A GUIDE TO THE LAW ON **TUPE**

August 2014, Workforce Team

Introduction

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

On 31 January 2014 the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (the 2014 Regulations) came into force. The 2014 Regulations amended TUPE and the collective redundancy requirements under the Trade Union and Labour Relations (Consolidation) Act 1992 in a TUPE context. Most of the changes in the Regulations apply in respect of transfers taking place on or after 31 January 2014.

Where relevant this e-guide sets out the pre and post 2014 Regulations position and details of the changes are in Advisory Bulletin 609 and revised Government guidance on TUPE.

1 Relevant transfers: the scope of the Regulations

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

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

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

A business transfer

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

A service provision change transfer

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

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

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

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

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

The 2014 Regulations amended TUPE to expressly provide that in respect of transfers occurring on or after 31 January 2014, a service provision change transfer will only occur where the transferred activities carried out after the transfer are ‘fundamentally the same’ as they were before the transfer. However, in many respects this reflects the case law position before the change, so it is not expected to have any significant impacts.

Subject to the ‘fundamentally the same’ activities requirement, as well as capturing the award or reassignment of a service contract, the Regulations could also apply where the original contract is split, and assigned to different contractors.

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

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

2 Staff transfers within public administrations

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

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

3 Withdrawal of two-tier code

The local government two-tier code (the Code of Practice on Workforce Matters in Local Authority Service Contracts) no longer applies as it was withdrawn on 23 March 2011. The code, which formed part of ODPM Circular 03/2003, required local authorities to specify in tender contracts that employees hired by the successful contractor had to be provided with terms and conditions "no less favourable overall" to the transferred ex-public sector employees they would work alongside. The announcement withdrawing the code is available at at www.gov.uk. However, some pension protections still apply to employees transferring from an authority on a contracting out (see 5 below).

4 Who and what transfers

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

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

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

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

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

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

- pay scales and rates and pay intervals;
- hours of work;
- place of employment;
- continuous service;
- annual leave entitlements;
- sick leave and sick pay schemes;
- maternity provisions;
- part-time or flexible working arrangements;
- other time off arrangements; and
- disciplinary, grievance and other contractual procedures.

Discretionary policies on compensation, severance and redundancy payments will also normally transfer (see Advisory Bulletin 590).

Collectively agreed terms and conditions
Transferred employees are entitled to the terms of a collective agreement as they stand at the time of the transfer and not to changes to the terms agreed after the transfer through a collective mechanism of which the new employer is not a party.

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

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

5 Pensions

Under the Regulations, the provisions of an occupational pension scheme, as defined by the Pension Schemes Act 1993, are excluded from transfer. However, it is specifically provided that provisions other than those relating to old age,

invalidity or survivors' benefits are not treated as being part of the occupational pension scheme, and are therefore liable to transfer.

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

Aside from the Regulations though there are some pension protections under the Pensions Act 2004 and Transfer of Employment (Pension Protection) Regulations 2005 which apply to employees who transfer and were in, or eligible to join, or in a qualifying period to join, the relevant occupational pension scheme. This means that where the new employer's pension scheme is not a money purchase pension scheme that non-money purchase scheme (generally a final salary or cash balance scheme) must be one that is either:

- a final salary scheme that meets the "reference scheme test" for contracting out of the state second pension (generally providing a pension of 1/80 of contracted-out earnings for each year plus provisions for spouses); or
- a scheme that matches employee contributions up to 6% of basic pay; or
- a scheme that entitles members to benefits worth at least 6% of pensionable pay (defined in the schemes rules as the pay that is used to determine the amount of contributions and benefits) per annum, plus the value of the employees' own contributions (and in this case, employees cannot be required to contribute in excess of 6% of pensionable pay per annum)

Where the new employer's pension scheme is a money purchase pension scheme or a stakeholder pension scheme, that scheme must be one where:

- the new employer matches employee contributions up to 6% of basic pay; or
- if the transferor employer's pension scheme was one where the employer's contributions produced money purchase benefits, the new employer matches the contributions payable by the transferor employer immediately before the transfer.

Public sector transfers (excluding best value authorities): Fair Deal

New guidance on the Fair Deal policy was published by the Government on 7 October 2013. The guidance implements the reform of the Fair Deal policy to allow staff compulsorily transferred out of the public sector to remain in a public service pension scheme. In addition to the guidance, the Government's response to the consultation on the application of the policy to staff that have already been transferred out under Fair Deal has also been published.

Paragraph 1.7 of the Fair Deal guidance says:

1.7 This guidance applies directly to central government departments, agencies, the NHS, maintained schools [8] (including academies) and any other parts of the public sector under the control of Government ministers where staff are eligible to be members of a public service pension scheme.[9] It does not apply to best value authorities (listed in section 1 of the Local Government Act 1999) but alternative

arrangements exist in respect of those bodies. The Local Government Act 2003 enables the Secretary of State to issue directions to best value authorities in England and Wales concerning how pension matters will be dealt with in the contracting out of services. In 2007 the Best Value Authorities Staff Transfers (Pensions) Direction 2007 was issued to best value authorities in England and Welsh fire authorities.[10] The Department for Communities and Local Government (DCLG) will consider what is needed in respect of directions or other arrangements to achieve the principles of new Fair Deal in local government.*

[* Please note, the reference above to Welsh *fire* authorities is an inadvertent error in the Fair Deal document and should refer to "Welsh police authorities".]

Footnotes:
8 Except and to the extent that a direction issued under sections 101 and 102 of the Local Government Act 2003, or other arrangements put in place to meet the principles of this guidance, apply to a school which is maintained by a best value authority.
9 "Public service pension scheme" has the same meaning in this guidance as in section 1(1) of the Pension Schemes Act 1993.
10 Other public sector bodies participating in the Local Government Pension Scheme may however be subject to this guidance.

It should be noted that neither Police Authorities in England nor Police and Crime Commissioners are best value authorities. Neither are their staff covered by the Fair Deal Policy because they are not under the control of Government ministers. However, the Home Office supports the adoption of Fair Deal where staff are transferred.

It should also be noted that new Fair Deal will apply to schools where the employer is not a best value authority. Therefore, it will directly apply to employees of academies (including free schools), and will also apply to employees of foundation schools, foundation special schools and voluntary aided schools as, although such schools are maintained schools, the staff in those schools are employees of the governing body of the school, not the local authority. Academies, foundation schools, foundation special schools and voluntary aided schools should, therefore, make sure they are conversant with the requirements of the new Fair Deal policy.

Contracting-out transfers from best value authorities
Unlike the rest of the public service, the Fair Deal pensions policy does not apply to local authorities which are best value authorities. However, the Best Value Authorities Staff Transfers (Pensions) Direction 2007(the Direction) provides that on a contracting out from a best value authority in England or a Police Authority in Wales to a service provider, the transferring employees must (for contracts let on or after 1 October 2007) be provided with continued access to the LGPS (via an admission agreement) or to a broadly comparable pension scheme, and this protection carries on for those originally transferred staff at each subsequent TUPE transfer. For contracts first let before 1 October 2007, where the contract is re-let on or after 1 October 2007, the original transferring staff (i.e. those who were transferred from the best value authority when the contract was first let) must be offered membership of a scheme that is at least broadly comparable to the scheme they were in prior to the re-let.

It should be noted that employees in a maintained community school, maintained community special school, maintained nursery school or maintained voluntary controlled school are employees of a local authority, and so remain covered by the Direction, rather than new Fair Deal.

As stated in the extract above from the new Fair Deal document, DCLG will consider, working with the LGA and other business partners, what is needed in respect of directions or other arrangements to achieve the principles of the new Fair Deal in local government.

6 Changes to terms and conditions

The Regulations set out the circumstances in which an employer and employee can agree to change terms and conditions of employment of transferred employees. By virtue of the changes made by the 2014 Regulations, different rules apply to transfers on or after 31 January 2014, to those which occurred before that date,

Transfers before 31 January 2014

- The employer must not vary the contract of employment by agreement where the sole or principal reason is either the transfer itself; or
- for a reason that is connected to the transfer that is not an economic, technical or organisational (ETO) reason entailing change in the workforce.

Any attempt to vary a contract of employment in these circumstances will be rendered void by the Regulations. However, case law has established that employers and employees are also able to agree transfer reason changes provided they are beneficial to the employee. This is because the underlying purpose of the Regulations is to ensure that employees are not penalised by a transfer. Employers should therefore be wary in a TUPE context of agreeing beneficial changes alongside detrimental changes, because at a later date the employee could challenge the detrimental change, while retaining the right to the beneficial change.

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

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

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

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

Entailing a change in the workforce The Regulations do not define what is meant by 'entailing changes in the workforce' but the courts have interpreted it to mean that the employer must change the job functions performed by the employees or change the number of employees making up the workforce.

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

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

Transfers on or after 31 January 2014

For transfers on or after 31 January 2014, the position differs as follows. In all other respects the position remains as above.

Save for the collective agreement situation below, the employer must not vary the contract through agreement where the sole or principal reason is the transfer.

The employee though can agree a variation where:

- the sole or principal reason for the change is an ETO reason entailing a change in the workforce; or
- the terms of the contract permit the employer to make a variation (e.g. a change of location within the area of a mobility clause).

These changes on the face of it do not represent any substantial change, and the revised BIS guidance does not give any examples to illustrate the practical impact of the change. Therefore, until there are tribunal cases dealing with the revised wording we are unlikely to have any substantive guidance on what these changes mean in practice.

Collective agreements
One year after the transfer the restrictions on variations to contracts will no longer apply to changes to terms and conditions derived from, or incorporating,

collective agreements, provided that after the variation 'the rights and obligations in the employee's contract, when considered together, are no less favourable to the employee than those which applied immediately before the variation'

This change could impact on those transferring out of local authorities, where collectively agreed terms and conditions are the norm. However, it is important to remember that any such change would still need to be agreed by employees, either on a collective or individual basis.

ETO reasons
The 2014 Regulations amended TUPE so that as well as a change in job functions or number of employees amounting to a change in the workforce, a change in the location of the employee's workplace will also amount to a change in the workforce.

7 Unfair dismissal

Transfers before 31 January 2014

Where, either before or after a pre-31 January 2014 transfer, an employee of the transferor or transferee is dismissed, the dismissal is automatically unfair if:

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

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

For both an automatic or normal unfair dismissal claim the claimant must have the two-year qualifying period of employment.

Transfers on or after 31 January 2014

Where the sole or principal reason for the dismissal is the transfer the dismissal will be automatically unfair.

The dismissal will not be automatically unfair where the sole or principal reason for the dismissal is an economic, technical or organisational (ETO) reason entailing a change in the workforce. Where there is such an ETO reason, then the dismissal is still subject to the normal requirements on unfair dismissal.

As with terms and conditions changes, the 2014 Regulations amended TUPE so that as well as a change in job functions or number of employees amounting to a change in the workforce, a change in the location of the employee's workplace will also amount to a change in the workforce.

As for pre 31 January 2014 transfers, for both an automatic or normal unfair dismissal claim the claimant must have the two-year qualifying period of employment.

8 Redundancy

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

Since 31 January 2014 pre-TUPE transfer consultation with transferring employees by the transferee on its proposed collective redundancies is allowed to count for the purposes of the collective redundancy consultation duties under the Trade Union and Labour Relations (Consolidation) Act 1992. However, such consultation will only be allowed if the transferee employer elects for it by way of a written notice to the transferor employer, and the transferor then agrees to it. Once made the transferee may at any time cancel its election. If pre-transfer consultation takes place, the current transferor employer "may provide information or other assistance to the transferee" to help them meet the consultation requirements, although it does not have to.

9 Notification of employee liability information

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

The information required is:

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

Timing of the information
For transfers before 1 May 2014 the information had to be given at least 14 days before the transfer took place. For transfers on or after that date, the information should be given at least 28 days before the transfer.

In special circumstances where it is not reasonably practicable to meet this deadline, the information must be supplied as soon as is reasonably practicable. The information may be given in instalments, as long as all of the information is provided and the 28-day deadline is met. The information can be given by a third-party, for instance a local authority could pass the information from the existing contractor to the new contractor in circumstances where the contract is awarded to a new employer following a second-generation tender.

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

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

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

10 Informing and consulting with the affected workforce

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

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

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

In respect of transfers after 31 July 2014 micro-employers (i.e. those with 10 employees or fewer) are able to directly inform and consult affected employees,

rather than invite them to elect representatives, where there are no existing trade union or employee representatives in place.

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

- that the transfer is going to take place, when it is proposed to take place and the reason for it;
- of the legal, economic and social implications for the affected employees;
- any measures that are proposed in connection with the transfer, and if none are proposed, of that fact;
- the total number of agency workers working temporarily for and under the supervision and direction of the employer;
- the parts of the organisation in which they work; and
- the type of work they are carrying out.

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

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

Further details of the informing and consulting duties are in the BIS guidance to the Regulations.

11 Employers' liability compulsory insurance

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

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

12 Legislation

EC Acquired Rights Directive 2001/23/EC
Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246).
Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (SI 2014/16)

13 Sources of information

BIS guidance
The Department for Business, Innovation and Skills (BIS) has published general guidance on the Regulations. Although it should not be regarded as a complete statement of the law, it does provide practical guidance to help employers and employees understand the provisions. For guidance to the regulations governing the transfer of undertakings please see the www.gov.uk website at:
Employment rights on the transfer of an undertaking: a guide to the 2006 TUPE regulations (as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014)