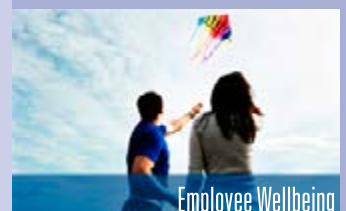


HR & OD POLICIES

HUMAN RESOURCES AND ORGANISATIONAL DEVELOPMENT

TUPE Procedure



Aberdeenshire
COUNCIL



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1. OVERVIEW OF THE TUPE REGULATIONS

When all or part of a business is bought or sold, or when one contractor takes over a contract to provide a service from another contractor, this change will normally be covered by The Transfer of Undertakings (Protection of Employment) Regulations 2006 (referred to as TUPE). The purpose of these regulations is to protect the rights of employees who are transferred to a new employer when a relevant transfer (see definition below in TUPE Terminology) takes place.

2. STATUTORY REQUIREMENTS

The Transfer of Undertakings (Protection of Employment) Regulations 2006 is the main piece of legislation governing the transfer of an undertaking. The legislation provides that the new employer assumes all rights, powers, duties and liabilities under or in connection with the employment contracts of the employees who are transferring.

The provisions of the Pensions Act 2004 also apply to TUPE transfers and new employers must provide the same or broadly comparable pension arrangements to employees if they were members of their old employers' scheme. Where possible, this should be achieved through admitted body status.

The Regulations also impose a duty to inform and consult the relevant representatives of affected employees and any dismissal directly connected with the transfer will normally be automatically unfair.

Whilst this guidance attempts to give as comprehensive advice as possible in what can be a complex area of employment legislation, it should not be regarded as a complete statement of the law.

3. TRANSFER IN THE PUBLIC SECTOR

Statutory guidance was issued by Scottish Ministers under section 52 of the Local Government in Scotland Act 2003. This statutory guidance applies only to Scottish local authorities and to any exercise which involves the consideration of a change of service provider or where the transfer of local authority staff is at issue. It is intended to support local authorities in their pursuit of Best Value, which places a premium on fair employment practice.

The terms and conditions of transferred employees shall be safeguarded by application of the principles and accepted practice of TUPE. Changes to the terms and conditions of transferred employees should only be achieved by agreement between employer and trades unions. The terms and conditions for any new appointee to the workforce should therefore be no less favourable overall than for transferred employees. There can be flexibility for negotiation between employers and trades unions to agree local adjustments to working practices and terms and conditions for transferred employees and new appointees to provide an overall package which is better suited to the needs of the service.

The guidance covers the interests of local authorities, prospective contractors, and sub-contractors and is seen as an important measure in removing the scope for two-tier workforces. Where there is a decision to outsource which may involve a transfer, and even where TUPE does not apply as a matter of law, the local authority should undertake to behave in a manner consistent with the good practice identified in this guidance.

Local authorities are required to warn potential bidders in advance that consistency in complying with the statutory guidance will be a formal part of the contracting process.

4. TUPE TERMINOLOGY

A Transfer Of Undertaking/ Relevant Transfer

Is where a business is sold as a going concern e.g. a normal business sale where premises, goodwill, stock, etc are sold. TUPE may also apply in circumstances which are not a conventional business sale, for example, where concessions or franchises are created or terminated or where two businesses merge.

Service Provision Change

The TUPE 2006 Regulations also extended TUPE protection to employees involved in the outsourcing, re-tendering or in sourcing of services. A service provision change takes place when there is an organised grouping of employees (it can also be just one person), which has as its main purpose the provision of a particular service to a client. If the client then changes its service provider, TUPE may apply.

The TUPE Regulations have been updated in January 2014. The new rules clarify the meaning of a service provision change by providing that for there to be a service provision change the activities carried on after the service provision change must be fundamentally or essentially the same as those carried on before it.

Transferor

Is the employer of the employees immediately before the transfer.

Transferee

Is the employer immediately after the transfer – this applies both to transfers of an undertaking and to service provision changes.

5. WHO IS COVERED BY TUPE?

This applies to all employees within the scope of the transfer, including those on full time, part time and fixed term employees who are absent from work for reasons such as sickness, maternity, paternity or special leave (please note that this is not an exhaustive list).

Where an employee is temporarily seconded to another post within Aberdeenshire Council but has a substantive right to an Aberdeenshire Council post that will transfer under TUPE, there is a requirement to write to such individuals. When writing the employer should be looking to seek clarification of the two options available and the implications of either option. These would be:

- For the individual to return to substantive post prior to transfer date and transfer in their substantive post along with the 'undertaking.'
- Remain with Aberdeenshire Council within the secondment arrangement and take them 'out of scope' of the TUPE transfer – N.B. in such a circumstance the employee will give up their substantive role and the employee remain with Aberdeenshire Council and at the end of the secondment arrangement may find themselves in a redundancy position (if a suitable alternative position cannot be found.)

6. MANAGEMENT RESPONSIBILITIES

TUPE is a very complex issue so it is essential to seek advice from Legal & Governance and HR&OD on every occasion when TUPE may be relevant at the earliest possible stage.

Services are expected to:

- Firstly, find out whether the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006 applies. Always

seek legal advice but as a general guide, a TUPE transfer is said to take place when whole or part of the business or undertaking is sold or transferred as a going concern to another employer or when performance of an ancillary function is outsourced or taken over by the Council from a private organisation.

- If TUPE applies then the employees who are employed in the undertaking immediately before the transfer and within scope of the transfer will transfer to the new employer. This includes full-time, part-time and fixed term employees.
- Identify which employees will be affected by the transfer (this is not just the employees who actually transfer - see section (Information and Consultation). If just part of an undertaking is to transfer, only those employees dedicated to that part of the undertaking will transfer. In such circumstances consideration should be given to the amount of time that each employee spends in the part of the undertaking that is being transferred, and the employee's job title, job profile and particular duties, in order to assess whether he or she will be a transferring employee.
- Provide employee representatives, with the necessary written information about the transfer and to keep accurate records. This may include provision of data to facilitate alternative pension arrangements.
- Inform and consult with employee representatives. While the duty is to consult with employee representatives it is good practice to inform and communicate with employees regularly.

7. INFORMATION AND CONSULTATION

The TUPE Regulations place a duty on both employers (the transferor and the transferee) to inform and consult representatives of their employees who may be affected by the transfer or by measures taken in connection with the transfer. Those affected employees might include:

- Those individuals who are to be transferred
- Their colleagues in the transferor employer who will not transfer but whose jobs might be affected by the transfer
- Their new colleagues in employment with the new employer whose jobs might be affected by the transfer.

There is no defined timescale for the provision of information and consultation but information must be provided long enough before the proposed transfer as to enable meaningful consultation to take place. It should be noted that both the transferor and the transferee are under the duty to inform and potentially consult appropriate representatives.

The term appropriate representatives means employee representatives elected by employees likely to be affected by the proposed transfer or acquisition or the trade union if there is a recognised independent trade union representing the interests of those employees.

Before the consultation process begins, the appropriate representatives must first be informed:

- That the relevant transfer is to take place; when, date or proposed date it is to take place; and the reasons for it
- Of the legal, economic and social implications of the transfer for any affected employees

- The measures the employer envisages taking in connection with the transfer, in relation to any affected employees, and if no measures are envisaged, that fact
- If the employer is the transferor, the measures which he envisages the transferee will take in relation to any affected employees, or if he envisages no measures, that fact. The new employer must give the transferor the necessary information so that the transferor is able to meet this requirement.
- Consultation by the transferee that begins pre-transfer can count for the purposes of complying with the collective redundancy rules, provided that the transferor and transferee has carried out meaningful consultation.

Providing Information to the Transferee

The transferor must provide the new employer with specified information which will assist in the understanding of the rights, duties and obligations in relation to those employees who will be transferred. This information is:

- The identity of the employees who will transfer
- The age of those employees
- Information contained in the “terms and conditions of employment”
- Information relating to any collective agreements and Aberdeenshire Council policies which are part of the contract of employment



- Instances of any disciplinary action within the preceding two years taken by the transferor against those employees
- Instances of any grievances raised by those employees within the preceding two years
- Information of any Court or Tribunal case, claim or action brought by those employees against the transferor in the previous two years and instances of potential legal actions which may be brought by those employees where the transferor has reasonable grounds to believe such actions might occur
- Information of any collective agreement which will have effect after the transfer, in its application in relation to the employees.

The list of information should include employees who were assigned to the grouping being transferred and who have been dismissed for a reason connected to the transfer. The information should be given at least 28 days before the date of the transfer. A spreadsheet is provided TUPE Transfer Details which details the information which will be required. If any of this information changes between the time when it is initially provided to the new employer and the completion of the transfer, the transferor is required to give the new employer written notification of those changes. Outsourcing contracts generally require much more detailed requirements regarding provision of information with much longer timescales to allow for retendering.

The transferor is not required to obtain employees’ consent before passing on the above information about them to the transferee, although the transferor must consider the implications of the Data Protection Act 1998 when disclosing information in the context of a TUPE transfer. However, signed Consent must be obtained from the individual before other personal information is disclosed e.g. payroll history, pension details and bank account details.

The Employment Practices Data Protection Code recommends that wherever practicable transferors should ensure that information handed over to another organisation in connection with a prospective acquisition, merger or business reorganisation is anonymised, and that workers are advised that their employment records are to be disclosed to another organisation before an acquisition or merger takes place. Furthermore, if the acquisition or merger goes ahead the employer should ensure that workers are aware of the extent to which their records are to be transferred to the new employer.

8. PENSION ARRANGEMENTS

Employees leaving Aberdeenshire Council as a result of TUPE - Potential transferee employers are likely to bid on one of the following basis.

Admitted Body Status

Where Aberdeenshire Council would act as Guarantor in respect of the pension liabilities in the event that the admitted body should cease to exist (e.g. declare bankruptcy). If approved, this would mean that transferring employees remain part of the LGPS and would see no real change in this respect. In cases whereby the transferee employer is seeking admitted body status, early discussions with the relevant Pensions Fund Administrators, are essential to ensure that the necessary arrangements are made in good time.

A Broadly Comparable Pension Scheme

The transferee would be required to submit a copy of the appropriate pension scheme which would be checked by an Actuary. Please also refer to [TUPE Q&A for Managers](#).

9. TUPE TRANSFER ACTIONS - A SUMMARY

From Aberdeenshire Council

- A senior manager identified to be responsible for the transfer and effective communication. Ensure specialist advice e.g. legal advice is sought and available throughout the process.
- An action plan or protocol is devised to ensure that employees are kept fully informed and involved from the outset.
- The trade unions and/or employee representatives are notified
- Decide which employees will transfer to the new employer, taking account of employees on permanent, part-time, temporary and casual contracts. Also identify any employees who may be transferred who are on long term sick leave, secondment or maternity/adoption leave etc.
- Enter into full and proper discussions with the trade unions with a view to achieving consensus about the way the transfer will be carried out, and how its effect on employees will be managed; staff should be told if no 'measures' are to be taken, such as no immediate proposals to make redundancies in the new employment.
- Full consultation, and, where appropriate, negotiation with the recognised trade unions or employee reps to commence as soon as possible.
- Ensure employees are provided with appropriate advice and assistance at all key stages.
- Put in place support for affected employees such as professional counselling service, help-line number, Aberdeenshire Council's [Employee Assistance Programme](#)
- Ensure that employees are given the opportunity to formally respond at the earliest opportunity.

- Ensure equal opportunities policies and principles are upheld at all stages.

When transferring staff to new employer:

- Provide information on staff terms and conditions to bidders, subject to Aberdeenshire Council's duty of confidentiality under the Data Protection Act. Please use spreadsheet TUPE Transfer Details which details the information which is required.
- Ensure employees are aware that Aberdeenshire Council propose to disclose personal information about them.
- Advise bidders that they will have to offer a broadly comparable occupational pension scheme and release details of the Local Government Pension Scheme.
- When transfer is confirmed provide information to the new employer on individual employees.



Into Aberdeenshire Council

- A senior manager identified to be responsible for the transfer and effective communication. Ensure specialist advice e.g. legal advice is sought and available throughout the process.
- An action plan or protocol is devised to ensure that employees are kept fully informed and involved from the outset.
- Notification to the trade unions and/or employee representatives of any employees who may be affected by the transfer within Aberdeenshire Council.

- Ensure detailed information is received about all the transferred employees taking account of employees on permanent, part-time, temporary and casual contracts. Also identify any employees who may be transferred who are on long term sick leave, secondment or maternity/adoption leave etc. This includes, any outstanding disciplinary or grievance actions and any ongoing Employment Tribunal claims
- Ensure detailed information is received on staff terms and conditions including any collective agreements which will be in place at the time of the transfer.
- Ensure equal opportunities policies and principles are upheld at all stages.

Please Note – Changes to Terms and Conditions

Employees who transfer into Aberdeenshire Council do so on their pre-existing terms and conditions and with their continuous employment preserved. Transferred employees terms and conditions cannot be changed if the reason for the change is the transfer itself for example to match those of the existing Council staff. However terms and conditions can be changed if the variation of terms derived from the collective agreement are one year after the transfer, and after the change, the contract terms are overall no less favourable to the employee than they were before the changes.

Advice must always be sought from HR&OD on any changes to the contractual terms and conditions of TUPE transferred employees.

The information contained in this procedure is taken directly from the following sources:

- Local Government Employers Organisation – Advisory Bulletin No.511
- Department of Trade and Industry – A Guide to the 21006 TUPE Regulations for Employees, Employers and Representatives
- TUPE Guidance – SPDS

This procedure is a summary of the TUPE legislation only, professional human resource and legal advice requires to be sought on each individual case that arises.

For further advice and guidance on any of the above please contact [Human Resources and Organisational Development](#).

Procedure

Revision Date	Previous Revision Date	Summary of Changes
02-08-2011	-	Creation of all Documents
20-02-2014	02-08-2011	Legislation Changes

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