Information paper

TUPE
The Transfer of Undertakings (Protection of Employment) Regulations in England, Scotland and Wales

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TUPE – The Transfer of Undertakings (Protection of Employment) Regulations in England, Scotland and Wales

Introduction

What is TUPE?

New TUPE regulations were laid before parliament on the 10th January 2014 and came into force on 31st January 2014. The new regulations, the Collective Redundancies and Transfer of Undertaking (Amendments) Regulations 2013 (CRATUPE) amend the 2006 TUPE regulations in England, Wales and Scotland and also change legislation around collective redundancies. These may be referred to in this paper as “TUPE regulations” “the 2013 regulations” or “CRATUPE”.

Employment law is a devolved function in Northern Ireland but TUPE regulations in Northern Ireland mirror the 2006 regulations. The Northern Ireland government are currently consulting on a change to the TUPE regulations. As soon as this is complete the CSP will update the TUPE guidance appropriately. Until this time members in Northern Ireland should use the CSP information paper “Transfer of Undertaking (Protection of Employment) Regulations – Northern Ireland”.

In broad terms, TUPE protects employees’ terms and conditions (except occupational pensions) when the business in which they work is transferred from one employer to another. Employment with the new employer is treated as continuous from the date of the employee’s start with the first employer.

TUPE can apply to any size of organisation, from a large undertaking with thousands of employees to very small organisations. Indeed a TUPE transfer can apply to only one person. The regulations also apply equally to public or private sector undertakings, and whether or not the business operates for commercial gain, such as a charity.
When does TUPE apply?

TUPE applies where there is a relevant transfer from one employer (the ‘transferor’) to another (the ‘transferee’).

The Government issued guidance on the applicability of TUPE to public sector employees in January 2000 (revised in 2013), following strong lobbying by the Trades Union Congress (TUC). The Cabinet Office “Statement of Practice on Staff Transfers in the Public Sector” 2 clarifies the situation on when TUPE applies.

This guidance clearly states that the principles behind the TUPE regulations are expected to be applied in virtually all circumstances, including “where the public sector is the employer when contracting out or the client in a subsequent retendering situation” (for example, where the NHS decides to contract out therapy and nursing services to a social enterprise company, and back again if subsequently the SEC lost its contract).

The Government’s Statement of Practice asserts that “it applies directly to central government departments and agencies and the NHS“ and that “other public sector organisations” are expected to abide by the code. Because the Statement of Practice is very useful in that its commitment to upholding TUPE principles is clear, it is worth quoting at length. For example, in its introduction to the Statement of Practice the Government explained:

“In the area of Public Private Partnerships and change in the public sector, the consultations that the Government has undertaken and the representations which have been made, have showed a strong consensus between private sector employers, the voluntary sector, employee representatives and public sector organisations for the application of TUPE to all general situations where a service or function is contracted out, then retendered, brought back into the public sector, transferred within the public sector, or restructured and organised in a new way in a different part of the public sector. In any event the TUPE Regulations 2006 have expanded the previous definition of what constitutes a transfer. It is accepted that there will be some genuinely exceptional circumstances where TUPE will not apply but attempts to orchestrate a non-TUPE situation in other circumstances should not be tolerated. The policy in this Statement of Practice is therefore based on the following principles:
• contracting-out exercises with the private sector and voluntary organisations and transfers between different parts of the public sector, will be conducted on the basis that staff will transfer and TUPE should apply, unless there are genuinely exceptional reasons not to do so;

• this includes second and subsequent round contracts that result in a new contractor and where a function is brought back into a public sector organisation where, in both cases, when the contract was first awarded staff transferred from the public sector;

• in circumstances where TUPE does not apply in strict legal terms to certain types of transfer between different parts of the public sector, the principles of TUPE should be followed (where possible using legislation to effect the transfer) and the staff involved should be treated no less favourably than had the Regulations applied; and

• there should be appropriate arrangements to protect occupational pensions, redundancy and severance terms of staff in all these types of transfer."

The revised TUPE regulations of 2006 consolidated these principles by extending the scope of the regulations to include “service provision changes” (SPC) – services that are contracted out, re-tendered or brought in-house. For a transferred service to qualify for TUPE protection, it must be identified as “an organised grouping of employees” where there are one or more employees whose main purpose is to carry out the activities concerned (i.e. they are not employed on an ad hoc basis).

The 2013 CRATUPE regulations amended this to say that activities after the transfer must be “fundamentally the same”.

TUPE does not apply where the transfer involved is merely of the sale of assets or supply of goods or where there is a change of management of a company following a sale of shares (a shares buy-out does not change the legal owner of a company). Nor does TUPE apply if the contract is to carry
out activities in connection with a single specific event or task or short-term duration.
What does TUPE Protect?

Terms & Conditions

Basically, if TUPE applies to a transfer then the terms and conditions, including pay and continuity of employment (but not occupational pension rights) of the existing contract will be preserved, and the employees employed by the previous employer (the ‘transferor’) when the transfer takes effect automatically become employees of the new employer (the ‘transferee’). Effectively it is as if their contracts of employment had originally been made with the new employer.

If the new employer attempts to make any changes to the employees’ terms and conditions as a result of the transfer these changes will be void (unenforceable) and employees can, if necessary, bring a claim to an Employment Tribunal to enforce their right to retain their proper terms and conditions.

Exceptions to the rule

Unfortunately there are several exceptions to the simple principles above. Employers can make changes to the contract on transfer if it is for an “economic, technical or organisational (ETO) reason unconnected with the transfer”. There is no formal definition of an ETO reason.

The 2013 regulations further weakened this right so that any terms which were negotiated via collective agreement (e.g. in partnership with unions) could be changed one year after the transfer.

In addition, recent case law (the case of Parkwood Leisure Ltd v. Alemo-Herron heard at the Court of Appeal in 2013) has meant that the terms which apply at the point of the transfer (e.g. your pay increment) are applied in a “static” manner meaning that you cannot rely on any changes made in the future – in the pay example this would mean further increments or pay rises negotiated in subsequent years applicable to your previous employer.

Employees faced with a prospective transfer can also negotiate contractual changes to their terms and conditions if the transferor (the existing employer) is insolvent. These changes can be agreed with trade union or employee representatives providing the reason for the change is to safeguard employment opportunities.
It is not possible under the TUPE regulations to reduce the pay of staff transferring over to the new company to achieve harmonisation of terms and conditions. The harmonisation of terms and conditions between workforces does not entail a change to the workforce and will therefore be unenforceable.

**Dismissals**

The regulations contain specific provisions to protect employees from dismissal before or after a relevant transfer. Unfortunately the 2013 regulations weakened dismissal rights for employees during a TUPE transfer. Under the 2006 regulations dismissals that occur “as a result of the transfer” or “for a reason connected with the transfer” were automatically unfair unless the employer could establish an ETO reason for the dismissal. The 2013 regulations removed the possibility of a dismissal connected with the transfer being unfair and narrowed the definition to only “as a result of the transfer”.

In addition the amended regulations mean that it is no longer unlawful to dismiss an employee due to a change in the location of work.

The 2006 TUPE regulations also introduced a new right to claim constructive dismissal1 “on grounds of TUPE if a transfer involves or would involve a substantial and detrimental change in working conditions”. The phrase ‘substantial’ has been left to the Employment Tribunals and law courts to decide. Employees no longer need to show that a change in terms and conditions amounts to a ‘fundamental breach of contract’ in order to claim unfair dismissal as they would under the usual constructive dismissal rules.

Any members who potentially find themselves in this position should contact their CSP steward at the earliest opportunity: constructive dismissal is a very difficult area of employment law and the chances of successfully prosecuting a case, while not impossible, are slim. Much will depend on the merits of the individual case but this is not a step to be taken lightly, and expert legal advice must be sought through the CSP. Redundancy

When staff are made redundant there is a legal duty on the employee to consult with them either individually or collectively (if more than 20 employees
are at risk). The 2013 regulations changed the obligation when redundancies are due to take place after a TUPE transfer. The government supported the view that consultation with the “incoming” employees should be allowed to start before the transfer. Consultation before the transfer can now count for the statutory obligation to consult if the two companies involved can agree and where the consultation is meaningful.

This was introduced to prevent additional costs to the companies involved and to reduce the impact on employees who may have to go through two consultation processes. In most TUPE cases, redundancy will be seen as an economic, technical or organisational (ETO) reason for dismissal and therefore a fair dismissal.

If an employee objects to the move to the new employer and refuses to transfer, then their employment contract is terminated and they are treated as if they have resigned. The employee cannot claim unfair dismissal or redundancy if the old employer (the transferor) decides not to retain their services.

In this respect, TUPE should be seen as a trade off or quid pro quo: although obliged to transfer to a new employer, the employee at least gets to retain an element of job security by remaining in employment.

There is nothing to prevent an employee who does not want to transfer from agreeing with their existing employer not to transfer although how realistic this is will depend on the circumstances and will be down to the employer's discretion.

**Pensions**

TUPE itself affords very little protection to occupational pension rights - any provisions relating to old age, invalidity or survivors’ benefits under an occupational pension scheme are specifically excluded from TUPE and do not transfer - and does not give the right to continued access to the previous employer’s pension scheme. Any accrued pension rights in the previous employer’s pension scheme, however, are protected at the time of the transfer.

Occupational pension rights in public sector transfers are governed by the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector.
(Cabinet Office, 2000, revised 2007 and 2013), and the annex to it, ‘A Fair Deal for Staff Pensions’ (revised October 2013).

Access to public sector pension schemes were identified by the Independent Public Services Pension Commission to be a significant barrier to increasing the number of providers in the public sector. A revised “Fair Deal” guidance was released in October 2013\(^4\) (known as “New Fair Deal”) which meant that staff who were compulsorily transferred from the public sector were to be given continued access to their public sector pension scheme.

Up to date information on New Fair Deal along with information about access to the NHS pension scheme can be found in ERUS information paper 68 “NHS Pension Scheme - widening access to staff who do not work directly in the NHS” via the CSP website.

**NHS Staff Passport**

The NHS Staff Passport\(^5\) is an on-line toolkit developed by the Social Partnership Forum in England to provide NHS staff facing transfer with an easy to use practical guide to the employment standards and rights they can expect when being transferred either to another NHS provider or outside the NHS to a provider that is contracted to offer NHS services. The CSP has produced a briefing on the staff passport “ERUS IP54 – NHS Staff Passport, England” available on the CSP website [www.csp.org.uk](http://www.csp.org.uk).

**Early retirement**

Although occupational pensions do not transfer under TUPE early retirement provisions do. In a “landmark ruling” by the European Court of Justice (ECJ) in *Beckmann v Dynamco Whicheloe McFarlane C-164/00*\(^6\) regarding rights for the over-50s, early retirement provisions do transfer under TUPE. Here, the NHS pension scheme provided that those aged over 50 who were made redundant would receive an early retirement pension: “The ECJ held that early retirement benefits are not old-age, invalidity or survivors’ benefits and were not covered by the pensions exclusion which, it said, must be narrowly interpreted.”.
The ECJ applied this principle again in the case of *Martin and others v South Bank University C-4/01*, and held that transferred employees who are entitled to enhanced benefits and compensation in the event of redundancy under their NHS scheme are entitled to the same early retirement benefits after transfer as they would have been under the NHS scheme.

**Information & consultation**

**The new employer’s right to information on the workforce**

The TUPE regulations place a duty on the transferor employer to provide information about the transferring workforce to the transferee employer before the transfer occurs.

This is called ‘employee liability information’ and must be supplied by the outgoing employer to the incoming employer not less than 28 days before the transfer, and must include details pertaining to the employees transferring such as identity and age, particulars of employment, information on grievance/disciplinary procedures activated by employees, information on court or tribunal cases within the last two years and claims that may be brought, and information on collective bargaining.

This information does not have to be provided to recognised trade unions.

**Employers’ duty to inform and consult with workplace representatives**

Both the transferor and transferee are also obliged to properly consult with their employees’ representatives before making any changes connected with the proposed transfer. The employers’ duties include:

- To inform representatives of the fact there is to be a transfer
- To say approximately when it is to take place
- To indicate what the legal, economic and social consequences for affected employees are likely to be
- To state if any new measures that will affect the transferred employees are to be taken by the new employer (for example, new training
requirements) and to provide information on this. The information has to be sufficient to enable the representatives to perform their duties.

If it is envisaged that measures will be taken and that jobs may change the employer has an obligation to consult with the representatives, to consider any representations they make and to reply to them, stating reasons for not accepting their arguments/proposals where appropriate.

Any consultation with representatives has to be in good time, i.e. long enough before a relevant transfer takes place to be meaningful. The penalty available that can be applied, via an Employment Tribunal, to employers who do not properly consult is a maximum award of up to 13 weeks pay to employees as compensation. Compensation for failing to consult can be claimed from either the transferor, the transferee or both. This rule is of potential benefit in cases of insolvency: under the previous TUPE regulations a claim could only be brought against the transferor, “meaning that compensation was often limited to what could be recovered from the state fund”.

Where there is a recognised trade union the employer must provide appropriate facilities for trade union representatives to carry out their union duties. Union officials are specifically entitled to paid time off for carrying out trade union duties in relation to TUPE under section 168(c) *Trade Union and Labour Relations (Consolidation) Act 1992*\(^8\)

**Insolvency**

The TUPE regulations introduce special provisions making it easier for staff employed by insolvent companies to be transferred to new employers. The regulations provide that the National Insurance Fund should cover debts owed to employees up to the statutory limit, with any sums over and above this limit transferring to the transferee (the new employer). This will ensure that all employees should be in a position to recover any sums owed to them and will ease the financial burden on the new employer.

There is greater scope in the new regulations for the employer to vary terms and conditions in an insolvency situation. This must be agreed with the affected employees and any “permitted variation” can only be made with the intention of safeguarding employment opportunities by ensuring survival of the business.
These provisions could feasibly be invoked for physiotherapists following the commercial failure of an organisation originally awarded an NHS contract (a social enterprise company, for example).

**Trade Union Recognition and other collective Terms and Conditions**

**Trade union recognition**

An existing trade union recognition agreement automatically transfers to the new employer (the transferee) under TUPE providing that the group of employees who transfer retain their distinct identity. If the transferring employees do not retain a separate identity to the rest of the transferee’s business their existing trade union recognition lapses and it will be up to the transferee and the trade union(s) to renegotiate a new agreement, or amend an existing agreement if the transfer introduces a new trade union into the transferee’s business. Two examples may help to illustrate how this provision may apply to physiotherapy:

**Example A:** if a multi-national corporation employing physiotherapists as part of their core business overseas won a contract from the NHS to operate in England and NHS employed physiotherapists were subsequently transferred to the company to work alongside an existing group of physiotherapists redeployed from the corporation’s head office. Because the CSP would not have a recognition agreement with the overseas company the Society would have to negotiate a new recognition agreement, or have any existing ones with other unions amended to include the CSP.

**Example B:** NHS physiotherapy staff are transferred from their Community NHS Foundation Trust to a new Social Enterprise Company (SEC ‘A’). Because the transferred staff retain their own identity as the new SEC’s physiotherapy workforce, their trade union recognition also transfers. Two years later, SEC ‘A’ is taken over by SEC ‘B’. SEC ‘B’ already has an established physiotherapy workforce but does not recognise trade unions. Instead, its employees are represented through a staff association. The transferring staff from SEC ‘A’ would not retain a distinct identity and therefore would lose
their trade union recognition and the CSP would have to renegotiate a new agreement.

The rationale for the provision on recognition is to minimise disruption to a new employer’s existing industrial relations framework when a new group of employees is transferred into an existing group of employees who are recognised by a different trade union. Most union recognition agreements are not legally binding, however, so it will be useful to obtain an agreement from the new employer in advance of the transfer that recognition will continue.

The NHS Staff Passport clearly states that regardless of who the new employer is, following transfer, staff can expect:

- That the new employer is committed to the principles of effective joint working as set out in the NHS Constitution and Handbook (2009) and the NHS Partnership Agreement 2007). This means that the employer should discuss decisions that affect staff and the services they provide.

- The new employer will respect staff’s right to remain a member of, or join a trade union (even if the union is not recognised by the employer) and access their services.

- The new employer will give staff access to trade unions as a source of advice about rights at work as set out in the Joint Statement on Access to Skills, Trade Unions and Advice on Government Contracting.

**Collective agreements**

Collective agreements made by a recognised trade union with the old employer (the transferor) transfer to the new employer (the transferee) under Regulation 5 of TUPE.

However, because collective agreements are not normally enforceable unless the terms of the collective agreement are incorporated into an employee’s contract of employment it is essential that any members who are facing a TUPE transfer check their employment contract, to ensure that reference is made to the incorporation of any collective agreements. This incorporation must be an ‘express’ or ‘implied’ agreement between the employer and employee.
• An express agreement is where the individual employment contract expressly states that certain of its terms are regulated by collective agreement - an example would be: “This contract is subject to the terms and conditions of the Agenda for Change agreement, as amended from time to time.” This clearly incorporates AfC (in this example) into the employee’s contract of employment.

• An implied or inferred agreement is where staff, by custom and practice, are employed on ‘the usual terms’, which have been collectively negotiated. Where this is well established any negotiated changes will be legally binding.

The importance of checking the employment contract can be seen further in this example: NHS staff who are transferred to a Social Enterprise Company will have their Agenda for Change terms and conditions transferred with them. However, unless their employment contract specifically states that it is subject to the terms of AfC, if there was to be a renegotiation of AfC in the NHS then any improvements negotiated would not transfer across to the staff in the SEC. A key question, then, for any member facing a TUPE transfer is:

• “Are the NHS (eg Agenda for Change) terms and conditions incorporated, expressly or impliedly, into my contract of employment and is there a reference to a mechanism for updating these terms and conditions in any future renegotiations? (ie does this incorporation extend to any renegotiations of the Agenda for Change agreement and other terms and conditions that may occur from time to time?)”

As outlined in the section “What does TUPE protect?” the new 2013 regulations only protect terms which were negotiated via collective agreement (e.g. in partnership with unions) up to one year after the transfer.

Legal Advice

It is important that prior to any transfer appropriate legal advice is taken. TUPE is widely described as complex and complicated by a range of commentators and any general advice on TUPE should be seen in that light. It is essential that any CSP member potentially affected by TUPE contacts their steward in the first instance.
Frequently Asked Questions

What happens to my contract if my employer changes?

The purpose of the TUPE regulations is to protect employees’ terms and conditions when their employment is transferred to a new employer. Your contract should therefore remain the same, as if it had been agreed with the new company all along, so your terms and conditions of employment, along with your continuity of employment, will be preserved. The NHS Staff Passport (England) offers further protection for employment standards that staff have the right to expect wherever they undertake NHS work.

How long does the protection offered by TUPE last? Is there a time limit?

An employee who has a contractual term that has transferred from the old employer continues to have the right to benefit from that term until it is lawfully changed. Terms which are negotiated under a collective agreement are only protected for one year. However, it is only changes that are proposed for a reason related to the transfer that are invalid. The more time that elapses since the transfer the more difficult it will be to establish that the transfer is the reason for the change. Variations to the contract that are unconnected with the transfer are allowed, although they must be agreed in the same way as they would in any non-transfer situation.

What happens when there is a ‘second wave’ or subsequent transfer?

The new regulations extend the scope of TUPE and confirm that they cover circumstances where services are outsourced or contracted out, taken back in-house or assigned to a new contractor (‘service provision changes’). The changes to the regulations make it clear that in all cases of outsourcing, including second generation contracts, TUPE protections will apply.

Will Agenda for Change still apply after I move to the new company?

The method adopted for pay structures, such as Agenda for Change, that have been negotiated in accordance with local and national collective bargaining agreements should also initially transfer to the new organisation. Any failure to preserve the terms and conditions (apart from the occupational pension scheme) could result in a potential claim of unfair (constructive) dismissal from those with the requisite one year qualifying period. There will,
however, be scope for the new employer to renegotiate pay and conditions subsequent to any transfer.

**Will the transferor take back staff in the event of financial collapse of the transferee?**

Paragraph 13 of the Cabinet Office Statement of Practice on staff transfers in the public sector states:

“There may also be circumstances that require a function contracted-out to a private sector contractor or voluntary sector body to be brought back into the public sector on the termination of the contract. If, when the contract was first awarded staff transferred from the public sector (irrespective of whether TUPE applied at the time), then the public sector organisation should ensure that staff working on the contract transfer (and TUPE should therefore apply) into its organisation unless there are genuinely exceptional reasons not to do so.”

**Is there a definitive guide to TUPE?**

No. Different courts and tribunals have interpreted TUPE differently. Case law has therefore changed frequently and although the TUPE regulations have just been revised there is still much scope for uncertainty and ambiguity.

A simple and clear statement on TUPE, however, is made in paragraph 18 of the Cabinet Office Statement of Practice: “The application of TUPE will...always be a matter of law based on the individual circumstances of the particular transfer.” This makes it necessarily difficult to give unqualified answers to many TUPE queries.
Checklist for Stewards

- Keep your CSP Senior Negotiating Officer informed of what is happening as soon as you hear of any proposals to tender your services or transfer staff.

- Seek an early meeting with management to clarify what is happening

- Obtain information on who and what is likely to transfer

- Ask for information on any potential bidders, including information on their financial performance, their current terms and conditions, whether they have recently declared any redundancies, and whether they recognise trade unions

- Seek agreement from the current employer for union representatives to interview or meet prospective bidders

- Seek agreement that employees who do not want to transfer retain the right to remain with their current employer

- Ensure that the employer provides facilities for meeting with affected employees and other representatives both at the current workplace and at the workplace where work is being transferred

- Carry out regular reviews to ensure that the terms and conditions of transferred staff have not fallen behind those of workers who remained with their old employer

- Alternatively seek agreement to automatically improve terms and conditions in line with those offered by the old employer

- Make sure early retirement pensions remain part of any redundancy pay packages

- Negotiate for new employees to benefit from the same terms as transferred staff

- Seek agreement that existing terms and benefits will not be lost through promotion
References and Further Reading

All CSP publications referred to in the document below can be accessed via the CSP website www.csp.org.uk

   http://www.legislation.gov.uk/uksi/2014/16/contents/made

2. The Cabinet Office “Statement of Practice on Staff Transfers in the Public Sector”
   http://www.civilservice.gov.uk/about/resources/employment-practice/codes-of-practice

3. Parkwood Leisure Ltd v. Alemo-Herron C-426/11:
   http://curia.europa.eu/jcms/jcms/j_6 - search for case C-426/11

4. Fair Deal for Staff pensions: staff transfer from central government:

5. NHS Staff Passport Toolkit:
   http://www.socialpartnershipforum.org/priority-areas/staff-passport-toolkit/

6. Beckmann v Dynamco Whicheloe McFarlane C-164/00:
   http://curia.europa.eu/jcms/jcms/j_6 - search for case C164/00

7. Martin and others v South Bank University C-4/01:
   http://curia.europa.eu/jcms/jcms/j_6 - search for case C-4/01

8. Trade Union and Labour Relations (Consolidation) Act 1992: