

TUPE

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Summary

This policy explains the effects on employees when TUPE is deemed to apply and sets out what managers must do to ensure compliance with the legislation on staff transfers following service provision changes.

Key principles of TUPE

- TUPE refers to 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". The TUPE rules apply to all organisations and protect employees' rights when the organisation or service they work for transfers to a new employer.
- There are two situations when the TUPE regulations may apply: business transfers and service provision transfers. Generally, for TUPE to apply to a service provision change there must be an organised grouping of employees whose principal purpose is to carry out the activities in question on behalf of the client; employees must be assigned to the group in question and the activities immediately before and after the transfer should remain fundamentally the same.
- When TUPE applies, the employees of the outgoing employer automatically become employees of the incoming employer at the point of transfer. Their continuity of service and terms and conditions of employment are preserved (different rules apply to pensions).
- TUPE legislation is however complex. HR and legal advice on **whether** TUPE **applies** and implications on employees must be obtained in all cases where a contract is awarded to an external organisation or the service is taken back in-house.

TUPE out of the Council

- All transfers of staff from the Council to another service provider should comply with the "Cabinet Office Statement of Practice on Staff Transfers in the Public Sector" and its Annex, "A Fair Deal for Staff Pensions and the Code of Practice on Workforce Matters", which is currently under review. If the Council is seeking a service provider by a tender exercise, the invitation to tender documentation must refer to the statement and code of practice. Legal advice should be taken on tender documentation.
- Potential external service providers will be required to confirm their support for these principles and their obligations to protect the terms and conditions of transferring staff. They will be asked to confirm:

- that they will provide the service on the basis that TUPE applies;
- their intentions concerning the taking on of staff and assets used in the service when provided by the council;
- the pension scheme arrangements they have in place for transferred employees.
 - At an early stage (and before any tenders are invited if it is proposed to contract-out the service) managers should make an assessment of:
 - the proportion of time spent by each affected employee on the individual activities which it is proposed to transfer;
 - the value of this work;
 - proportional cost;
 - contractual documents concerning work duties and location.
 - People Services advice must be sought at the very start of the process where it is proposed to transfer parts of a service as opposed to a whole service, or a whole service is proposed to transfer to several providers, as a minor reorganisation of the service may be needed at an early stage
- If TUPE is deemed not to apply, following legal advice, managers may need to declare staff employed in the service redundant. Where there is likely to be a redundancy situation managers should refer to the [Managing Organisational Change guide](#).

Consultation

- The Council recognises the importance of consultation and communication with staff and trade unions during any reorganisation in the way services are provided. Managers should start consultation with staff and trade unions at the earliest possible stage of any such project and communication will be ongoing (e.g. meetings with staff and trade unions followed up by staff bulletins) in line with the [Managing Organisational Change](#) guide
- All affected staff should be consulted, even those who will not transfer
- During consultation employees and trade unions must be informed in writing:
- that a transfer may take place, when this might happen and the reason for it;
- the implications of any potential transfer for affected employees on social, legal and economic issues (including at the appropriate time information about the new external provider, where it is based etc., and the potential impact of a transfer on contracts, pensions etc.);
- the measures that the council or the external provider propose to take in relation to the transfer.
 - ongoing consultation with the trade unions should ensure that staff and trade unions have every opportunity to make representations on any matters arising and to have those representations responded to
 - consultation will normally involve staff meetings, with the new provider if service provision is to be externalised

Employees included in a TUPE Transfer

- **Organised Grouping.** In order for TUPE to apply, there must be a group of employees that has been deliberately organised by the employer to service a particular client. It is not enough that because of, for example, shift patterns, the employees actually do service a particular client.
- The Manager must therefore determine which employees are assigned to the service that will transfer, based on the above definitions, seeking People Services' advice as appropriate. Where employees work only partly in the area to be transferred, or provide a general support service that covers more than the service to be transferred, the requirement for an organised grouping may not be met, and this will need to be identified at an early stage.
- **Economic Entity retaining its identity.** The activities carried out on or after the change must be "fundamentally or essentially the same" as those carried on before it transferred. The courts have adopted a stringent test as to whether or not the economic entity retains its identity following the transfer. Relatively minor changes in the way the service is provided by the incoming contractor can defeat TUPE. There have also been a number of cases establishing that splitting up the services provided by the incumbent between a number of contractors will defeat TUPE.

Appeal against inclusion/non-inclusion to the transfer list

Employees can appeal about their inclusion or non-inclusion in the transfer list. The appeal should be lodged within 5 working days of receiving written confirmation. A member of ELT, assisted by an HR Adviser, will hear the appeal. The appeal should consider whether the employee is assigned to the transferring service. If the employee does not wish to transfer, but is assigned to the transferring service, the employee will transfer by operation of law.

Provision of Information to potential tenderers: Pre-contract award

- The Council is obliged to provide tenderers with relevant employee information so that they can assess their potential liabilities in respect of the transfer of staff if TUPE applies; this information must be as detailed as necessary for them to prepare their tender. (For more details, please see [Disclosure of Information To Potential Contractors at Tender Stage](#).)
- Where organisations are invited to tender, shortlisted or awarded a contract, full details relating to the costs of employing the current workforce in that service has to be made available to them. Managers must liaise with the HRBP and IBC to ensure that appropriate staffing information is provided as required using the standard spreadsheet at every stage of the tendering and contract awarding process.
- The staffing information provided should normally include details of all employees working in the service area being outsourced and the percentage of their time spent on work included in the tender. This should include all the costs related to employing the staff.
- Information to potential tenderers must not include personal details. Potential tenderers should receive only as much detail as is necessary for them to be able to prepare their tender.

- In addition to the above information about employees, managers need to provide the following information about all TAC's (Temporary Agency Contractors)
 - The total number of agency workers engaged
 - The areas of the business in which they are utilised
 - The type of work they are contracted to undertake

Provision of Information to the new service provider: Post contract award

- If the service is transferred to another provider (e.g. the successful tenderer) on the basis that TUPE applies, the new employer will require full employee liability information of the staff who will transfer.
- Staffing information must be provided no less than 28 days prior to the effective date of transfer.

Managers should liaise with the HRBP and IBC to ensure that all required employee liability information is provided (for more details, please see [Disclosure of Information to New Employer After the Award of the Contract](#)).

TUPE into the Council

The Council may be in the position of receiving staff when services in the community are reorganised, such as when:

- a service is transferred to the Council by statute
- a service which was previously externally provided (e.g. by a contractor) is brought back in-house
- a service is shared by one or more authorities/statutory bodies and the council becomes the employer for "pay and rations" purposes
- the Council is contracted by another body (e.g. another local authority) to provide a service already being provided by that body/or another provider

TUPE is likely to apply in most of the above scenarios and result in the employees transferring to the Council from the former external provider. In these circumstances, the guidance on assignment and requirements around consultation set out above will still apply, except that the Council will become the new service provider and, therefore, the new employer.

Employees who transfer to the Council will be entitled to retain continuity of service and the terms and conditions of employment they enjoyed before the transfer. The Council however offers much more favourable terms and conditions compared to most employers and hence seeks to avoid having different groups of staff on different terms as far as it can. Nevertheless, there are complex legal considerations and managers should seek the advice from People Services' before proposing any of such measures.

Manager's Responsibilities

Managers should:

- Identify whether the service change proposed is likely to result in a TUPE transfer, either into the Council or out of the Council
- Identify which employees would be potentially assigned to the transfer and seek HR and legal advice where relevant
- Consult with employees and trade unions
- Liaise with HRBP and IBC to ensure compliance with due diligence data requirements
- To action leavers or new starters (depending whether TUPE in or out) via IBC

FAQs

Q1. Can employees be made redundant before or immediately after the transfer?

A1. No, employees cannot be made redundant because of a transfer of services unless there is an "economic, technical, or organisational" (ETO) reason entailing changes in the workforce or a change in location for the redundancies. Any dismissal that results solely or principally because of the transfer will automatically be unfair unless it is for an ETO reason.

Where there is an ETO reason for the redundancy, consultation that begins pre-transfer will now count for the purposes of complying with the collective consultation rules, provided the transferor and transferee can agree and where the transferee has carried out meaningful consultation. Provided appropriate consultation has taken place, dismissals can be effected immediately or shortly following the transfer for the transferee's ETO reason.

Q2. What are contractual terms?

A2. Contractual terms in the main, apply to pay and conditions, including any provisions negotiated at national and local level. Though not defined in TUPE, these could include:

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

Q3. Can the transferee/transferor make changes to employees' terms and conditions of employment?

A3. The ability of the transferee and transferor to change terms and conditions for a reason connected with the transfer is limited by the regulations which provide that a variation of contract is void if the sole or principal reason for it is connected with the transfer and is not an ETO (Economic, Technical, Organisational) reason entailing changes in the workforce, or a change in work location.

It should also be noted that where a relevant transfer involves a substantial change in the working conditions to the material detriment of a person whose employment contract is or would be transferred, such an employee may treat the contract as having been terminated and he/she will be treated as having been dismissed.

Managers therefore should seek the advice from People Services before making any proposals to change the terms of conditions even when these are more favourable to employee as there are complex legal considerations.

Q4. What is the definition of an ETO?

A4. No satisfactory definition of ETO reasons has emerged from the case law and none is to be found in the regulations or the directive. The reasons may encompass the following:

- Reasons relating to profitability or financial performance (economic).
- Reasons relating to equipment or processes (technical).
- Reason related to management or organisational structure of the business (organisational).
- Reason related to a change in work location

Q5. Can an employee opt out of the protection offered by TUPE? E.g., can an employee agree to being made redundant rather than transfer, or accept some detrimental changes to their terms and conditions?

A5. No. Where TUPE is deemed to apply the employee will transfer to the new employer, unless they decide to resign.

Q6. What is the minimum period for consulting the Trades Unions?

A6. There is no legal minimum period of consultation, but consultation should begin at the earliest opportunity.

Q7. What happens to employees who are on sick or family leave, annual leave at the time of the transfer etc.?

A7. In these circumstances, and other legitimate absences, if they are assigned to the service being transferred, their employment will transfer on the effective date of the transfer. Employees must also be consulted together with the rest of transferring staff.

Q8. Can employees refuse to transfer to the new employer?

A8. Yes. Under TUPE, all transferring staff have the right to opt out of the transfer, provided they confirm their intention in writing. However, the effect of this is that the employee's employment ends at the transfer date and there is no right to be redeployed or to receive a redundancy payment. Seek People Services' advice if in this situation.

Q9. What should happen to temporary/fixed term employees assigned to the transferring service?

A9. These employees transfer to the new provider on their existing terms and conditions, including the contractual term that the employee is only employed for a fixed period. As any employee with over two years' service can bring a claim for unfair dismissal, fixed term employees should be treated the same way as permanent employees. Even if the employees do not have two years' service at the date of dismissal, they can still bring a claim for failure to inform and consult.

Q10. What is the position on pension if TUPE applies?

A10. Pension rights do not transfer under TUPE but contractors should provide a comparable pension scheme. If an employee joins a new pension scheme, their council pension is preserved, as it would be if they had left the council's employment. The contractor could seek "admitted body status" into the Local Government Pension Scheme. Employees are encouraged to talk to Surrey County Council wccpensions@surreycc.gov.uk about their options.

Disclosure of Information to Potential Contractors at Tender Stage

Where a tenderer submits a TUPE bid, they will need information to enable them to put their bid together. They should receive only as much detail as is necessary for them to be able to prepare their tender. This must not include personal information; therefore, any information listed below should not identify any individuals.

1. The numbers of staff who are working on the service being outsourced
2. Grade and salary levels
3. Contracted hours of work (show whether part-time or full-time)
4. % of time spent on work included in the tender
5. Length of service and age (not date of birth)
6. Notice periods
7. Details of any bonus/PRP scheme and indication of how many are part of the scheme
8. Details of any Market Based Salary Supplements (MBSS)
9. Where shift allowances and other premium payments are payable, which % applies
10. Other allowances payable to individual posts: standby allowances; telephone allowances, car allowances (indicate whether essential or casual)
11. Contractual overtime
12. Indication of where night work and/or week-end enhancements apply
13. Other individual allowances – e.g. first-aid/fire officer allowances
14. Any unpaid benefits such as contract cars, annual leave entitlements
15. Any staff in emolument accommodation
16. An example of a specimen contract
17. Job descriptions
18. Numbers of temporary and permanent staff
19. Appropriate parts of national conditions, Green Books, etc.
20. Redundancy entitlement
21. Local conditions which would have an impact on the cost of the bid, e.g. maternity arrangements, leave entitlements
22. Details of our pension scheme
23. The following information about all TAC's (Temporary Agency Contractors) assigned to the service:
 - a. The total number of agency workers engaged
 - b. The areas of the business in which they are utilised
 - c. The type of work they are contracted to undertake

Disclosure of Information to New Employer After the Award of the Contract

When the contract has been awarded, the new contractor will be entitled to receive, prior to the transfer, full employee liability information concerning all staff who will transfer. Notification of the employee liability information must occur no later than 28 days prior to the transfer or, if this is not reasonably practicable (e.g. where the negotiations for the transfer take place over a very short period of time), as soon as is reasonably practicable afterwards. Information must be in writing or made available to the contractor in readily accessible form which includes email and computer data files.

Under the TUPE regulations employee liability information is the minimum information about transferring staff that outgoing employers must provide to the incoming employer. However new employer may seek additional information and this is called due diligence. These two methods of gathering information should be treated as part of the same process and run together.

Failure to comply with the requirement to provide employee liability information may result in the council having to pay compensation to the contractor.

The IBC will prepare a template which can be used for both outgoing and incoming TUPE transfers.