

A GUIDE TO THE LAW ON **SECONDMENTS**

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Introduction

Secondments are part of the modern workplace. They can be a useful way to enable employees to gain new skills and experience while meeting short-term staffing needs, such as maternity cover. Where turnover rate is low, secondment arrangements can be used to inject new ideas, skills and perspective into the organisation.

Local authorities are increasingly viewing external secondments as a useful tool in an armoury of strategies designed to enhance service delivery and as part of staff development. However, both the employer and the host organisation need to pay careful attention to matching people to opportunities. Employees should only be required to undertake secondments where it is appropriate for the organisation or is capable of enhancing the employee's job.

Before embarking on a programme of secondments, authorities should be clear what their aims and objectives are and how these are to be achieved. Strong commitment to the principles of secondments from senior managers and elected members is a critical factor to success. The authority's human resources department should be asked to assist.

This guide, which focuses on external secondments, is intended to provide legal and practical information to local authorities. It does not address the advantages and disadvantages of secondments. A sample secondment agreement is at *Appendix 1*, although it is an example only and authorities should seek their own advice to ensure that any agreement is tailored to their particular needs and circumstances.

1. Secondment arrangements

To avoid confusion it is necessary to make clear in writing before the period of secondment begins:

- a. *How long the secondment will last*
- b. *What happens if any of the parties to the arrangement wish to end the secondment early*
- c. *What specific contractual obligations the employee will have to fulfil, and for whom*
- d. *Who will be the 'employer' during the period of secondment*
- e. *What happens to pay and other benefits during the secondment*
- f. *Who will be responsible for disciplinary and performance issues*
- g. *What obligations the employer and the host organisation will have to each other*
- h. *What data protection arrangements will need to be put in place, for example, whether the employer needs to issue the seconded member of staff with a specific privacy notice*
- i. *The procedures and supervisory arrangements to be followed during the secondment*
- j. *The day-to-day line management responsibility for a seconded member of staff, for example, reporting absence due to sickness, approving holidays*
- k. *What travelling and subsistence expenses the employee will be eligible for, the rates that will apply and who will be responsible for reimbursement*
- l. *Release of the employee for training and/or maintenance of professional qualifications, and which party will meet the cost of training*
- m. *What mechanisms the releasing employer will put in place so the seconded employee can keep in touch.*

The releasing employer will also have to consider how it will cover the seconded employee's post during the secondment, as well as how it will manage the employee's re-introduction to

work, evaluating the secondment and considering how to apply the learning gained by the employee during the secondment.

2. Status of the contract

A secondment does not terminate an employee's contract of employment; the contract continues to subsist during the period of secondment, and a key principle of the arrangement is that the employee is expected to return to his or her substantive post when the secondment ends.

The effect of a secondment agreement is to vary certain terms of the employment contract for the duration of the secondment. Accordingly, the employee's agreement to the secondment, and therefore to any variation of the employment contract, must be obtained before a secondment can commence.

During the period of secondment the usual intention of the parties is that the employee will undertake duties for the organisation to which he or she is seconded and will not be in a day-to-day management relationship with the releasing employer.

Because the contract continues in force for the period of secondment, continuity of employment will be preserved for the purposes of computing service-related entitlements and statutory employment protection rights.

3. Leave and sickness absence

Though leave and sickness absence are subject to agreement amongst the parties to the secondment, the seconded employee would normally be entitled to no less favourable terms than those enjoyed with the releasing employer.

4. Disciplinary responsibility

As the releasing employer retains control over the contract of employment, if the host employer wanted to dismiss the employee its powers are restricted to simply terminating the secondment arrangement. This will immediately reactivate the employee's contract with the releasing employer, who must then decide if the employee's actions impinge upon the employment relationship to the extent that dismissal or other disciplinary action should be considered.

5. Pensions

Because the employee remains employed by the local authority during the secondment, membership of the Local Government Pension Scheme for the duration of the secondment is unaffected.

Normally, the releasing employer will continue to pay the employee through its payroll function, and will invoice the host employer for the employee's salary plus on-costs for the period of secondment. As the releasing employer continues to pay the employee pension contributions are made in the usual way.

6. Secondments and TUPE

Under the [TUPE Regulations](#), responsibility for all employees assigned to the undertaking or service at the time of transfer will pass to the transferee.

The TUPE Regulations transfer the contracts of employment in force at the moment of transfer. Therefore, in a situation where employees are on secondment, if the part of the organisation they would normally work in is being transferred they automatically transfer as well. This is because the original contract of employment remains in force. This is similar to employees who are on long-term sick leave or maternity leave.

7. Secondments as an alternative to TUPE transfer

The challenge of delivering improvements in service delivery has led local authorities to use various ways of working. One model is the use of partnership arrangements, bringing together complementary organisations to deliver a joined-up and more efficient service, either directly to the community or to provide in-house back office support across partner organisations.

Although such partnering arrangements would usually involve the transfer of staff under TUPE, in some cases employers have populated the new delivery teams with seconded staff rather than transferred staff. Secondments have been used to ease the often complex arrangements that arise when bringing together staff from different organisations, removing the burden on the lead employer, who would otherwise have to accept liability for the transferred staff. Similarly, employees often perceive that a secondment gives them the best of both worlds; a place in the new team and the right to return to their substantive post.

However, the issue of whether such an arrangement may amount to a TUPE transfer, irrespective of being an agreed 'secondment', may arise, for example in a redundancy situation.

Celtec Ltd v Astley – House of Lords

This was discussed in *Celtec Ltd v Astley* [2006] UKHL 29, a case concerning former civil servants who were seconded to a Training and Enterprise Council (TEC) and who subsequently resigned from the civil service to take up posts with the TEC at the end of their three-year secondment. The issue was whether continuity of employment started from the date of the original civil service employment or from the date when they first became employed by the TEC.

On appeal to the House of Lords, a referral was made to the European Court of Justice (ECJ) on the question of whether a TUPE transfer could take place over a period of time, or whether it must occur at a particular point in time. The ECJ held that a transfer must occur at a particular point in time, which could not be postponed at the will of the transferor or transferee.

Following the decision of the ECJ, the House of Lords held that the employees transferred on the date on which the TEC took control of the business, notwithstanding their agreement to be seconded. The only way that the employees would not have transferred is if they had exercised their right to object to the transfer, thereby effectively resigning.

Lord Hope, delivering the leading judgment, considered that the employees must be offered employment with the transferee before the transfer took place. This would enable the employee to make a genuine choice between transferring and resigning (which is the only exception to the rule that employees must transfer). Lord Hope considered that because the employees were not given the option of taking up employment directly with the TECs (only whether or not to go on secondment) they had not validly exercised their right to object, and must be treated as having transferred.

Effect of the decision

This case does not affect an authority's ability to enter into valid secondment arrangements, either short or long term. Nor does it affect an authority's ability to enter into a secondment

arrangement in a TUPE situation, provided that the employees on secondment are not from the part of the business being transferred. This decision is only relevant where the employer is seconding employees who would otherwise be TUPE transferred to the transferee.

For existing 'secondment' arrangements, there is a risk, if challenged, that as a matter of law employees thought to be on secondment will actually have transferred. Authorities may need to revisit such arrangements and seek advice on the appropriate course of action.

If authorities wish to enter into such arrangements in the future, the decision in *Celtec* does not entirely rule out the possibility of such arrangements being valid, provided certain conditions are met. These are:

- an employee is made a genuine offer of employment with the transferee
- to which he or she validly objects (thereby resigning)
- the employee is then able to secure alternative employment with the original employer, i.e. the local authority,

following which the employee may be seconded to the transferee, while a contract of employment continues to subsist with the local authority transferor.

As well as being more complicated, such an approach has some risk; at the end of his judgment, Lord Hope suggested that if an employee on secondment in a TUPE transfer situation continues to carry out essentially the same job with the transferee, the secondment may be ineffective even if the employee has validly objected. The longer the secondment lasts (and, correspondingly, the less control the employer will exercise) the more vulnerable the parties may be to a finding that the employee did, in fact, transfer.

Workforce Team
Local Government Association
April 2020

APPENDIX 1 – SAMPLE SECONDMENT AGREEMENT

NOTE - individual contracts will vary in accordance with arrangements agreed between all parties

THIS AGREEMENT IS MADE THIS DAY OF [INSERT DATE] BETWEEN:

- 1) [Insert employer's name] of [insert address] ('the Council'), and
- 2) [Insert host organisation's name] of [insert address] ('the Host'), and
- 3) [Insert individual's name] of [insert address] ('the Employee').

WHEREAS the Council has agreed to second the Employee to the Host in accordance with the terms set out in this Agreement THE PARTIES AGREE AS FOLLOWS:

1. Interpretation

1.1 In this Agreement the following words will have the meanings set out below:

'Period of Secondment' means the period from [insert start date] to [insert end date]

'Contract' means the contract of employment between the Council and the Employee.

1.2 References to clauses only relate to this Agreement unless stated otherwise.

1.3 The masculine includes the feminine and vice versa and the singular includes the plural and vice versa.

1.4 The headings to this Agreement will not affect its interpretation.

1.5 This Agreement shall be governed by and construed in accordance with the laws of England and Wales.

2. Secondment of the Employee

2.1 The Council shall second the Employee to the Host on the terms of this Agreement for the Period of Secondment.

2.2 During the Period of Secondment the Employee shall act as [insert title], whilst continuing to be employed by the Employer under the Contract, which shall remain in force.

2.3 The Employee's line manager for day-to-day purposes during the period of secondment will be as nominated by the Host, and the Employee agrees to accept such control.

2.4 During the period of secondment the Host agrees to release the Employee for the purpose of attending training necessary to maintain the Employee's skills and/or to maintain any relevant professional qualification and the Council and the Host agree [insert arrangements for payment for training].

3. Duties of the Employee

3.1 During the Period of Secondment the Employee shall carry out all reasonable instructions of the Host and the Host shall ensure that the duties of the Employee are appropriate to the Employee's status, skills and abilities.

3.2 In the event that the Employee's performance is not satisfactory the Host shall:

3.2.1 Draw to the Employee's attention at an early stage the areas of unsatisfactory performance.

3.2.2 Provide any support and training necessary to assist the Employee to improve his/her performance.

3.2.3 Arrange a meeting between the parties, at which the Employee will have a right to be accompanied, to consider whether the secondment should continue.

3.3 In the event of misconduct the Host shall:

3.3.1 Notify the Council in writing within seven days of the alleged misconduct occurring or being discovered;

3.3.2 Arrange a meeting between the Council and the Host to discuss how best to investigate the alleged misconduct, in accordance with any of the Council's relevant policies;

3.3.3 Arrange a meeting between the parties, at which the Employee will have the right to be accompanied, to consider whether the secondment should continue and whether the employee should be subject to disciplinary proceedings.

4. Payment of Employee

4.1 The Host agrees to pay the Employee such sum as agreed between them for the period of the secondment.

4.2 In the event that the Host has agreed an increase in salary during the Period of Secondment, on the termination of this agreement the Employee's salary shall revert to that payable under the Contract.

4.3 *[Set out any arrangements for payment, i.e. Employee will continue to be paid through the Council's payroll, the Host agrees to pay the Council a sum equivalent to the Employee's salary plus on-costs, any pension arrangements]*

4.4 The Host will reimburse the Employee reasonable expenses incurred in the performance of agreed duties during the Period of Secondment.

4.5 The Host will reimburse the Employee for any additional hours incurred in performance of the agreed duties during the Period of Secondment.

4.6 If the Host wishes to pay further additional amounts to the Employee they will be paid direct to the Employee and the Host will be responsible for deducting any tax in respect of such payments.

5. Information and data protection

[Insert any necessary data protection provisions depending on what data protection provisions are already in place in the Council and the Host]

5.1 The Council will provide the Host with sufficient details of the Contract to enable the Host to comply with any relevant contractual terms and conditions during the Period of Secondment.

5.2 The Host will provide the Council with all such information as the Council may reasonably require in respect of the performance by the Employee of agreed duties during the Period of Secondment.

5.3 The Host will maintain and make available to the Council on request an attendance record in respect of the Employee, recording absence due to annual, sick or special leave, industrial action, unauthorised absences, and overtime.

5.4 The Council will inform the Employee of any material changes to the workforce during the Period of Secondment, and the Host agrees to release the Employee if the Council deems it necessary in order for the Employee to attend any meeting on changes to the workforce affecting the Employee.

6. Termination

6.1 This Agreement will automatically terminate at the end of the Period of Secondment unless the parties have agreed, in writing, to an extension.

6.2 This Agreement may be terminated by any party giving one month's notice in writing to the other parties.

6.3 Notwithstanding clauses 6.1 and 6.2, this Agreement may be terminated immediately by the Host if it reasonably considers that the Employee is guilty of gross or serious misconduct, subject to following the procedure in clause 3.3.

6.4 Notwithstanding clauses 6.1 and 6.2, this Agreement will automatically terminate if the Employee leaves the Council's employment.

6.5 Any party may terminate this agreement if one of the other parties is in material breach of the Agreement and fails to remedy the breach, if capable of remedy, within seven days of a notice from the non-defaulting party requiring such breach to be remedied and specifying how to remedy it.

Health and safety

7.1 During the Period of Secondment the Host will be responsible for compliance with all duties relating to health, safety and welfare at work imposed upon an employer by any relevant statutory provision as if the Host was the employer of the Employee.

7.2 The Host will provide to the Council such information and access to its premises as the Council may reasonably require to monitor the Host's performance of its obligations under this clause.

8. Indemnity

8.1 The Host will indemnify the Council fully and keep it indemnified fully at all times against any loss, injury, disease, damage or costs arising out of any act or omission of the Secondee during the Period of Secondment or arising out of that period.

9. Working Time

9.1 The Employee is entitled to *[insert number]* days' annual leave under the Contract. The Employee's annual leave year runs from *[insert date]* to *[insert date]* and at the start of the Period of Secondment the Employee will have *[insert number]* days' annual leave entitlement remaining. The Employee's annual leave entitlement is exclusive of public holidays.

9.2 The Employee will take annual leave at such times approved in advance by the Host.

9.3 The Employee is further entitled to *[insert number]* paid days leave each year, to be taken *[insert details]*.

9.4 During the Period of Secondment the Employee will be required to work a five-day week of *[insert number]* hours.

9.5 The Host agrees to comply with all obligations towards the Employee under the Working Time Regulations 1998.

10. Confidentiality

10.1 The Employee agrees not to divulge any confidential information during or after the Period of Secondment without the prior written consent of the Host. In this clause 'confidential information' means all documents and information in whatever form disclosed or made available to the Employee during or in connection with the secondment to the Host but will not include information which:

10.1.1 Is already in the public domain; or

10.1.2 Is disclosed to the Employee without any obligation of confidence by a third party who has not derived it directly or indirectly from the Host; or is trivial or cannot reasonably be considered to be confidential.

11. Miscellaneous

11.1 No amendment or variation to this Agreement will be effective unless it is in writing and signed by or on behalf each of the parties.

11.2 This Agreement may not be assigned or sub-contracted in whole or in part by any party? without the prior written consent of the other parties.

11.3 Any notice to be given shall be delivered personally or sent by first class post to the relevant party's address as set out at the beginning of this agreement. Any such notice will be deemed to be served, if delivered personally, at the time of delivery, or, if sent by post, 48 hours after posting.

Signed by/on behalf of

[insert Council's name]

Date

Signed by/on behalf of
[insert Host's name]

Date

Signed by

[insert Employee's name]

Date