



**ABERDEEN**  
**CITY COUNCIL**

**TUPE**

**GUIDANCE FOR MANAGERS**

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# SECTION 1: INTRODUCTION

## Overview of the TUPE Regulations

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When all or part of a business is bought or sold (often referred to as a transfer or transfer of undertaking), this will normally be covered by The Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended by The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (referred to as TUPE). The purpose of these regulations is to protect the rights of employees who are transferred to a new employer when a *relevant transfer* (see definition below in TUPE Terminology) takes place. This means that employees employed by the previous employer when the transfer takes effect automatically become employees of the new employer on the same terms and conditions (except for certain occupational pensions rights, see section 5). It is as if their contracts of employment had originally been made with the new employer.

## Statutory Requirements

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The Transfer of Undertakings (Protection of Employment) Regulations 2006, amended by The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 are the main pieces of legislation governing the transfer of an undertaking.

The legislation provides that the new employer assumes all rights, powers, duties and liabilities under or in connection with the employment contracts of the employees who are transferring.

The Regulations impose a duty to inform and to consult the relevant representatives of affected employees on any measures to be taken in relation to any such employees. Any dismissal where the reason for the dismissal is the transfer itself will normally be automatically unfair, unless it takes place for economical, technical or organisational reasons entailing changes in the workforce.

**The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 - These amendments will not apply in respect of any transfers which take place on or before 30 January 2014:**

- Permits transferees to collectively consult with transferring employees/representatives about redundancies before the transfer (provided the transferor agrees.) This will count towards 30 or 45 day collective redundancy consultation period.
- The right for an employee to claim automatic unfair dismissal is limited to situations where the reason for dismissal is the transfer itself.

- Post transfer changes to location can amount to an Economic, Technical or Organisational (ETO) reasons entailing changes in the workforce. This means redundancies due to a change of location will not be automatically unfair.
- Prohibition on contractual changes following a transfer will be limited to situations where the transfer is the reason for the change. In addition contractual changes will not be unlawful where a change is permitted by the terms of an employee's contract
- Where a collective agreement determines the terms and conditions of an employee's contract these can be varied after a year following the transfer provided "when considered together" these are no less favourable following the variation. Also, where a transferee inherits contractual terms which derive from collective agreements the transferee will not be bound to terms and conditions negotiated and agreed in future through collective bargaining agreements to which they have no representation.
- The transferor must provide stipulated information (see Section 3) regarding the transferring employees at least 28 days before the transfer date
- Micro-employers (i.e employers with fewer than 10 employees) may consult directly with employee within scope of transfer, where there are no existing appropriate representatives.
- The regulations introduced a clarification regarding the test for service provision changes , the activities carried out after the changes in provider must be fundamentally the same as those carried out by the person who has ceased to carry them out before it

The provisions of the Pensions Act 2004 also apply to TUPE transfers and new employers must provide a pension arrangement to employees if they were members of their old employers' scheme.

Whilst this guidance attempts to give as comprehensive advice as possible in what can be a complex area of employment legislation, it should not be regarded as a complete statement of the law.

## **TUPE Terminology**

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*A transfer of undertaking/relevant transfer* - is where a business is sold as a going concern e.g. a normal business sale where premises, goodwill, stock, etc are sold. TUPE may also apply in circumstances which are not a conventional business sale, for example, where concessions or franchises are created or terminated or where two businesses merge.

*Service Provision Change* - TUPE Regulations also provide TUPE protection to employees involved in the outsourcing, re-tendering or insourcing of services. A *service provision change* takes place when there is an organised grouping of employees (it can also be just one person), which has as its main purpose the provision of a particular service to a client. If the client then changes its service

provider and the service provision is fundamentally the same as the activities carried out previously, TUPE will normally apply.

*Transferor* - is the employer of the employees immediately before the transfer

*Transferee* - is the employer immediately after the transfer – this applies both to transfers of an undertaking and to service provision changes

## **Who is Covered by TUPE?**

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This applies to all employees of the Council, including those on full time, part time and fixed term contracts, and employees who are absent from work for reasons such as sickness, maternity, paternity or special leave (not an exhaustive list).

## **Management Responsibilities**

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The Director of each service is ultimately responsible for all TUPE transfers in their service area. TUPE is a very complex issue so it is essential to seek advice from Legal Services and Human Resources on every occasion when TUPE may be relevant at the earliest possible stage.

Management is expected to:

- Firstly, find out whether the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006 as amended apply. Always seek legal advice but as a general guide, a TUPE transfer is said to take place when the whole or part of the business or undertaking is sold or transferred as a going concern to another employer including when performance of an ancillary function is outsourced and the activities remain fundamentally the same.

If TUPE applies then the employees who are employed in the undertaking immediately before the transfer will transfer to the new employer. This includes full-time, part-time and fixed term employees.

- Identify which employees will be affected by the transfer (this is not just the employees who actually transfer - see section 3 for more information). If just part of an undertaking is to transfer, only those employees dedicated to that part of the undertaking will transfer. In such circumstances, consideration should be given to the amount of time that each employee spends in the part of the undertaking that is being transferred, and the employee's job title, job profile and particular duties, in order to assess whether they will be a transferring employee.
- Once it has been decided that TUPE should apply then a Committee report is required. Consultation should take place in line with the normal Committee Reporting procedure. Committee approval is required before progressing with the TUPE transfer in all cases.
- Provide representatives with the necessary written information about the transfer and keep accurate records

- Inform and consult with employee representatives. While the duty is to consult with employee representatives, it is good practice to inform and communicate with all affected employees regularly throughout the process.

## **SECTION 2: Information and Consultation**

The TUPE Regulations place a duty on both the transferor employer and new employer to inform and to consult representatives of their employees who may be affected by the transfer or by measures taken in connection with the transfer. Those affected employees might include:

- those individuals who are to be transferred;
- their colleagues in the transferor employer who will not transfer but whose jobs might be affected by the transfer; and
- their new colleagues in employment with the new employer whose jobs might be affected by the transfer.

There is no minimum specified period for the provision of information and consultation but information must be provided long enough before the relevant transfer as to enable meaningful consultation to take place. It should be noted that both the transferor and the transferee are under the duty to inform and potentially consult appropriate representatives.

The term appropriate representatives means employee representatives elected by employees likely to be affected by the proposed transfer or acquisition or the trade union if there is a recognised independent trade union representing the interests of those employees.

Before the consultation process begins, the appropriate representatives must first be informed:

- that the relevant transfer is to take place, the date or proposed date it is to take place and the reasons for it;
- of the legal, economic and social implications of the transfer for the affected employees;
- any measures the employer envisages taking in connection with the transfer, in relation to any affected employees, and if no measures are envisaged, that fact.
- If the employer is the transferor, the measures which they envisage the transferee will take in relation to any affected employees, or if they envisage no measures, that fact. The new employer must give the transferor employer the necessary information so that the transferor employer is able to meet this requirement.

## **SECTION 3: Providing information to the Transferee**

The transferor employer must provide the new employer with specified information which will assist in the understanding of the rights, duties and obligations in relation to those employees who will be transferred. This information is:

- the identity of the employees who will transfer;
- the age of those employees;
- information contained in the “statements of employment particulars”;
- information relating to any collective agreements and Council policies which are part of the contract of employment;
- instances of any disciplinary action within the preceding two years taken by the transferor;
- instances of any grievances raised by those employees within the preceding two years;
- information of any Court or Tribunal case, claim or action brought by those employees against the transferor in the previous two years and instances of potential legal actions which may be brought by those employees where the transferor has reasonable grounds to believe such actions might occur
- information of any collective agreement which will have effect after the transfer, in its application in relation to the employees.

The list of information should include employees who were assigned to the grouping being transferred and who have been dismissed for an economical, technical or organisational reason entailing changes in the workforce and where the reason for the dismissal is the transfer.

The information should be given at least 28 days before the date of the transfer.

If any of this information changes between the time when it is initially provided to the new employer and the completion of the transfer, the transferor is required to give the new employer written notification of those changes.

The transferor is not required to obtain employees’ consent before passing on the above information about them to the transferee, although the transferor must consider the implications of the Data Protection Act 1998 when disclosing information in the context of a TUPE transfer. Signed Consent must be obtained from the individual before information is disclosed relating to their payroll history, pension details and bank account details.

The Employment Practices Data Protection Code recommends that wherever practicable transferors should ensure that information handed over to another organisation in connection with a prospective acquisition, merger or business reorganisation is anonymised, and that workers are advised that their employment records are to be disclosed to another organisation before an acquisition or merger takes place. Furthermore, if the acquisition or merger goes ahead the employer should ensure that workers are aware of the extent to which their records are to be transferred to the new employer.

## **SECTION 4: Pension Arrangements**

### **Employees leaving the Council as a result of TUPE:**

The employing Service must contact the Pensions Section with names of the employees who may be transferred.

Potential transferees would bid on one of the following basis:

- a) "admitted body status": As a result the Council would act as Guarantor in the event that the admitted body should cease to exist. If approved, this would mean that transferring employees remain part of the LGPS and would see no real change in this respect.

In cases whereby the transferee **is** seeking admitted body status, the Council's employing Manager should liaise with the Pensions Section, who would then prepare reports to go to the relevant Council Committee and to the Pension Panel. Providing these arrangements were approved, the Legal team would prepare an Admission Agreement, which would require the signature of contractor, employer and Aberdeen City Council as the Administrators of the Pension Scheme.

- b) Alternatively, the transferee would need to offer a broadly comparable pension scheme. The transferee would be required to submit a copy of the appropriate pension booklet which would be checked by the Actuary.

### **Employees joining the Council under TUPE:**

Similar rules would apply to employees joining the Council under TUPE. If the transferring employees are not already members of the LGPS, the scheme from which they are transferring must be broadly comparable. It does not require to be the same in all aspects but generally must be comparable and the previous scheme's booklet should be provided. The Council would then have to pay the costs of gaining a certificate from the Fund Actuary to confirm that the LGPS is comparable to the previous scheme. In instances whereby the existing scheme is significantly different, for example non contributory or with a different retirement age, these issues would need careful discussion under the agreement. It would be likely that the transferring employees would need to either freeze their benefits under their existing scheme and join LGPS or look into the possibility of transferring their existing pension amount into LGPS, with all future contributions etc under the terms of the Council's scheme.

### **Auto enrolment**

The duty on employers to automatically enrol their eligible workers into a workplace pension scheme was introduced in October 2012. Implementation started with the largest employers and will apply to all employers from 1 February 2018. Automatic enrolment does not affect the TUPE rules. However, where a receiving employer is already subject to the duty to automatically enrol, they will have to automatically enrol all eligible transferring workers.

## **SECTION 5: Transfer of Employment**

The transferee takes over the contracts of employment of all employees who were employed immediately before the transfer. Employees employed in the business



immediately before the transfer automatically become employees of the new employer, unless they inform either the new employer or the Council that they object to being transferred. In this case the contract of employment with the Council is terminated by the transfer of undertaking but the employee is not dismissed. This would have the same effect as if the employee had resigned

The Council's Managing Redeployment Policy is not applicable in a TUPE transfer because the employee is not entitled to be redeployed as the employee's job is not at risk of redundancy and continues with the new employer.

Employees are still free to apply for any Council vacancy but this would be their choice and they would have to do this through the normal recruitment process.