

# **Ealing Council**

## **Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)**

### **Guidance on managing TUPE and staffing issues**

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# Guidance on managing TUPE and staffing issues

## 1. Introduction

This document provides managers with a summary of the The Transfer of Undertakings (Protection of Employment) Regulations 1981 (as amended in 2006) (“TUPE”) and guidance on the key employment issues to be addressed when managing TUPE transfers out or into the Council.

As TUPE is a complex and frequently changing area of law, managers are advised to seek specific advice from Core HR, Legal, Contracts and Procurement before making any decisions and taking certain actions around:

- a contracting out
- a re-tendering exercise
- a decision that the Council will begin to directly carry out an activity which has previously been performed on the Council's behalf by another party
- a sale or purchase by the Council of premises where it is intended that the buyer will continue to carry out the same, or similar, activities from the premises that were carried out by the previous owner
- a disposal or acquisition by the Council of a business or part of a business (and, in this context, “business” should be interpreted widely, and may include various non profit activities)

A number of supporting appendices are also available and referred to in section 7 of this document.

### Government guidance

The Council is required to have due regard to a number of documents issued by the government:

- **Cabinet Office: Statement of Practice for Staff Transfers in the Public Sector (January 2000, revised November 2007)**

This outlines the government's expectation that staff should be treated fairly and consistently in outsourcing exercises and extends to second and subsequent contracting, i.e. where work previously contracted out by Ealing Council is brought back in house, the workers currently engaged in providing the service

will TUPE back to Ealing Council. The principle also applies where one contractor wins a contract which was previously carried out by another contractor, i.e. the staff transfer from the first contractor to the second. The statement provides that the contracting exercise should be conducted on the basis that TUPE applies unless there are genuinely exceptional reasons why it should not.

*NB: Separate guidance can be obtained from the Legal Contracts and Procurement teams where a service area commissions a contract for services that requires the transfer of staff from one contractor to another contractor.*

- **Best Value and Performance Improvement Circular (issued by the Office of the Deputy Prime Minister, March 2003) and Annex D – Code of Practice on Workforce Matters in Local Authority Service Contracts.**

This Code forms part of the service specification and conditions for all contracts involving a transfer of staff from a local authority to a service provider or a re-tendering of such a contract. It sets out key issues to be addressed in contracting out exercises, including that staff must have ongoing access to the Local Government Pension Scheme or be offered a broadly comparable scheme, together with arrangements for handling accrued benefits.

- **The Best Value Authorities Staff Transfers (Pensions) Direction 2007**

This stipulates that local authorities must require contractors as part of the service contract, to secure pension protection for employees who are transferred under TUPE.

## **2. Scope**

This guidance applies to all employees of the Council except teaching and support staff employed by Schools. It does not apply to agency workers, who do not have the right to transfer under TUPE. Therefore, a service area should make arrangements with an agency to bring relevant assignments to an end before a TUPE transfer. If a new contractor wishes to use the same agency workers, they may enter into their own arrangement with the employing agency.

### 3. Key facts about TUPE

#### 3.1 *What is TUPE*

TUPE stands for The Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”). TUPE is the main piece of legislation governing the transfer of an undertaking, or part of one (e.g. from a Council service area to another organisation). TUPE applies to what are known as ‘**relevant transfers**’, which may occur in a range of situations when:

- There is a transfer of a business or undertaking (or part of one) from one organisation to another. This is sometimes known as a ‘**business transfer**’, or an “old style transfer - for example, takeovers and mergers, as well as sales of parts of a business.
- Or where a client engages a contractor to carry out work on its behalf – (outsourcing), or where it re-assigns such a contract (re-tendering) or where it brings the work back in-house. This includes sub contracts, where the main contractor awards the work or part of it to a sub contractor. These types of transfers are known as ‘**service provision changes**’.

#### **A relevant transfer:**

- May fall into both of the above categories. The definitions are by no means mutually exclusive. Thus a contracting out exercise, which happens to fail one of the requirements to make it a “service provision change”, may still be a relevant transfer if it fulfils the requirements of a business transfer.
- May be to more than one new contractor where the original contract is split.
- May take place even if only one employee has the right to transfer.

#### 3.2 *Protection and continuity of employment*

The purpose of the TUPE Regulations is to protect the rights and employment of individual employees, affected by a transfer of an undertaking from one employer to another. This means that employees employed by the previous employer become employees of the new employer, on the same terms and conditions of employment (except for most occupational pension rights). There is no set time limit on the protection afforded by TUPE.

#### 3.3 *Who transfers under TUPE*

Employees who are employed by the old employer immediately prior to the transfer, and who are assigned to the relevant grouping of employees that carries out the particular service activities, transfer to the new employer. This includes any employees who are on authorised leave, for example, on maternity, adoption, parental, career break and/or sick leave etc). Employees who are on fixed-term contracts may also transfer under TUPE if the duration of their contract is still ongoing after the

transfer date. Agency staff will not transfer under TUPE as they are employed by the agency.

When identifying the group of employees who may transfer, managers should seek advice from HR, especially where an employee does not spend their whole time assigned to the service activity transferring. In these cases, managers will need to make an assessment that takes into account, amongst other things, the proportion of the employee's time spent on the transferring activities, the breakdown of salary costs to be borne by the transferring entity, and the value given by the employee to the transferring entity and any other relevant factors.

### **3.4 *Rights of employees not to transfer***

Employees have a right to object to transfer, but if they do, the employment contract will cease on the date of the transfer and they do not transfer to the new employer. This termination of employment will not be a dismissal and so any employee objecting to transfer under TUPE will lose their job with no right to claim redundancy or unfair dismissal.

### **3.5 *Constructive dismissal***

Transferred employees who find that there has been, or will be a substantial change for the worse in their working conditions as a result of a TUPE transfer, have the right to terminate their contract and claim unfair dismissal before an employment tribunal. In all circumstances where changes are proposed, HR advice should be sought.

### **3.6 *Changes to terms and conditions***

The TUPE Regulations provide a limited opportunity to vary or make changes to the terms and conditions of employment of the transferring employees. Contracts of employment can only be changed following a transfer where there is an economic, technical or organisational (ETO) reason entailing changes in the workforce, or where there is a provision in the contract of employment that allows it.

**Economic reasons** – relating to the profitability or market performance of the new employer's business

**Technical reasons** – relating to the nature of new equipment or production processes where existing employees may not have the appropriate skills

**Organisational reasons** – relating to the management or organisational structure of the new employer's business, for example, situations where the new employer decides to integrate its newly acquired employees with its existing workforce, whereby fewer people are needed to do the job or to provide the services in a different way

Changes to terms and conditions cannot be made where the sole or principal reason for the change is to do with the transfer itself and there are no extenuating circumstances for the change. To make changes to terms and conditions, the new employer will need to consult the affected employees in the usual way they would do so. (See paragraph 4 for further advice on considering changes to terms and conditions)

### **3.7 Consultation with representatives**

Good management practice requires that employees and their representatives are involved in and consulted about, changes that will impact upon their work. The process of transferring employees to another employer will be made easier if employees and their representatives are made fully aware of how and why the decision to externalise a service has been made.

The consultation process with employees and their representatives, should ideally start prior to the selection of the preferred bidder and should include areas such as:

- The scope of the project
- The timetable
- How to raise issues
- The Council's opinion on TUPE applicability
- Pension provision

A list of possible methods of involving, consulting and communicating with employees is provided in Appendix A.

The Council also has statutory obligations to conduct consultation under the TUPE regulations. One of these is to provide certain information to the trade unions and employee representatives "long enough before a relevant transfer to enable consultations to take place". Note that under TUPE the obligation is to consult with all employees affected by the transfer. This can include employees that are not transferring to the new employer.

To meet the Council's statutory obligations and as good practice, at the earliest possible opportunity a letter should be sent to representatives and employees, informing them:

The old employer must inform representatives of the following:

- The fact that a transfer is going to take place, approximately when, and why the transfer is happening
- Who the new employer will be
- What the legal (impact on contractual or statutory employment rights), economic (changes to pay arrangements and prospects) and social implications (pension arrangements) of the transfer will mean for the affected employees

- What measures the old employer proposes taking in connection to the transfer in relation to the employees (this includes changes in working practice, including change in location)
- What measures the new employer envisages taking that will affect the employees, and if none, of this fact. (The new employer must give the old employer the necessary information to be able to undertake this before the relevant transfer takes place).
- As of 1<sup>st</sup> October 2011, information relating to the use of agency workers, i.e. the numbers, location and type of work (The Agency Workers Regulations 2010)

It is important to ensure that any employees absent, e.g. on maternity leave, career break or on long term sickness absence are also provided with this information and are given an opportunity for their comments to be heard.

Measures to be taken in connection with a transfer, includes any action the new employer intends to carry out that will significantly affect the employees, for example, a reorganisation, any plans to dismiss employees, or to vary their contracts. The new employer is responsible for providing this information to the existing employer well in advance of the transfer, so that the existing employer can consult the representatives of the affected employees about the measures. Any significant non-contractual changes (e.g. a change of work location as permitted by a mobility clause or other significant changes to working practices) should also be regarded as a 'measure' and must be disclosed.

Where there will be measures taken by the new employer, sufficient time should be set aside for the employees' representatives to consider the measures and make submissions about them to the old employer, and for the old employer to respond to those submissions, either agreeing to adopt the suggestions, or giving reasons for refusing. Some changes, which are not contractual changes, and which are fairly minor (perhaps a change of one uniform for another) would not necessarily have to be disclosed in advance. In any case, the information must be provided long enough before the transfer to enable consultation to take place.

It is likely that a series of meetings will need to be held in order to undertake consultation. Any representations made by the representatives should be considered and replied to. All consultation meetings should be recorded.

In all cases, the old employer must allow time (as well as facilities) for the employees' representatives to meet with the affected employees and to discuss the proposals. Failure to inform and consult the representatives can result in joint liability for compensation of up to 13 weeks' pay per employee by the old and new employer.

### **3.8 Redundancies**

Redundancies may be associated with the externalisation of a service for a number of reasons. TUPE transfers can result in some functions being transferred, while others



are retained in house or cease. All redundancies must meet the statutory definition, i.e. a reduction in the need for employees to do work of a particular kind. If an employee is unable to transfer under TUPE, e.g. there is a cessation of the service in a certain location, it is the Council's policy to redeploy employees wherever possible. In any situation where redundancies may arise, the employer must follow the usual redundancy arrangements when handling the dismissals.

### **3.9 Disclosure of employee liability information**

The old employer is responsible for providing a set of specified information described as 'employee liability information' in writing to the new employer at least **two weeks** before the completion of the transfer. This is to help the new employer understand the rights, duties and obligations in relation to the affected employees who will transfer.

The information which must be provided is set out in detail in the legislation. Some examples, include:

- The identity of the employees who will transfer
- The age of those employees
- Information contained in the "statement of employment particulars" (*individual contracts of employment*) for those employees
- Information relating to any collective agreements, which apply to those employees (e.g. *National Conditions of Service, Ealing Local Conditions of Service*)
- Instances of any disciplinary action within the preceding two years taken by the old employer in respect of those employees (*excluding oral or written warnings or suspensions on full pay*)
- Instances of any grievances raised by those employees within the preceding two years, and
- Instances of any legal actions taken by those employees against the old employer in the previous two years, and instances of potential legal actions, which may be brought by those employees where the old employer has reasonable grounds to believe such actions might occur.

The information must be transferred securely and can be provided in instalments, as long as all of it is given not less than two weeks before the effective transfer date. Any changes to the information before the transfer date must be notified in writing and provided to the new employer.

It is essential to provide the required information within the required timescales as failure can lead to a complaint by a new employer to an Employment Tribunal for compensation. This will usually be £500 for each employee for whom the information was not given, but can be more if the new employer can show that it has suffered a financial loss that is greater than that.

### **3.10 *Collective and Trade Union agreements***

Collective agreements concerning terms and conditions transfer to the new employer. Trade union recognition agreements also transfer to the new employer, providing that the transferred entity retains its identity distinct from the rest of the new entity).

### **3.11 *Transfer of Rights and Liabilities***

The new employer takes over the liability for all statutory rights, claims and liabilities arising from contracts of employment, for example, to do with unfair dismissal, equal pay and discrimination claims. The exception to this applies to any criminal liabilities and employer liability insurance claims. In some circumstances, the liability of employees dismissed by the old employer prior to the transfer date passes to the new employer.

### **3.12 *Protection against dismissal***

Employees are protected against dismissal by reason of the transfer, before or after the transfer takes effect. Any dismissal for a reason connected with the transfer that is not an ETO one will automatically be unfair (subject to the normal one year qualifying service). Where there is an ETO reason that necessitates a change in the workforce, then normal rules on unfair dismissal apply.

### **3.13 *Pensions***

The provisions of an occupational pension scheme do not transfer under the TUPE Regulations and a new employer is not required to continue identical occupational pension arrangements for transferred employees.

However, from 6<sup>th</sup> April 2005, transferring employees have some degree of pension protection. In effect, where transferred employees were eligible to be, or would have been eligible to be a member of an occupational pension scheme prior to the transfer, the new employer must provide some form of pension arrangement. This must be offered as soon as the transfer takes place and must be broadly comparable to, or better than, those rights received as an employee of the old employer.

Where employees transfer out of the Council, the new employer has a choice of what type of pension scheme to offer. One option is for contractors to apply for Admitted Body Status to continue provision of the Local Government Pension Scheme. If the new employer is granted Admitted Body Status to the LGPS, this allows transferring employees to remain in the LGPS and contributions and benefits would remain.

Alternatively, the new employer can offer transferring staff membership of their own pension scheme, however, this scheme must be certified as 'broadly comparable' to

the LGPS, by the Government Actuary's Department (GAD). A copy of the GAD certificate of comparability should be made available to the trades unions and employee representatives. Certification by the GAD can take a significant time period and needs to be built into the procurement timetable.

It is important for managers conducting TUPE exercises to be aware that the pension issue is one of those that causes the most concern to both employee and trade unions during TUPE transfers. Managers should ensure the pension provision following the transfer is explained to transferring employees at an early stage.

**Bearing in mind the above, advice from Procurement and Pensions should be sought at the earliest possible stage when managing TUPE transfers.**

## **4. Considering changes to terms and conditions**

- 4.1 Managers should seek HR advice whenever changes to the terms and conditions of employees who are transferring into the Council are being considered.
- 4.2 The TUPE Regulations provide that employees are protected on their existing terms and conditions of employment and the new employer must not change them to less favourable ones. This means that the Council may have different employees on different terms and conditions of employment.
- 4.2.1 Changes must NOT be made where the sole or principal reason is:
- The transfer itself or
  - A reason connected with the transfer, which is NOT an ETO reason entailing a change in the workforce.
- 4.2.2 However, a new employer and employee can agree to vary an employment contract where the sole or principal reason is:
- A reason unconnected with the transfer; or
  - A reason connected with the transfer, which is an ETO reason entailing a change in the workforce
- 4.2.3 The TUPE Regulations do not prevent a new employer and employee agreeing to amend a particular term where that particular amendment benefits the employee or where the old employer would have had the contractual right to make changes. In effect, salaries could be increased, or extra holidays given, and there would be no breach of TUPE.
- 4.2.4 Subject to the above, TUPE does not allow a new employer the ability to make changes for a reason connected to the transfer that is to an employee's detriment. It is no defence for a new employer to argue that it has upgraded some terms and downgraded others, so that the overall effect is that an employee is better off. In that scenario, an employee might be able to retain the benefit of those terms that had been improved, without having to accept the burden of those terms that had been reduced.
- 4.2.5 Therefore, if incoming employees have a package of terms, some of which are 'better' than the Council's equivalent terms, and others are 'worse' than the Council's equivalent terms, then TUPE Regulations may prevent there being a trade off. In such cases, it will usually be appropriate to leave all of the employees' terms and conditions the same. It would not usually be appropriate to simply upgrade those which are 'worse' than the Council's equivalent term, since that might mean that the employees were better off than colleagues doing the same job, and may mean that the Council is not achieving value for money.

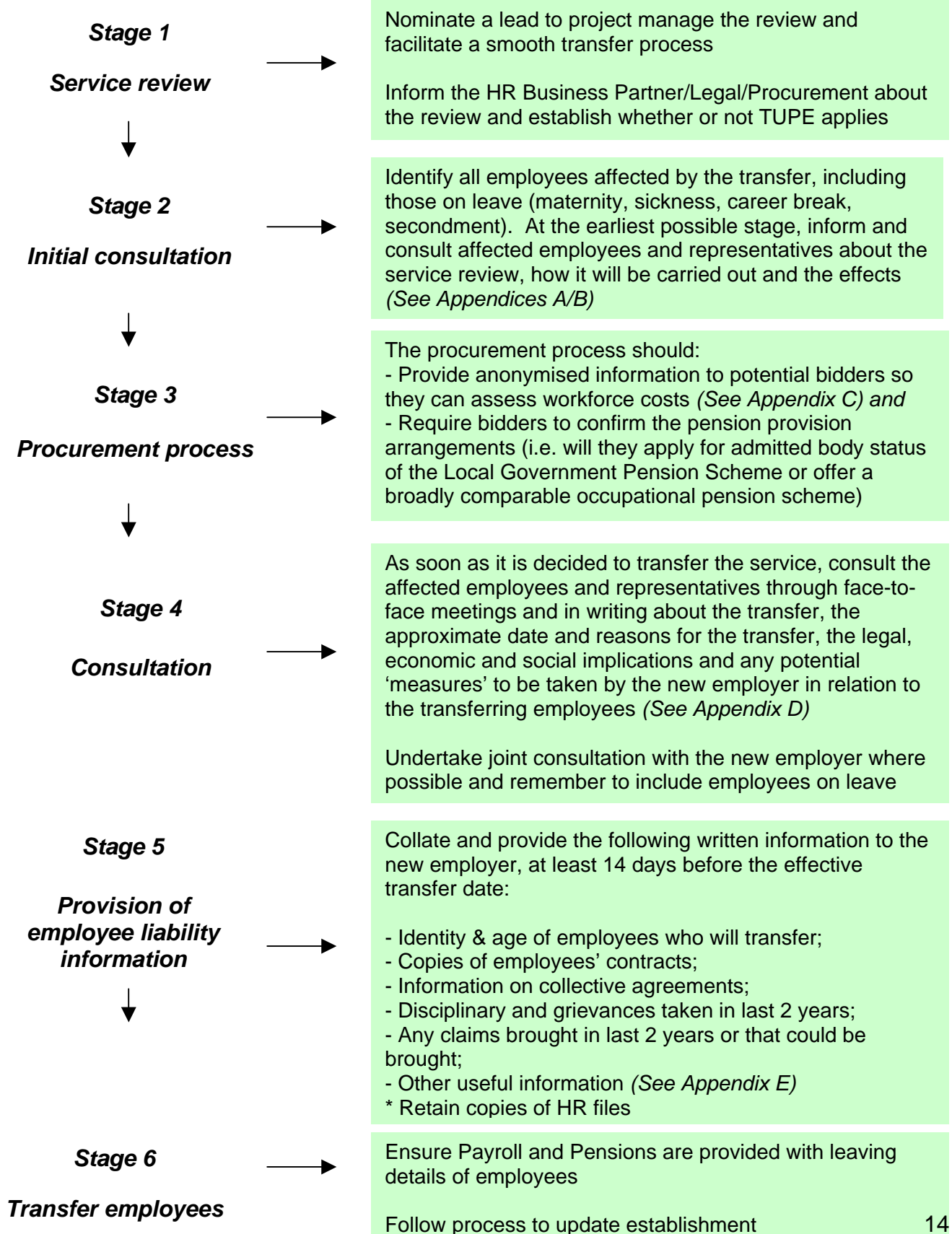
4.2.6 The TUPE Regulations protection is not time limited. In other words, it is not the case that changing contractual terms for a reason connected to the transfer, will be permitted a few weeks, months or years, after the transfer.

4.2.7 When considering changing terms and conditions, the following issues should be taken into account:

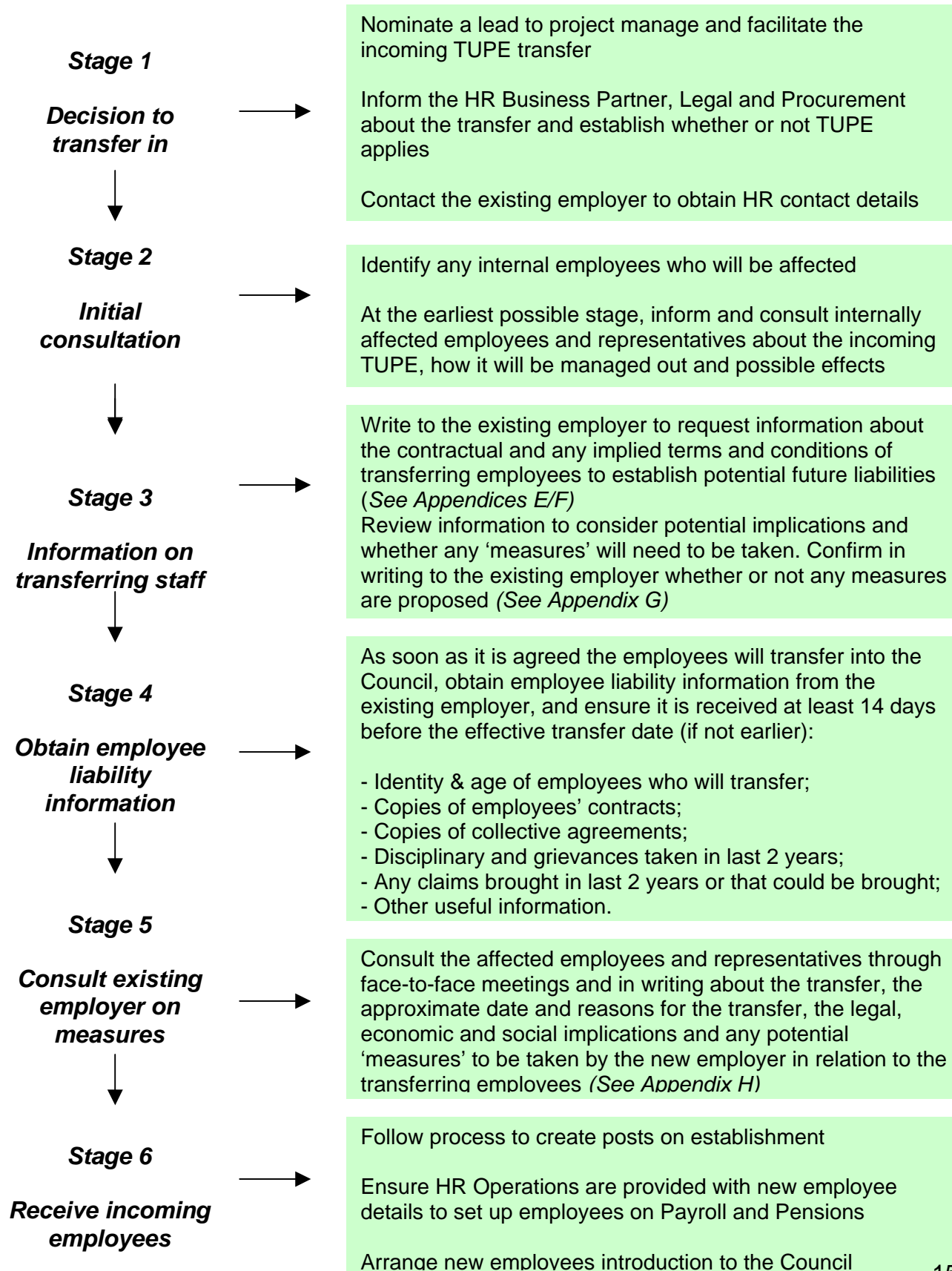
- Review what, if any, changes to duties, hours, etc are permitted by the existing contract. It may be that the Council can make all the necessary changes without having to vary the contract.
- Will each contractual term that is changed be a benefit to the employee? Or is it proposed that some new terms will be less advantageous than the employee's current contract?
- Is the reason for the proposed change, a reason connected to the transfer? If the reason for the proposed change is something entirely different then TUPE Regulations have no relevance.
- Is the reason for the proposed change, a reason connected to the transfer? If so, then is it an "ETO reason"?
- Remember that the TUPE Regulations may act to prevent the Council relying on a change to a contract even if the employee initially indicated that they were willing to agree to the change. *(Seek HR advice about making sure that any of the new beneficial terms would have to be given up should the employee later seek to rely on the older terms.)*
- Remember that the TUPE Regulations are not the only factor that limits the Council's ability to make changes to contracts. Where employees have not been willing to agree the changes, then, even apart from TUPE issues, the Council can only make changes to the contract unilaterally by following the appropriate process fully.
- Can the changes be managed within existing budgets?
- Remember the Council is not obliged to upgrade the contracts of incoming staff, even where doing so would not breach TUPE Regulations.

4.2.8 Where an employee voluntarily moves to a different post within the Council, then they will be expected to move to all the standard terms and conditions of that post.

## 5. Protocols on transferring a service out



## 6. Protocols on transferring a service in



## **7. List of supporting appendices**

### **Transferring a service out**

- A Possible methods of consultation
- B Sample letter to employees and representatives for consultation
- C Sample proforma tender documentation of employees transferring out
- D Sample letter to communicate decision to transfer out

### **Transferring a service in**

- E Sample checklist on individual TUPE information required for each employee transferring
- F Sample due diligence letter to request information from existing employer about employees transferring into the Council
- G Sample measures letter on any proposed ETO changes
- H Sample letter to new employees notifying them of a TUPE transfer and invitation to a one to one meeting