



**workforceunit**

voluntary sector social services workforce unit

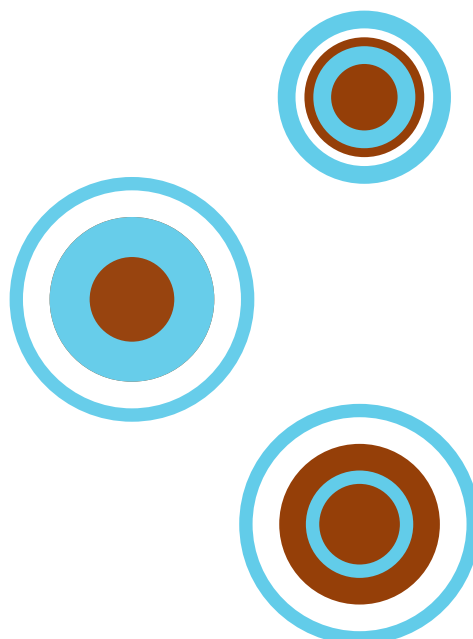
## **TUPE Guidance for Social Care Managers**

**Guidance from the  
Voluntary Sector Social Services Workforce Unit**

**August 2009**

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## Purpose of the guide

The idea for this document came from the findings of a research project into the impact of re-tendering on the voluntary sector workforce that the Workforce Unit carried out with the Centre for Employment Research at Strathclyde University in 2008/09 (referred to as 'Gathering Storm Report'). The research revealed that voluntary sector social care providers had difficulties in interpreting TUPE regulations and that employees received inconsistent information regarding their rights under TUPE. Quotes from research participants and the research report are used throughout this document to illustrate some of the text.

This document provides basic guidance to social care managers to help them understand the TUPE Regulations and to equip them to answer questions from staff should they find themselves having to manage a transfer in or out of their organisation. This document gives general guidance only and should not be regarded as a complete or authoritative statement of the law. Managers should seek human resources and legal advice to ensure they comply with all legal requirements.

## Background

### ***What is TUPE?***

TUPE stands for the Transfer of Undertakings (Protection of Employment) Regulations 2006. These Regulations provide employment rights to employees when their employer changes as a result of a transfer of undertaking.

### ***When does it apply?***

The TUPE Regulations were introduced in 1981 and revised in 2006.

In 1981 TUPE was applied to 'the transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the UK to another person where there is a transfer of an economic entity which retains its identity'.

In 2006 the Regulations were revised to expressly cover cases where services are outsourced, in sourced or assigned by a client to a new contractor (described as 'service provision change'). 'Service provision change' is most likely to cover cases that social care managers will find themselves dealing with – tendering of services previously delivered by local authorities, bringing back in house of services previously contracted out by local authorities and re tenders.

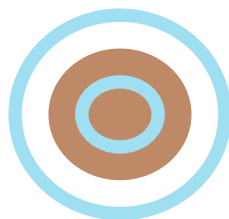
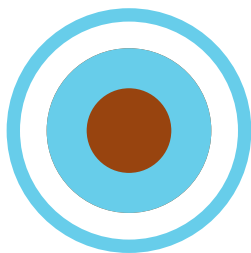
## **Who does it cover?**

TUPE covers all employees who were employed by the transferring organisation and “assigned to the organised grouping of resources or employees that is subject to the relevant transfer.” Employees assigned to work for the whole of their working week in an area, a particular service or for an individual whose service is being transferred are likely to be covered. The difficulty arises where employees have split roles or work across different services, some of which are not the subject of the relevant transfer.

Example – an Area Service Manager, spending 70% time managing a particular service that is the subject of the relevant transfer, 30% of time managing other services that are not transferring, may not transfer under TUPE. In the case of a dispute, Tribunals will look at whether an employee is essentially dedicated to the activities that are being transferred.

‘Similar concerns (about job losses) were evident among transferees to X. This was not initially helped by uncertainty regarding where employees were going to be transferred to. Transferees reported how their original project was split into two, with some of them transferring to X and others to a private organisation, but that this was shrouded in confusion and the final decisions regarding the final destination was seen to be arbitrary. Once transferees entered X, there remained concerns regarding what would happen to their terms and conditions of employment and job security.’

(Gathering Storm Report)



## Process

**If you are a manager transferring staff out (the ‘transferor’):**

### ***What protection will transferring staff have?***

Broadly speaking, the effect of TUPE is to preserve the continuity of employment and terms and conditions of those employees who are transferred to a new employer when the relevant transfer takes place. This means that employees employed by the previous employer (the ‘transferor’) when the transfer takes effect **automatically** become employees of the new employer (‘the transferee’) on the same terms and conditions (except for certain occupational pension rights). It is as if their contracts of employment had originally been made with the new employer. However, the Regulations provide some limited opportunity for the transferee or transferor to vary, with the agreement of the employees concerned, the terms and conditions of employment contracts for a range of stipulated reasons connected with the transfer.

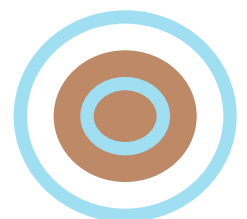
### ***What happens to occupational pension rights?***

Occupational pension rights earned up to the time of the transfer are protected by social security legislation and pension trust arrangements. But occupational pension rights and invalidity/death in service rights under occupational pension schemes do not transfer. Where transferred employees were entitled to participate in an occupational pension scheme prior to the transfer, the new employer must establish a minimum level of pension provision for the transferred employees. The new employer must match employee contributions, up to 6% of salary, into a stakeholder pension, or offer an equivalent alternative. Special rules may apply where the current employer is a local authority or in the NHS.

### ***What counts as ‘terms and conditions of employment’?***

Contract terms and conditions can come from a number of different sources; for example they could be:

- agreed verbally
- in a written contract, or similar document;
- in an employee handbook or on a company notice board;
- in an offer letter from the employer;
- required by law, for example, minimum wage;
- in collective agreements; or
- terms implied by custom and practice.



Whether a term has become implied through custom and practice can be difficult to determine. There is no fixed time limit after which something is definitely part of the contract. Among other things, it depends on:

- how seriously it has been treated? (has the employer acted like they have a choice?)
- how clear it is? (has the employer treated the matter differently each time?)
- how long it has been in place?

Transferring organisations should attempt to provide clarity to both the staff that are the subject of the TUPE transfer, the recognised Union or staff representatives and to representatives of the receiving organisation as to what is a term and condition and what is not. Areas of potential uncertainty include mileage rates, mobile phone payments, subsistence rates and shift allowances.

### ***What should you tell staff and when?***

The research commissioned by the Workforce Unit in 2008/09 revealed that employees were less distressed by the prospect of a transfer of employment the more accurate and timely information they were given.

I would say they were good [with communicating about the re-tendering process]...they told us everything that they could tell us...we were looking for more information but they didn't know what was happening either.

*(Support Worker)*

I didn't get fed up with what I was doing, I got fed up with the not knowing what was going to happen. I didn't know if I was going to be in a job'

*(Support Worker)*

As soon as you know you have lost the contract, and you know who the new employer is going to be, you should tell all affected staff. The way in which you communicate this information is crucial for your reputation as a manager and for your organisation's reputation. Visits to the services by the CEO or other senior staff member to relay this information face to face is good practice and will be greatly appreciated by staff who are likely to be profoundly shocked by the news. Informing staff by e-mail is unlikely to enhance your reputation – and, remember, these staff may well be coming back to you in three years time when the services are re-tendered again.

## ***What if one or more of your staff objects to the transfer?***

An employee has the right to object to the automatic transfer of her contract of employment. She must inform her current employer, the transferor, that she objects. The objection has the effect of terminating her employment and she will be deemed to have resigned, and is not entitled to a redundancy payment. Employees would, therefore, be ill advised to object.

### ***Your duty to inform***

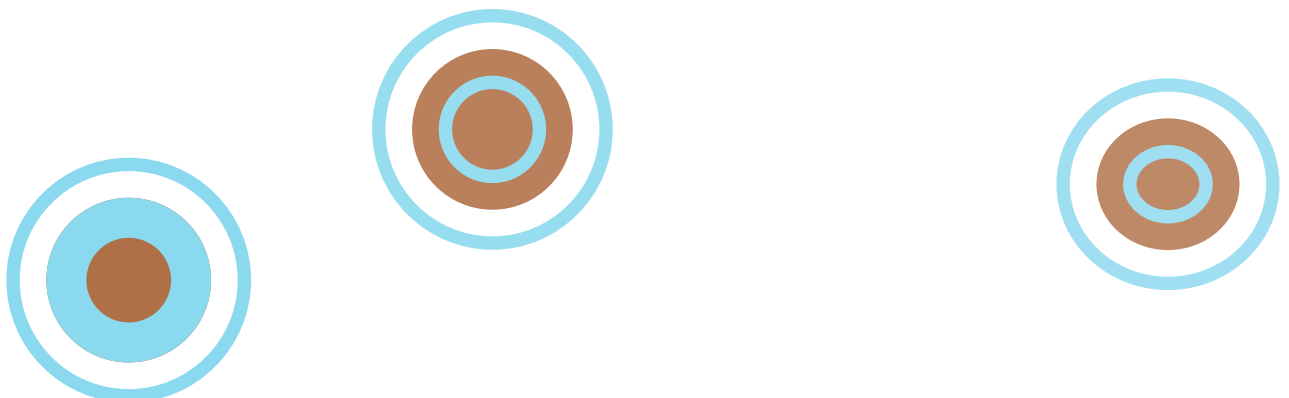
It's the new provider that's going to be making the changes or whatever and yet the legal obligation is still on us to make sure that consultation happens, so it's been quite interesting..... seeing how the regulations sit sometimes not very comfortably side by side with just what's practical.

*(HR Advisor, Transferor Organisation)*

As the transferor, you must inform representatives of affected employees in writing of:

- The transfer itself, the date and the reason;
- The legal, social and economic impact (TUPE will protect terms and conditions except occupational pensions); and
- Whether the transferor and transferee envisage any action (reorganisation for example) in connection with the transfer which will affect the employees and, if so, what action is envisaged.

'Affected employees' include not just staff that are transferring but those left behind whose jobs are going to change as a result of the transfer. So, for example, managers and back office staff such as HR and finance officers whose job coverage or remits are going to be affected, must also be given this information. There is a specific form of letter that your legal or HR advisor will send to the transferee to request details of any action they envisage taking once the employees transfer.



### ***If you recognise a Union***

If you recognise a Union for collective bargaining purposes, you must provide this information to an authorised official of that Union.

‘On the ground, what happened was that at each of the consultation meetings, we had the lay and our employees, but plus we had full time officials who came along. They reassured the employees they would have Trade Union support if there was a conflict in terms of alterations to terms and conditions of employment et cetera’.

*(HR Advisor, Transferor organisation)*

### ***If your staff are not Unionised***

If a group of employees are affected you should ensure that you elect staff representatives for the purposes of consultation. Many social care providers, whether unionised or not, will already have staff representative structures in place but you will need to check whether the existing representatives have sufficient remit to engage in TUPE consultation. If not, then the TUPE regulations contain guidelines for electing staff representatives.

*The Transfer of Undertakings (Protection of Employment) Regulations 2006.* (2006) SI 2006/246. London: HMSO. Available at <http://www.opsi.gov.uk/si/si200602.htm>

A non unionised social care provider, facing transferring out around 100 employees across a wide geographical area, organised the election of a staff representative from each of the 7 work bases. These staff representatives met regularly with the HR Director and senior staff in the lead up to the transfer. They were supplied with all relevant information which they were then afforded time and use of work facilities to disseminate to all transferring staff.

You should also consider using the existing structures you have in place for communicating with staff – staff newsletters, e-bulletins and intranet. It is good practice to provide written information rather than simply rely on managers and staff representatives to cascade verbal briefings, which can easily get distorted.

### ***What information must you give the new employer and when?***

If you are the manager transferring staff out ('the transferor') the **minimum** you must provide the new employer with is:

1. Identity of employees who will transfer;
2. Age of those employees;
3. Information contained in the 'statement of employment particulars';
4. Information relating to any collective agreements which apply to those employees;
5. Disciplinary action within preceding 2 years to which the ACAS Code of Practice applies;
6. Grievances within preceding 2 years to which the ACAS Code of Practice applies; and
7. Instances of legal action taken by transferring employees within preceding 2 years, or potential legal action by them where transferor has 'reasonable grounds to believe such actions might occur'.

You are required to supply this information not less than 14 days before the transfer. You have to supply it in writing or via another medium e.g. CD/e-mail. If there are changes between the date you supply the information and date the transfer takes place, then you must update the information.

You are under no obligation to allow the new employer access to the staff.

It is important to ensure you have good central record keeping systems as you will only want to pass on relevant information. You should keep information from accident report forms (e.g. slips and trips) for potential personal injury claims (see item 7. above) and from payslips in case the Inland Revenue requires it.



## **If you are a manager transferring staff in (the ‘transferee’):**



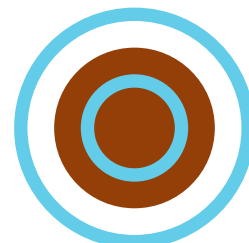
### ***Before the transfer***

#### ***What information must you get and when?***

You will see from the section above that the transferor employer only has to give you the minimum employee liability information and only 14 days before the transfer. You will, of course, want much more information than this and much further in advance of the transfer. It is good practice on the part of both the transferor and transferee to meet regularly well in advance of the transfer taking place and to attempt, albeit in difficult circumstances, to build a good working relationship in the interests of the transferring staff and service users.

As the new employer, the information you should be asking for includes:

- Rota patterns – ask to see recent rotas and check whether the employees identified on the transfer list are actually working in the services concerned. Check for any potential working time directive and national minimum wage claims (e.g. look at whether there are opt outs where sleepovers appear to be worked as part of a rota). Check arrangements for supporting service users on holiday, including payments.
- Absence statistics – check for any staff long term sick that appear on the transfer list but do not appear on the rotas. Ask for evidence that they were working in the transferring services prior to going off sick – ‘essentially dedicated to the services concerned’. The stories are legion about transferor employers ‘dumping’ the staff they want rid of onto the unsuspecting new employer – don’t get caught out.
- Status of required registration with Scottish Social Services Council, Disclosure Scotland checks and right to live and work in the UK – you don’t want to find yourself with employees that you can’t put on rota.
- Length of service – relevant for unfair dismissal, redundancy, maternity entitlements etc.
- Skills and qualifications levels – training records
- Staff Handbook
- Redundancy and severance arrangements
- Health and Safety issues – ask to see accident reports for the last 3 years to assess potential personal injury claims. A reciprocal arrangement between both employers’ insurers can usually be agreed for these.



- Any disputes brewing – item 7 of the employee liability information should include whistleblowing, working time directive, national minimum wage, job evaluation lags and equal pay claims.

### ***What information must you give and to whom?***

You must inform your own affected employees of the transfer and any implications. Area service managers, HR, Finance and other ‘back room’ staff are all likely to be affected.

As the transferee you must respond to the letter you receive from the transferor requesting details of any measures you envisage undertaking. If you are intending to restructure after the transfer you must share these plans with the transferor. You must also consult your own affected employees where you envisage taking measures. You must do this long enough before the transfer to enable the transferor employer to consult the appropriate representatives of any affected employees.

### ***Penalties for failure to consult***

Penalties for failing to consult, particularly where redundancies are planned, are severe. The failure to consult will attract an Employment Tribunal award of up to 13 weeks pay per employee under TUPE and failure to consult in relation to collective redundancies (more than 20) will attract another 13 weeks pay (potentially 6 months pay per affected employee). Both the transferor and transferee employer may be liable for a failure to inform and consult and the Tribunal will take a view as to who is at fault.

Giving affected employees accurate and timely information about your plans is good practice and can help to alleviate anxieties. Conversely, delaying informing, senior managers giving differing information or partial information can cause rumours to circulate and cause both staff and service users unnecessary and prolonged distress.

I think I was a bit apprehensive. Will we keep our jobs? Will everything progress as normal? What's it going to be? Will we restructure our workplace? Will they completely change things, how we're working?

*(Support Worker)*

Was I going to be kept on, were they going to have too many people employed because obviously if it was a costing issue...the people that got it maybe paid a lot less for the tendering so they would have to claw back some of that money somewhere and we thought that we were going to be out of a job.

*(Support Worker)*

I think they did look after our interests because they did actually send a letter, and it was kind of updating you on what was happening...

(Support Worker)

### ***After the transfer***

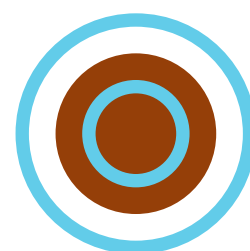
#### ***What can you change?***

Terms and conditions of staff cannot be varied where the sole or principal reason is:

- the transfer itself; or
- a reason connected with the transfer which is **not** an economic, technical or organisational (ETO) reason entailing changes in the workforce.

There are some areas that you may need or wish to change immediately or soon after the transfer:

- Pay dates – for example, your payroll system may be a monthly one whereas your new employees may have been paid 4 weekly. You should give these employees good advance notice so that they can amend their standing orders and direct debits to avoid becoming overdrawn. Running an additional payroll for the first few months is another option.
- Holidays – you may wish to introduce systems to stagger holidays across the year to minimise the use of agency and relief staff. Be careful here that you do not trigger a discrimination complaint if, for example, staff are able to take less time off in the summer than they previously enjoyed with their old employer and this has an impact on childcare arrangements.
- Rota and shift patterns – be careful to ensure you are complying with the working time regulations, or seek waivers from individual staff members. Also, remember sleepovers count as hours worked for national minimum wage purposes, so beware of introducing additional sleepovers, particularly to lower paid employees.



Changes can be made if you have an ETO reason.

Economic (profitability)

Technical (equipment)

Organisational (restructure)



A recent analysis of TUPE 2006<sup>1</sup> suggests that whilst it continues to provide important legal safeguards for workers, there is also some latitude for employers to take advantage of increased opportunities to cut terms and conditions. This is particularly the case with the 'ETO' reason where an employer can vary terms and conditions on the basis of issues arising due to economic, technical or organisational reasons. Employers can also dismiss an employee if the reason is principally due to the ETO reason.

*(Gathering Storm Report)*

### ***What are the risks?***

As the transferee, you will find yourself with staff on different terms and conditions, possibly working alongside one another in the same service.

'It's a worry for the future if you're going to end up with all kinds of staff on different terms and conditions, and how you manage that and whether you can get away with harmonising it, which, in some ways you would like to do'.

*(HR Manager)*

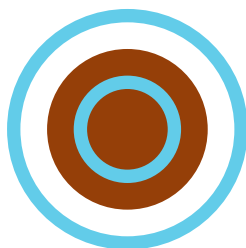
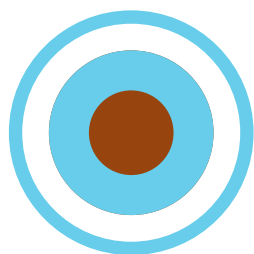
Beware – harmonisation is not an ETO. You will have to continue to manage the varying terms and conditions and all the additional administrative and managerial issues that entails. Promotions or new starts will give you the opportunity to move staff onto your own terms and conditions, but it is a slow process.

A transfer that results in a fundamental change to someone's contract of employment or a substantial change to their working conditions can lead to an unfair dismissal claim.

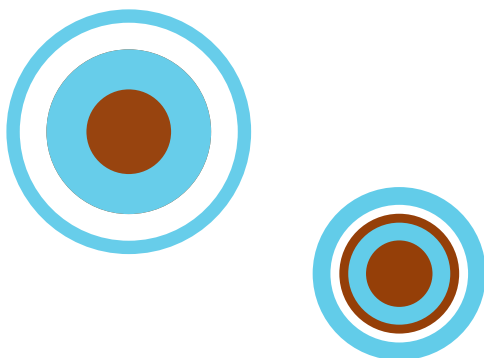
There is no set time after which it is safe to make changes to terms and conditions. There will eventually come a time when the link to the transfer will not be valid any longer. Changes can be agreed through consultation but your new employees can cherry pick the terms and conditions on offer and revert back to their previous terms and conditions unless you have an ETO reason for the change or the change is unconnected with the transfer.

<sup>1</sup> Cavalier, S. and Arthur, R (2006) Providing a Service? The New TUPE Regulations, Liverpool: The Institute of Employment Rights

One option may be to carry out a review of benefits across the whole organisation to seek to break the transfer connection. Another option would be to give your new staff notice under their current contracts of employment and seek to re-engage them on new contracts but this may give rise to claims for unfair dismissal so should be reserved for exceptional circumstances. Neither of these options is very attractive if you are concerned to maintain a motivated and loyal staff team with the capacity to deliver high quality services.



## NOTES



## Comments and Feedback

The Workforce Unit has a process of on-going evaluation of its support to the sector. We welcome comment and feedback on the content of this document so that future editions may incorporate your views and suggestions.

## Acknowledgements

The Workforce Unit would like to thank all of the stakeholders who participated in the re-tendering research that informed the production of this document.

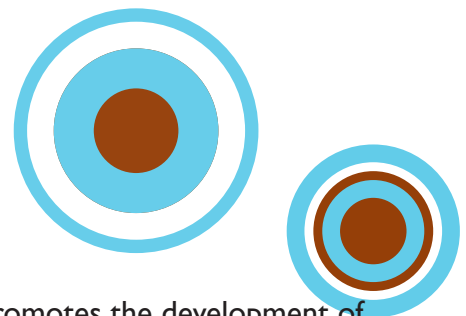
Special thanks are due to Claire Maclean of Maclay, Murray and Spence, Solicitors, who checked this document for legal accuracy.

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The Voluntary Sector Social Services Workforce Unit supports and promotes the development of the sector's workforce in Scotland through a range of information products, an enquiry service, events, research, networks and by influencing the national workforce agenda. The Unit is hosted by Community Care Providers Scotland in collaboration with the Scottish Social Services Council (SSSC). It is funded by the Scottish Government.



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