

[GUIDANCE ON A TUPE TRANSFER]

This guidance note aims to provide LPCs with basic guidance in relation to “TUPE transfers”.

It outlines what a TUPE transfer is and how to recognise one. It also sets out the legal implications and requirements that arise when a transfer occurs. It is essential that LPCs follow the correct procedure in order to avoid facing any claims being lodged in the Employment Tribunals (such as “automatic” unfair dismissal or a failure to inform and consult under TUPE), which may lead to compensation and/or financial penalties.

Where LPCs consider there is a risk of a TUPE transfer, please contact Clyde & Co LLP for bespoke legal advice. We can support you with assessing whether there is likely to be a TUPE transfer and the appropriate procedure.

[It is intended that this document be legally privileged, being part of solicitor/client correspondence and containing legal advice on a confidential basis. Any copies of this document circulated to committee members, provided they are sent for the purpose of giving legal advice to the LPC and remain confidential, are likely to benefit from legal advice privilege. It should be noted that any comments made on the document, or noted on any copies, which are expressions of personal views will not be privileged. Similarly, notes or other forms of communication which contain extracts of this document, accompanied by personal views of the situation will not be privileged. It is, therefore, recommended that any comments on this document should be forwarded to Clyde & Co LLP by way of formal correspondence for the purpose of obtaining legal advice.]

1 Introduction

- 1.1 The aim of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“**TUPE**”) is to protect employees when:
 - (a) the whole or part of an undertaking transfers to another entity where there is a transfer of an economic entity which retains its identity; or
 - (b) activities (to which employees are assigned) transfer to another entity as a result of an outsourcing, insourcing or a new provider being introduced.
- 1.2 Our understanding is that TUPE might be relevant to LPCs in a number of situations, including where LPCs merge, become “federated” or if a new committee is created.
- 1.3 Our understanding is that there are no current proposals for the transfer of undertakings or activities from LPCs to the PSNC. On that basis, no TUPE transfer will be established involving the PSNC.
- 1.4 Where there is a transfer of employment from one employer to another pursuant to TUPE, the former employer is referred to as the “**Transferor**” and the new employer is referred to as the “**Transferee**”. These terms are used below.

2 What is the effect of TUPE?

- 2.1 When TUPE does apply:
 - (a) The employment of the employees employed by the Transferor **automatically transfers** to the Transferee on the **same terms and conditions**. It is as if their contracts of employment had originally been made

with the Transferee. Thus, employees' **continuity of employment is preserved**, as are their terms and conditions of employment under their contracts of employment and all liabilities and rights under the contract of employment pass to the Transferee. Different provisions apply in respect of pension arrangements;

- (b) Representatives of employees (or the employees themselves if the LPC has fewer than 10 employees) affected by the transfer have a **right to be informed** about the transfer. They must also be **consulted** about any “**measures**” (see below) which the Transferee envisages taking concerning affected employees; and
- (c) Where an employee **objects to the transfer** and chooses not to become an employee of the Transferee, they will not be seen as having been dismissed. Instead, their contract of employment will be considered to have been terminated at the date of the transfer.

2 Under what circumstances does TUPE apply?

- 2.1 TUPE applies on the transfer of the whole or part of a business or undertaking where there is **a transfer of an economic entity** that retains its identity post-transfer (also known as a business transfer).
- 2.2 TUPE also applies where there is a '**service provision change**'. This occurs where a contract to provide a customer with a service is:
 - (a) outsourced to a contractor to do work on its behalf;
 - (b) reassigned to a new contractor; or
 - (c) ended with the bringing in-house of the service in question.
- 2.3 Any activities that are transferred under a service provision change must be fundamentally or essentially the same as those carried on prior to the transfer for TUPE to apply.
- 2.4 TUPE may not apply to service provision changes where:
 - (a) the current service is provided by different persons on an ad hoc basis rather than by a team assigned to provide the service on a permanent basis;
 - (b) the current service is provided by the same persons, but those persons provide that service to a number of different clients rather than a single specific client;
 - (c) the current service is a one-off task rather than services being provided on an on-going basis; or
 - (d) the service in question is the supply of goods rather than services.
- 2.5 Please note that in all cases the size of the transferred undertaking is irrelevant – TUPE will apply whether it is small, medium or large.

3 Can the effects of TUPE be excluded or limited?

- 3.1 The effects of TUPE cannot be excluded or limited, and any provision of an agreement (including contracts of employment and outsourcing agreements) will be void to the extent it attempts to exclude or limit the rights granted or the obligations imposed by TUPE.

4 What happens when a TUPE transfer takes place?

- 4.1.1 The Transferee takes over the contracts of employment of all employees who were assigned to the undertaking immediately before the transfer (or who would have been so employed if they had not been dismissed for a reason connected with the transfer). The Transferee cannot pick and choose which employees to take on.
- 4.1.2 The Transferee takes over all rights and obligations arising from those contracts of employment, except criminal liabilities and rights and obligations relating to provisions about benefits for old age, invalidity or survivors in employees' occupational pension schemes. Any liability to employees (including existing claims or causes of action) transfers from the Transferor to the Transferee.
- 4.1.3 Although the Transferee is not obliged to offer the same pension rights as the Transferor, if the Transferor contributed to a pension scheme the Transferee must, as a minimum, match employee contributions up to 6% of basic pay.
- 4.1.4 The Transferee takes over any collective agreements made on behalf of the employees and in force immediately before the transfer. The Transferee is able to change terms derived from collective agreements one year after the transfer, provided that the overall change is no less favourable to the employee.
- 4.1.5 Neither the Transferee nor the Transferor may dismiss an employee because of the transfer, or a reason connected with it, unless the reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce.
- 4.1.6 Sometimes the Transferee may wish to make large scale redundancies immediately after the transfer. Any pre-transfer consultation by the Transferee with the transferring employees will count as part of a collective consultation process for the purposes of collective redundancy, provided the Transferor and the Transferee can agree on the process, and that the Transferee has carried out meaningful consultation. See our separate advice note on redundancy (which focusses on individual rather than collective consultation and explains the differences between the two).
- 4.1.7 The Transferee may not vary the terms and conditions of employment of any transferred employee unless it is for an economic, technical or organisational ("ETO") reason entailing changes to the workforce or unless the change is unconnected with the transfer. Changes in the location of the workforce following a transfer fall expressly within the scope of "an economical, technical or organisational reason entailing changes in the workforce". This effectively prevents genuine place of work redundancies from being automatically unfair.
- 4.1.8 The Transferee takes the benefit of any insurances that the Transferor had where those insurances arise in connection with the contract of employment *eg* employer's liability insurance.
- 4.1.9 The Transferor is statutorily obliged to provide certain basic information about transferring employees to the Transferee.
- 4.1.10 The Transferor must inform and consult representatives of the employees. Details about the information and consultation requirements are set out below.
- 4.1.11 Any restrictive covenants which are contained in the contract of employment transfer to the Transferee, but interpretation problems can occur if the Transferee later seeks to rely on those covenants. We can advise further if necessary.

- 4.1.12 Where the Transferor offers a benefit which is not capable of proper replication by the Transferee, the Transferee is obliged to put in place benefits of 'substantial equivalence'.

5 What is the LPC's duty to inform and consult?

- 5.1 The Transferor and Transferee must inform and, if appropriate, consult 'employee representatives'. Where a trade union is recognised, the appropriate representatives will be from the trade union. Where a trade union is not recognised the appropriate representatives will usually have to be elected from the affected employees.
- 5.2 In the case of LPCs with fewer than 10 employees, they may inform and consult affected employees directly in cases where there is no recognised independent union, nor any existing appropriate representatives.
- 5.3 The consultation must be commenced in such time as to allow it to be "meaningful", it must not be just advanced notification of the event.
- 5.4 Once in place, the LPC must tell the employees/representatives in writing:
- (a) that the transfer is going to take place, approximately when, and why;
 - (b) the legal, economic and social implications of the transfer for the affected employees;
 - (c) whether the Transferor envisages applying any measures (for example, restructuring, redundancies or changes to working practices) in connection with the transfer which will affect the employees, and if so, what measures are envisaged;
 - (d) the Transferor must also disclose whether the prospective Transferee envisages carrying out any measures which will affect the employees, and if so, what. The Transferee must give the Transferor the necessary information so that the Transferor is able to meet this requirement. The information must be provided long enough before the transfer to give adequate time for consultation. **'Measures'** will include post-transfer administrative changes which are not an inevitable consequence of the transfer itself. For example, they might include changes to salary payment dates, changes to how holiday entitlement is paid or job title changes; and
 - (e) if there are no measures anticipated this should be stated.
- 5.5 If the LPC uses any agency workers, it must give information to the employee representatives as to the number of agency workers working temporarily for and under its supervision and direction, the parts of the LPC in which those agency workers are working and the type of work they are carrying out.
- 5.6 If measures are envisaged which will affect the employees, the employer must consult the representatives of the employees affected about that action. The consultation must be undertaken with a view to seeking agreement. During these consultations the employer must consider and respond to any representations made by the representatives. If the employer rejects these representations, it must state the reasons.
- 5.7 Commonly the Transferee may take measures which affect the transferring employees after the transfer. Strictly, the Transferee is not required to consult the transferring employees about those measures as the requirement is for each LPC

to consult in relation to the measures that it is taking in relation to its own employees. However, in practice voluntary consultation, conducted in good faith, is advisable in the interests of good industrial relations practice. This can be achieved by inviting the Transferee to the Transferor's pre-transfer information and consultation meetings with the employee representatives.

- 5.8 Where there is an obligation to inform and consult and there is a failure to do so, there is a financial penalty, which can a joint and several liability of both the Transferor and Transferee. See below as to what such financial penalties might be.

6 What is the employees' position on a transfer to which TUPE applies?

- 6.1 Under TUPE, when an undertaking or services contract is transferred the position of the employees of the Transferor or Transferee is as follows:

- 6.1.1 An employee claiming to have been unfairly dismissed because of a transfer has the right to complain to an Employment Tribunal. They must have at least two year's qualifying service.
- 6.1.2 An employee dismissed by the Transferor prior to the transfer and for a reason connected with it will be deemed to have been employed immediately prior to the transfer and therefore liability for the dismissal will transfer to the Transferee.
- 6.1.3 An employee of the Transferor who will prospectively transfer to the Transferee and is informed that the Transferee proposes a substantial change in working conditions to the material detriment of that employee may treat the Transferor as being in anticipatory breach of contract (ie that the LPC would not honour their existing terms) and resign claiming constructive unfair dismissal. This liability remains with the Transferor.
- 6.1.4 Transferred employees who find that there has been a fundamental change for the worse in their terms and conditions of employment as a result of the transfer generally have the right to terminate their contract and claim unfair dismissal before an Employment Tribunal on the grounds that actions of the employer have forced them to resign. Alternatively, they could seek to have the changed terms declared void.
- 6.1.5 Employees employed in the undertaking immediately before the transfer automatically become employees of the Transferee unless they inform either the new or the Transferor that they object to being transferred. If any transferring employees do object they are treated as having resigned without remedy.
- 6.1.6 An employee's period of continuous employment is not broken by a transfer, and, for the purposes of calculating entitlement to statutory employment rights, the date on which the period of continuous employment started is the date on which the employee started work with the Transferor. This means that if the Transferee makes transferred employees redundant, they will be entitled to count their period of employment with the Transferor towards their redundancy payment entitlement.
- 6.1.7 Transferred employees retain all the rights and obligations existing under their contracts of employment with the Transferor and these are transferred to the Transferee, with the exception that the Transferor's rights and obligations relating to benefits for old age, invalidity or survivors under any employees' occupational pension schemes are not transferred.
- 6.1.8 Where a Transferee attempts to harmonise terms and conditions between transferring employees and its existing workforce, transferring employees are entitled to 'cherry pick' the more favourable terms. In other words, transferring

employees may rely on any more favourable terms which they were originally entitled to under their contract with the Transferor and at the same time take advantage of any more favourable terms offered by the Transferee. Even where there is agreement by the employee to accept new revised terms they may elect at a later date to treat that variation as void in so far as it deprives them of the benefit of better terms under their original contract and for them to assert that they remain entitled to those more favourable terms.

7 What are the main costs implications of TUPE to an LPC?

- 7.1 The Transferee will inherit the cost of employment of all transferred employees and any existing liabilities to those employees.
- 7.2 If an LPC decides to dismiss transferring employees (either before or after the transfer takes place) it will bear the cost of dismissing those employees, including making appropriate redundancy payments. The dismissals may also be unfair.
- 7.3 Depending on the type of pension arrangement in place with the Transferor, the Transferee may have to meet additional obligations. For example, where the employee was enrolled in an occupational pension scheme with the Transferor, the Transferee may have to meet pension auto-enrolment obligations, place the employee into a qualifying scheme and be obliged to match employer contributions of up to 6%.

8 What are the risks of getting it wrong?

- 8.1 Under TUPE, an employee will have enhanced protection against being unfairly dismissed where a TUPE transfer occurs.
- 8.2 Neither the Transferee nor the Transferor may dismiss an employee because of the transfer or a reason connected with it. Where a dismissal of an employee does occur in these circumstances, and they have the requisite two years of continuous employment, the dismissal will be automatically unfair.
- 8.3 It may be possible to avoid liability for a claim of unfair dismissal if it is clear that the reason for the dismissal is an ETO reason entailing changes in the workforce. If there is such a reason, and it is the cause or main cause of the dismissal, the dismissal will be fair provided the LPC acted reasonably in the circumstances in treating that reason as sufficient to justify dismissal. If, in this case, there is a redundancy situation, the usual redundancy procedures will apply.
- 8.4 Where an employee brings a claim for automatic unfair dismissal, this will usually be brought against both the Transferor and Transferee.
- 8.5 If an employee is successful in their claim for automatic unfair dismissal, they may be entitled to a basic award and to receive compensation for loss of earnings, in an amount of **up to one year's pay**.
- 8.6 Where the Transferee proposes a substantial change in working conditions to the material detriment of the transferring employee, the employee may resign and claim constructive dismissal. In these circumstances, the employee may be entitled to receive compensation in the Employment Tribunal up to a maximum of **£25,000** for breach of contract against the Transferor, alongside an award for unfair dismissal (being the basic award and compensation for loss of earnings).
- 8.7 Where there is an obligation to inform and consult and there is a failure to do so (either a partial or complete failure), there is a penalty of **13 weeks' gross pay** per employee, which is a joint and several liability of both the Transferor and

Transferee. It is intended as a penal measure and the approach taken by Employment Tribunals is that they will award the full 13 weeks unless there is a reason why a lesser award should be made. There is no requirement on the employees to show any financial loss.

[Note: we have also provided a separate note about the personal liability for committee members which will be relevant in the event TUPE is breached. Please see separate note on this.]