

TUPE - Advice for UNISON Representatives

This leaflet provides information, guidance and advice to support UNISON Representatives where a decision has been taken to proceed with a TUPE transfer of their employer or workplace

UNISON Representatives have a clear responsibility to continue to represent and protect the interests of members who are or will be working in transferred employment. The Local and Branch Representative(s) and Regional Staff will all have a role to play in the transfer process and should be informed of any TUPE proposals. In these circumstances the UNISON Representative in the potentially transferring workplace should seek advice immediately from their Branch. The Branch should then keep their Regional Centre aware of any developments.

1. Where the current employer is proposing to move staff from their current employment to employment with another organisation or company, the UNISON Representative should confirm with both the current and any proposed future employer that this will be treated as a relevant transfer under the terms of the TUPE Regulations

The TUPE Regulations

The TUPE Regulations were designed to protect employee's rights and provide for proper information and consultation where there is a change of employer. TUPE is a complex area of law and this leaflet summarises the main issues and principles that effect both potentially transferring staff and any other staff who may be affected by the proposed transfer.

It must be noted at the outset that TUPE is intended to cover employees only. Therefore, any agency workers are not afforded protection of the TUPE regulations.

TUPE Consultation Rights

The transferring employer should already be aware of the consultation requirements under the TUPE regulations. These require employers to **inform** and **consult** 'appropriate representatives of any affected employees' where there is a transfer.

The duty to **inform** applies to any situation where a transfer is proposed. The TUPE Regulations require that employee representatives be **informed** that:

- the transfer is to take place, when it is to happen, why it is to happen;
- the legal, economic and social implications of the transfer for the affected employees; and
- Whether the employer envisages taking any action, such as reorganisation, in connection with the transfer which will affect the staff, and if so, what action is envisaged.
- The number of agency workers working temporarily for the employer and the type of work those agency workers are carrying out.

In addition to informing the representatives, the employer must also engage in **consultation** with representatives of affected employees with a view to seeking the agreement of employee representatives to the intended measures. The duty to consult covers 'Affected Employees'. This could include employees that are due to be transferred, co-workers of those due to be transferred who may have their jobs affected by their transfer and also new co-workers who are employed by the new employer who jobs may also be affected by the transfer. In addition, the consultation only becomes active when the employer proposes to take measures in connection with the transfer. 'Measures' can include a whole host of issues, but is generally any action, step or arrangement that is a result of the transfer. It includes matters such as proposed changes to monthly pay dates or the running of the annual leave year.

The TUPE Regulations do not set out detailed requirements relating to the timing of consultation, and consultation would not have to take place in advance of the publication of proposals. The regulations make clear, however,

that employee representatives should be informed of any transfer long enough before the transfer to enable consultations to take place. UNISON would expect this to be at least 90 working days before the transfer.

The duty to consult falls on the employees' current employer. However, the future employer may be jointly liable with the current employer for any failure to consult in accordance with the regulations. The TUPE Regulations have provided that **both the current and future employer could be held responsible** for any failure to consult employees concerning the transfer of their employment.

For transfers taking place after 31st January 2014, the new employer has the right to consult with elected representatives of the transferring workforce prior to the transfer date that they intend on carrying out collective redundancies after the transfer. Any redundancy dismissals arising from this must still be carried out after the transfer date. However, the new employer can use the time before the transfers to count towards the 45 or 30 days of statutory consultation time they are required to give before effecting collective redundancy dismissals.

2. Where the future employer is proposing to consult on redundancies prior to the transfer, Representatives must make enquiries as to whether they have sought the agreement to enter into the redundancy consultation with the existing employer. If they have not the consultation is void. Representatives should seek advice from Branch on any proposed redundancy consultation.

Employer Liabilities

All rights, powers, duties and liabilities will transfer from the current employer to the new employer. Another consequence of the transfer is that anything done by the current employer in respect of the employee is considered, from the implementation date, to be done by the new employer. The effect of the

transfer of employer liabilities is to protect an individual's employment rights on transfer.

Employment Rights Protected by TUPE Transfer

➤ Continuity of Employment

In these circumstances members' continuity of employment and associated employment rights (such as unfair dismissal and redundancy qualifiers) would remain unaffected.

3. Where the current employer is the Local Authority or an NHS employer the UNISON Representative should seek to negotiate an agreement with them to ensure that continuity of employment and associated employment rights will be retained if staff move back into the employment of the Local Authority or NHS.

➤ Staffing Reductions

Any dismissal will be deemed to be automatically unfair where the sole or principal reason for the dismissal is because of the transfer, or for a reason connected with the transfer that is not an economic, technical or organisational (ETO) reason that requires a change in the workforce.

4. If staffing reductions become required as the result of an ETO reason, the Employer must show that this is reasonable. Employees dismissed in these circumstances will be entitled to a redundancy payment. Where a redundancy or dismissal is proposed the UNISON Representative should immediately inform their Branch and, if necessary, their allocated Regional Organiser.

➤ Changes in Location

ETO reasons under TUPE have now been expanded to include changes in work location. Therefore, it is possible that the employer may be able to dismiss an employee or vary their contract if the location where staff are located is changed because of the transfer.

5. The UNISON representative must request information from the employer as soon as possible if they intend on relocating employees as a result of the transfer. Employees with at least two years service will be entitled to a redundancy payment if they are dismissed as a result of the relocation.

➤ Local Collective Agreements

Local collective agreements already in place, such as policies and procedures that are expressly referred to in a member's contract, will be transferred under the TUPE regulations. Any collective agreements entered into by the current employer before the transfer date, in respect of an individual's terms and contract of employment, must therefore be honoured by the new employer.

Collective agreements may not transfer if there is no reference to them in a member's contract of employment. Advice should be sought from the Branch where there is any doubt and where the new employer does not accept that such agreements negotiated with unions transfer under TUPE.

6. The UNISON Representative should seek confirmation in writing that collective agreements referred to in members contracts of employment will transfer with the contracts of employment of TUPE transferred staff. In addition, the Representative should seek agreement from the current employer to incorporate into contracts of employment any collective agreements that are not already specifically recorded in the contract.

With all transfers taking place after the 31st January 2014, any contract term incorporated from a collective agreement will not be protected by

TUPE from variation, if the variation takes place one year after transfer and that the change will be no less favourable overall to the employee. The Employer cannot make these changes without agreement from the staff.

7. The UNISON Representative should inform their Branch immediately if the new employer proposes to alter collectively agreed terms and conditions regardless if the employer proposes to do this before or after 12 months have passed since transfer.

➤ Union Recognition

The right to Union recognition transfers over when the group of employees who transfer retains a distinct identity. However, it does not automatically transfer.

8. The UNISON Representative should seek confirmation in writing from the new employer will be a recognised trade union for purposes of collective bargaining on behalf of all UNISON members and that UNISON representatives will be guaranteed access to premises, staff and adequate facilities to undertake their duties.

➤ Contractual Changes

Any dismissals or contractual changes made at or around the time of the transfer must be entirely unconnected with the transfer and justifiable for an ETO reason. TUPE allows for the new employer to agree betterments to contracts with transferred employees.

9. If an Employer offers a new contract of employment it is usual to advise TUPE transferred members against transferring from their TUPE transferred substantive contract of employment, especially where this specifically incorporates local collective agreements. However, advice should be sought from the Branch concerning specific proposals.

➤ Changes to Pay and Conditions of Service

If changes are negotiated, or imposed, as a result of the transfer that are not for an economic, technical or organisational (sometimes referred to as ETO) reason, employees to whom TUPE transfer applies may be able to bring a claim to an Employment Tribunal.

Any new arrangements would only apply to new appointees and would not be enforceable with regard to those to whom TUPE transfer applied, unless they give their express agreement in writing that they wish to accept the new collective agreements.

10. Where changes are suggested to TUPE transferred staff pay and conditions of service the Branch should be contacted immediately for advice. It should be agreed in writing that changes to pay and conditions of service for all staff working for the new employer, including new appointees, should be negotiated in joint negotiating structures involving the UNISON and other workforce trade unions.

An important amendment now appears in the TUPE regulations which impacts dramatically on pay for those employees whose employment is outsourced to the private sector. Essentially those employees are no longer able to derive benefit from national or industry pay negotiations. What this means therefore is that the level of pay is deemed to have frozen at the level it was upon transfer. The transferred employees cannot in future rely on levels of pay awards that are negotiated nationally to raise their levels of pay.

➤ Collective Disputes

As is usual with negotiations, if a solution that is agreeable to members can not be reached and they remain unhappy about changes to policies, pay, pensions, terms and conditions or anything else that the employer seeks to change, such as working hours, then advice should be sought from the Branch to make arrangements to canvass members' views and for advice and guidance to be given to those members.

Pensions

Pension entitlements do not transfer under the TUPE Regulations; however, those who are transferred from public sector employment and are members of a public sector pension scheme must be ensured access to that scheme by their new employer.

11 The UNISON Representative should confirm in writing that all staff in pensionable employment will automatically be entered for membership of their relevant Pension Scheme and that the new employer will make the necessary pension contributions.

Advice and support

For advice and support contact your UNISON Branch or Regional Centre, as appropriate. Contact details can be found on the UNISON website at www.unison.org.uk or by telephoning 0800 0857 057.