consensus about the way the transfer will be carried out, and how its effect on employees will be managed; staff should be told if no 'measures' are to be taken, such as no immediate proposals to make redundancies in the new employment full consultation, and, where appropriate, negotiation, with the recognised trade union(s) or if none, other employee representatives should commence as soon as possible.

### **The preliminary process:**

- decide, with the employee if possible, whether staff working between two departments will transfer to the new service provider – 'the percentage test' will be relevant here to identify whether an employee is assigned to the part that will transfer
- advise staff on 'non-standard contracts', such as part-time, temporary and casual staff, that they too will transfer
- consider staff on career breaks and sabbaticals and whether they will form part of the transfer
- staff on maternity, long-term sick leave and secondment are identified and involved in the process
- where the employee objects to being transferred, advise them of the consequences and obtain the employee's written objection at the earliest opportunity.

### **Disclosure of staff information**

- provide information on staff terms and conditions to bidders, subject to the council's duty of confidentiality under the Data Protection Act
- make sure that staff are aware that the council propose to disclose anonymised Information about them

- advise bidders for the council work that they will have to offer a broadly comparable occupational pension and release details of the Local Government Pension Scheme and where relevant the Teachers' Pension Scheme.

### What are contractual terms?

Contractual terms in the main, apply to pay and conditions, including any provisions negotiated at national and local level. Though not defined in TUPE, these could 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
- pension arrangements
- part-time or flexible working
- other time off arrangements
- disciplinary, grievance and other procedures.

*Once the transfer is confirmed:*

The information to be disclosed to the transferee once it is determined that employees will transfer could include:

- full list of employees to be transferred
- age, sex and identity of each employee
- job/title and job description
- details of untaken leave and any carry-forward arrangements
- remuneration, salary structure and progression and job evaluation and grading schemes in operation

- staff handbooks
- details of bonus schemes or other employee benefits such as car leasing, car allowances, mobile phones, health insurance, gym membership
- employees who are away on sick leave, maternity or paternity leave
- details of any outstanding claims for work-related injury
- details of loans made by the authority, such as car loans season ticket
- sick leave and sick pay schemes
- policies on equal opportunities, health and safety and agreed redundancy policy
- details of recognised trade unions and facilities arrangements.

*Also to note that:*

**Indemnities on future redundancies:** Local authorities have no legal powers to grant indemnities against the possibility of redundancies after the transfer or on the subsequent re-let of the contract. Any agreed redundancy policy will transfer across to the new employer with the contract of employment.

See *Whitewater Leisure Management Ltd v Franklin and another* (EAT/964/98) Advisory Bulletin 397 (extract attached at annex A)

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## **ANNEX A: Extract from LG Employers Advisory Bulletin 397**

In **Whitewater Leisure Management Ltd v Franklin and another** (unreported, EAT/964/98) the EAT held that a local authority was not acting ultra vires by applying a blanket policy of using the actual week's pay for redundancy calculations.

### *The facts*

Mr Franklin and Mrs Jones worked in a DSO of Brent Council and were transferred to Whitewater in 1995. The following year they were both dismissed due to redundancy and were awarded a statutory redundancy payment based on the statutory maximum for a week's pay. They brought a claim at an employment tribunal that their redundancy payments should have been based on an actual week's pay as this was a contractual provision that transferred in accordance with TUPE. At the tribunal the employers argued that this term was ultra vires because of the decision in *Allsop v North Tyneside Metropolitan Borough Council* (see Advisory Bulletin 272). (It was held in that case that the local authority could not pay redundancy payments beyond that allowed by statute.) The tribunal rejected this argument since paying up to a week's pay was specifically allowed by statutory regulations.

### **The EAT**

At the EAT the employers said that Brent's blanket policy did not allow the proper exercise of discretion. Their argument was based on the Court of Appeal's decision in *Allsop*. The EAT rejected this line of reasoning. *Allsop* was about exercising discretion that the Council did not have. The EAT said that there was nothing to prevent Brent from adopting a blanket policy of paying an actual week's pay since this was within the specific powers that the Council had.

### **Implications**

Although this case only relates to the discretion to calculate redundancy payments on an actual week's pay, it seems that the judgment could also apply to the power to award up to 66 weeks pay and the power to award added years (although in this case a policy about added years would not have transferred to the new employer according to the *Frankling* decision).