TUPE: the Transfer of Undertakings (Protection of Employment) Regulations 1981 and 2006 (commonly known as TUPE)

When does TUPE apply?

TUPE applies where there is one of two types of "relevant transfer":

1. A "business transfer": the transfer of a business, undertaking or part of a business or undertaking where there is a transfer of an economic entity that retains its identity.
   - An economic entity is "an organised grouping of resources that has the objective of pursuing an economic activity". This can include part of a business and doesn't have to be profitable.
   - How the transfer takes place is not relevant. Indeed, it can result from a series of transactions.
   - In deciding if the economic entity has retained its identity, the test is whether the economic entity is still in existence after the transfer. This should be apparent from the fact that the operation is being continued, or has been taken over, by the new owner carrying on with the same or similar economic activities. A mere change in the way it is carried out does not necessarily change its identity.

2. A change in service provider, for example
   a) where the Council engages a contractor to do work on its behalf which was previously undertaken in-house – e.g. the Council employs employees to clean its buildings, however it decides to outsource this service and awards the cleaning contract to an external provider.
   b) reassigning such a contract e.g. where the Council contracts with a provider for the provision of cleaning of BCC buildings and subsequently decides to re-tender the service and offer it to a different provider.
   c) bringing the work in-house e.g. where the Council contracts with a provider for the provision of cleaning of BCC buildings and subsequently decides to provide the service itself.

   - There must be an organised group of employees before the change whose principal purpose is to carry out the relevant activities on behalf of the client. A single employee can be an organised grouping.
   - There is no need for the entity to retain its identity; it is merely necessary for one person to cease to provide the activities and for another to take them over. This means that it is not possible for the incoming service provider to avoid TUPE by performing the services in a different way or by not taking over the workforce.

It will not be a service provision change: -
• where it only covers the supply of goods for the client's use; or
• where the contractor is providing the services for a single specific event or a task of short-term duration.

Some transfers may be both a business transfer and a service provision change.

**What does TUPE do?**

TUPE applies to a transfer from a transferor (current employer) to a transferee (new employer). If TUPE applies:

3. Anyone employed by the transferor in the "organised grouping of resources or employees" immediately before the transfer automatically becomes the transferee's employee on their existing terms of employment (including pay) and without a break in their period of employment. This includes employees who are dismissed before the transfer, but for a reason connected with it which is not an "economic, technical or organisational reason entailing changes in the workforce" (often called an ETO reason).

4. All rights, powers, duties and liabilities under the employment contracts pass to the transferee. This could even include trade union recognition in some circumstances.

5. Any changes to the employees' terms will be void if the sole or principal reason for the change is either the transfer itself or a reason connected with a transfer which is not an ETO reason.

6. Any dismissal will be automatically unfair where the sole or principal reason for the dismissal is the transfer itself or a reason connected with the transfer that is not an ETO reason. It will also be necessary to show that the dismissal was procedurally fair. This will include any resignations in response to a repudiatory breach of contract or to substantial changes in working conditions to the employee's material detriment.

7. Employees may refuse to transfer (known as objecting), but the effect is to terminate their employment without any right to compensation.

8. Both parties must inform and (if they propose any "measures", which is pretty wide) consult representatives of their own affected employees in relation to the transfer. If they fail to do so, an employment tribunal can award up to 13 weeks' actual pay for each affected employee.

**Consultation and notification**

The Transferor has a responsibility to conduct full and meaningful consultation with
employees at the earliest practicable time. Failure to conduct consultation results in liability for the payment of compensation which may be up to 13 weeks' pay. The employer must provide the following information to the representatives:

- that a transfer is to take place
- the reason for the transfer and when it is expected to take place
- the implications for the employees
- the measures that the new employer expects to take in relation to the employees.

**SERVICE MANAGER’S CHECKLIST**

- Ensure a meeting is set up with HR People Partner (if part of a change project or programme) or HR advisor at an early stage to discuss TUPE implications, and to plan the activities needed to ensure a smooth transfer.
- Ensure that bidders for the contract are aware of the TUPE implications;
- Ensure that necessary consultation with staff and trade unions is timely and meaningful so that staff are aware of all implications of the transfer;
- Lead negotiations with senior management of the external organisation that wins the contract;
- Ensure that all necessary TUPE information is accurate and released at appropriate times to all bidders with full and final TUPE information to the new external organisation
- Ensure that the prospective employer (new contractor) secures approval for admitted body status to the LGPS pension scheme or will provide a broadly comparable pension which has been assessed by the Government Actuary’s Department.
TRANSFER OUT OF STAFF FROM BRISTOL CITY COUNCIL
What does this mean for you, and what should you do next?

If TUPE does apply:

- Any employees employed by the Council in the "organised grouping of resources or employees" would transfer to the new provider on their existing terms, unless they object to the transfer (which is not common) or they were dismissed before the transfer, provided they were not dismissed because of the transfer or a reason connected with it which is not an ETO reason.

- They would transfer on their existing terms of employment, and with their period of continuous employment unbroken.

- The Employee Liability Information should be provided by the Council to the new provider 28 days before the transfer and consist of:

  1. The name and age of those employees who are assigned to the business or who are essentially dedicated to the contract of services being transferred (Transferring Employees).

  2. The particulars of employment of the Transferring Employees, as required under section 1 of the Employment Rights Act 1996 which is specified in the final TUPE spreadsheet.

  3. Information about any disciplinary procedure taken against, or grievance procedure brought by any of the Transferring Employees within the previous two years.

  4. Information about any court or tribunal case, claim or action: brought by any Transferring Employees against the Council within the last two years or that the Council has reasonable grounds to believe that an employee may bring arising out of their employment with the Council.

  5. Information about any collective agreements affecting the Transferring Employees which will have effect after the transfer.

- Any dismissal will be automatically unfair where the sole or principal reason for the dismissal is the transfer itself or a reason connected with the transfer that is not an ETO reason.

- The new provider must inform and (if the new provider proposes any "measures") consult representatives of the Council’s affected employees in relation to the transfer. Failure to do so can result in an award of up to 13 weeks' actual pay for each affected employee. Measures relate to any action to be taken related to the transfer e.g. a change in pay date, restructuring post-transfer, potential redundancies or relocation.

- Pension – TUPE Pension Guidance
The following link provides details of the process and timeline for dealing with a transfer of staff from the Council to a new provider – TUPE Timeline
TRANSFER OF STAFF IN TO BRISTOL CITY COUNCIL

What does this mean for you, and what should you do next?

If TUPE does apply:-

- Any employees employed by the current employer in the "organised grouping of resources or employees" would transfer to the Council on their existing terms, unless they object to the transfer (which is not common) or they were dismissed before the transfer, provided they were not dismissed because of the transfer or a reason connected with it which is not an ETO reason.

- They would transfer on their existing terms of employment, and with their period of continuous employment unbroken. The next stage is to find out more details of the employees' terms as part of the due diligence process.

- The Employee Liability Information should be provided by the current employer at least 28 days before the transfer and consist of: -
  1. The name and age of those employees who are assigned to the business or who are essentially dedicated to the contract of services being transferred (Transferring Employees).
  2. The particulars of employment of the Transferring Employees, as required under section 1 of the Employment Rights Act 1996 which is identified in the TUPE spreadsheet we ask the current employer to complete.
  3. Information about any disciplinary procedure taken against, or grievance procedure brought by any of the Transferring Employees within the previous two years.
  4. Information about any court or tribunal case, claim or action: brought by any Transferring Employees against the current employer within the last two years or that the current employer has reasonable grounds to believe that an employee may bring arising out of their employment with their current employer.
  5. Information about any collective agreements affecting the Transferring Employees which will have effect after the transfer.

- Any dismissal will be automatically unfair where the sole or principal reason for the dismissal is the transfer itself or a reason connected with the transfer that is not an ETO reason.

- The Council must inform and (if proposing any "measures") consult representatives of the affected employees in relation to the transfer. Failure to do so can result in an award of up to 13 weeks' actual pay for each affected employee. Measures relate to any action to be taken related to the transfer e.g. a change in pay date, restructuring post-transfer, potential redundancies or relocation.
Pensions

When a Local Authority transfers a local authority service to an external provider (company), and that transfer is covered by the TUPE Regulations, the external provider has options regarding pension provision for the employees who are transferring. Whilst there is no automatic right for the employees to remain in their existing pension scheme, staff are entitled to a broadly comparable pension. This means that the pension provision must be better, the same, or broadly comparable to the pension scheme they were entitled to join as Bristol City Council employees before the transfer took place under the TUPE regulations.

Most BCC employees are entitled to join the Local Government Pension Scheme (LGPS) so the details below relate to this pension scheme. Similar arrangements apply to BCC employees who are eligible to join the Teachers’ Pension Scheme (TPS) and the NHS pension scheme. However, the Human Resources Department should be contacted for details of the procedure in relation to each of the relevant pension schemes.

A: to provide a Broadly Comparable Scheme

- The new contractor can offer the employees a broadly comparable scheme.
- The benefits may differ and the employees would not be able to continue contributing to the LGPS.
- Pension benefits built up in the LGPS can be preserved within the LGPS or transferred to the new employer’s pension scheme, and it is the individual employees who would make the decision in their case.
- The Council’s Pension Officer must ensure that a Government Actuary’s Department Certificate is up to date and valid before the contract is signed. The GAD certificate shows that the pension scheme provided by the new contractor is broadly comparable to the Local Government Pension Scheme (LGPS), although not necessarily a mirror image.
- The Government Actuary’s Department (GAD) may require improved terms and conditions for the overall package to ensure broad comparability.

B: Admitted Body Status

- The new contractor can apply to the Avon Pension Fund for admitted body status.
- The application will normally be accepted if the new contractor undertakes to accept the relevant requirements of the LGPS.
- This allows the employees who are transferring to remain in the LGPS and contribute as before the outsourcing.
- If the application is accepted the company would become a Scheme Employer from the effective date of the admission agreement. This is a legal contract between the new contractor, the local authority and the administering authority.
- A risk assessment will also be completed as required by the Regulations. The Fund Actuary usually takes up to 12 weeks but this may be extended during periods where triennial fund valuations are being assessed. The risk assessment will determine the percentage figure of employer contributions and outline all potential risks, for example, if staff made redundant.
- Further time must be allowed for Pensions to reconcile and verify data provided

It is important to establish the pension arrangements that will apply early on in the process as it can take several weeks to obtain all of the relevant information (as outlined above). In order to achieve this, the relevant manager will need to determine who is in scope to transfer
to the new organisation. Details about the relevant employees will then need to be collated. The HR department has a standard template document for this purpose, and will provide advice on the details of the process and time-scales for individual cases.
### Task/Activity

| Week | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 |
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**Set up working party/teams to include Project Manager, Legal Advisor, People Business Partner, Finance Business Partner, Corporate Procurement, Corporate Property (as appropriate), and plan the process in detail.**

**Week 1**

1. Review TUPE template anonymous, important to keep information accurate.
2. Consultation with trade unions and staff decide the way you will consult eg setting up of sub BC meetings.
3. Agree communications arrangements with employees concerned and other parties (contractual and material).
4. Identify other liabilities to consider eg premises, equipment etc.
5. Check and confirm correct contractual details with each employee including those on sick, maternity leave etc. Continually review this throughout the process.
6. Confirm full employment costs for running service to include casual workers, overtime, standby callouts, enhancements etc.
7. Start process for collecting disciplinary, attendance, performance warnings together with outstanding leave details etc.
8. Send outsourcing pension information to Pension Authority for assessment.
9. Assess other/support services employees working on existing contract eg HR, Legal, Finance for inclusion on transfer list (and costs).
10. Identify any casual workers used within service. Issue notices of termination of employment (not automated).
11. Consultation and communication with employees and trade unions (arrange meeting(s) with existing management and new provider).
12. Make available full staffing information (unnamed) plus total costs and pensions risk assessment to enquirers.

**Task List**

- Set up working party/teams to include Project Manager, Legal Advisor, People Business Partner, Finance Business Partner, Corporate Procurement, Corporate Property (as appropriate), and plan the process in detail.

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**SD/SM**

**SD/SM/PBP/HRA**

**PB**

**SM/FPB**

**SM/FPB/HRA/PO**

**HRA/ES**

**SD/SM**

**SD/SM/PBP - others**

**SD/SM/PBP/HRA**

**NP**

**SM**

**SM/HRA**

**SM/FPB**

**SM**

**SM/HRA/PO**

**NP**

**SM**

**SM/HRA/PO**

**NP**

**SM**

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**Transfer of Undertakings (TUPE) Externalisation Process/ Timeline Guidance for Managers**

Assumes appropriate options appraisal and authorisations have been obtained - WHEN DOES TUPE APPLY?

**TUCE template anonymous. Important to keep information accurate.**

**Outsourcing pension info required**

**TUCE template anonymous, important to keep information accurate.**

**Weeks Comm. (Enter start date e.g 04/02/13 - all other dates will default to 12pm)***

**Pre Contract Tender Stage**

- Review TUPE template anonymous, important to keep information accurate.
- Consultation with trade unions and staff decide the way you will consult eg setting up of sub BC meetings.
- Agree communications arrangements with employees concerned and other parties (contractual and material).
- Identify other liabilities to consider eg premises, equipment etc.
- Check and confirm correct contractual details with each employee including those on sick, maternity leave etc. Continually review this throughout the process.
- Confirm full employment costs for running service to include casual workers, overtime, standby callouts, enhancements etc.
- Start process for collecting disciplinary, attendance, performance warnings together with outstanding leave details etc.
- Send outsourcing pension information to Pension Authority for assessment.
- Assess other/support services employees working on existing contract eg HR, Legal, Finance for inclusion on transfer list (and costs).
- Identify any casual workers used within service. Issue notices of termination of employment (not automated).
- Consultation and communication with employees and trade unions (arrange meeting(s) with existing management and new provider).
- Make available full staffing information (unnamed) plus total costs and pensions risk assessment to enquirers.

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**Contract Awarded Stage**

- Consultation and communication with employees and trade unions (arrange meeting(s) with existing management and new provider).
- Make available full staffing information (unnamed) plus total costs and pensions risk assessment to enquirers.
- Send outsourcing pension information to Pension Authority for assessment.
- Assess other/support services employees working on existing contract eg HR, Legal, Finance for inclusion on transfer list (and costs).
- Identify any casual workers used within service. Issue notices of termination of employment (not automated).
- Consultation and communication with employees and trade unions (arrange meeting(s) with existing management and new provider).
- Make available full staffing information (unnamed) plus total costs and pensions risk assessment to enquirers.

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**3 MONTHS IS INDICATIVE, BUT THIS CAN TAKE UP TO 6 MONTHS**

**Contract Awarded Stage - NOTE THIS MAY START AT A DIFFERENT TIME DEPENDING ON YOUR COMMISSIONING PLAN. IT MAY START LATER OR EARLIER THAN WEEK 8.**

**TUPE template anonymous, important to keep information accurate.**

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**TUCE template anonymous, important to keep information accurate.**

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**Outsourcing pension info required**

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**TUCE template anonymous, important to keep information accurate.**

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<tr>
<th>Task/Activity</th>
<th>Who?</th>
<th>Week 1</th>
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<td>21</td>
<td>Send full details of employees data as soon as possible, updating regularly even if the list is 2 weeks before transfer</td>
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<td>22</td>
<td>Send full list with employee numbers of those transferring to NP Employer (HR) and Final Payroll 4 weeks before transfer date so that they can prepare information for new employees.</td>
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<td>23</td>
<td>Send full details of employees data to new provider at least 28 weeks before transfer date.</td>
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<td>24</td>
<td>Confirm arrangements to transfer, invite them to handover event if applicable, and to thank them for their service.</td>
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<td>Implementation Stage - for the purposes of this example, the transfer date is week 18 - this could be much later or earlier in real life depending on your commissioning timetable</td>
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<td>Final letter to employees</td>
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<td>26</td>
<td>Send payroll details of transferring employees to the new providers’ payroll department</td>
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<td>27</td>
<td>Send full list with employee numbers of those transferring to HR Employee Life Cycle and HR Payroll 5 weeks before transfer date so that they can prepare information for new employees.</td>
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<td>28</td>
<td>Send full details of employees data as soon as possible, updating regularly even if the list is 2 weeks before transfer</td>
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