



## NCVO WORKFORCE DEVELOPMENT

### *'TUPE': TRANSFERRING PROJECTS TO AND FROM YOUR ORGANISATION*

#### 1. Introduction

In the voluntary sector, funding for particular projects is often of limited duration. At the end of the funding period, the funding may be renewed, may cease, or the funding and responsibility for the project may pass to another organisation.

Third sector organisations may also change in other ways. For example, one organisation may be taken over by another, or two organisations with similar charitable objectives may merge.

In all the above situations where the transfer of a project, organisation or part of an organisation takes place, responsibility for the employees and all employment rights and liabilities is taken on by the new employer. This is called a Transfer of an Undertaking.

There are a number of legal obligations that arise when a Transfer of an Undertaking takes place. These are set out in The Transfer of Undertakings (Protection of Employees) Regulations 2006 ('TUPE').

#### 2. Scope of this fact sheet

This fact sheet incorporates changes to the TUPE Regulations which came into effect in April 2006. The fact sheet:

- Describes the 'TUPE' Regulations which govern staff transfers.
- Explains what you will need to do if a project is transferred in or out of your organisation, or if your organisation merges with another.
- Includes information on good practice, in respect of dealing with the staff affected by TUPE.
- Outlines some points of detail that you may need to be aware of.

- Attempts to demystify this complex area of the law

The fact sheet gives introductory guidance. However, the TUPE Regulations are complex and their application will be different in each circumstance. It is therefore recommended that employers involved in the transfer of an undertaking seek legal or HR advice.

Please note that the TUPE Regulations only cover employees and not volunteers. Section 6.7 below has brief information about what to do in respect of volunteers in a project that is transferring.

### 3. Summary of the TUPE regulations

TUPE protects employees who belong to the undertaking (i.e. a project or work activity) that is being transferred. TUPE applies regardless of whether an organisation operates to make a profit or has purely charitable objectives and regardless of the size of the organisation. A TUPE transfer can involve just one employee.

#### **Below is a summary of the effects of TUPE:**

- All employees employed in the undertaking to be transferred automatically become employees of the new employer (the "transferee"). An employer cannot pick and choose which employees to take on.
- Employees must transfer on the same terms and conditions ('contracts of employment') as those they had with their former employer (except for certain occupational pensions rights, see section 6.1). Length of service is also maintained from the former employer.
- The new employer takes over all liabilities (e.g. unfair dismissal or discrimination claims) arising from those contracts of employment, except for criminal liabilities.
- Any liabilities relating to employees who were dismissed before the transfer (for a reason connected with it) also transfer to the transferee. So if the transferor were to dismiss an employee immediately before the transfer, to avoid the employee having to transfer, the liability for unfair dismissal would fall to the transferee.
- Any collective agreements made with recognised trade unions and any recognition agreements where the business retains a distinct identity following the transfer will also transfer (see section 6.2).
- There is special protection against dismissal. Employees who are transferred cannot, in most circumstances, be dismissed, if the dismissal is in connection with the transfer (see section 6.3).
- Of course, the above provision does not mean that an employer cannot dismiss in any circumstances – a case of gross misconduct, for example,

would warrant dismissal. A dismissal in this case would be for misconduct, not on account of the transfer.

- Employees may object to the transfer or resign and claim unfair dismissal if the transfer involves a substantial change in their working conditions to their material detriment.

## 4. How do I know if TUPE applies?

TUPE will apply to what are known as 'relevant transfers', which may occur in a wide range of situations. The two broad categories are 'business transfers' and 'service provision changes'. In the third sector, most TUPE transfers will be service provision changes.

If a project transfers from one organisation to another in the voluntary sector and its activities are broadly similar after transfer (i.e., it retains its identity), the TUPE Regulations will normally apply.

The 2006 TUPE Regulations have broadened the circumstances where the legislation will apply, so that with limited exceptions, all contracting-out exercises, changes of service provider and contracting-in exercises are now covered by the legislation.

TUPE may not apply if there is a single specific event or a task of short-term duration.

## 5. So, I believe TUPE applies in my situation – what do I do next?

What you do next depends on whether you are the transferee or the transferor.

### **5.1. Obligations on the transferor to provide information to the transferee**

If you are a transferor, you are obliged to give the transferee written information before the transfer about employees who are to transfer and all rights and obligations towards them. The following must be provided:

#### **INFORMATION THAT MUST BE PROVIDED BY THE TRANSFEROR**

- The identity and age of the employees who will transfer.
- Information contained in the employees' written particulars of employment under section 1 of the Employment Rights Act 1996 (i.e., the employee's 'contracts of employment').
- Information on any collective agreements affecting the employees that will apply after the transfer.
- Information about any disciplinary proceedings taken against the employees or grievances brought by them in the last two years.
- Information about any claims brought by the employees against the transferor in the last two years.

- Information about any claims that the transferor reasonably believes might be brought.

The information should be given at least 14 days before the transfer or as soon as is reasonably practicable. The information must be no more than two weeks old.

Clearly, it would be good practice, and helpful to the transferee, if the information is provided earlier than 14 days before the transfer is due to take effect.

Once the relevant information has been provided, you must, as transferor, provide written notification of any changes which occur up until the actual completion of the transfer.

One point to be aware of is to be absolutely clear which employees you believe to be involved in the transfer. Particular note should be taken of those employees who are temporarily assigned to the service or undertaking to transfer. Advice should be taken if you are not sure which employees should and should not transfer.

If, as transferor, you do not provide this information, the transferee may apply to an employment tribunal for compensation. Compensation starts at a minimum of £500 for each employee in respect of whom the information was not provided or was defective.

## **5.2. Obligations on both transferor and transferee to inform representatives of affected employees**

The Regulations place a duty on both the transferor and transferee employers to inform and consult representatives (see 5.4 for further information about representatives) of their own employees who may be affected by the transfer.

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; or
- Their new colleagues in employment with the transferee whose jobs might be affected by the transfer (such as a manager who will be required to manage the transferee employees).

The information that must be given is outlined below.

### **INFORMATION THAT MUST BE PROVIDED TO EMPLOYEE REPRESENTATIVES**

Long enough before a relevant transfer to enable the employer to consult with the employees' representatives, the employer must inform the representatives:

- That the transfer is going to take place, approximately when, and why;
- The legal, economic and social implications of the transfer for the affected employees;

- Whether the employer envisages taking any action (reorganisation for example) in connection with the transfer which will affect the employees, and if so, what action is envisaged;
- The previous employer must also disclose to employee representatives whether the prospective new employer envisages carrying out any action which will affect the employees, and if so, what. The new employer must give the previous employer the necessary information so that the previous employer is able to meet this requirement.

In reality, the employees to transfer may wish to know a lot more than the above information. For example, they may want to meet the managers of their new organisation and their new colleagues. The more the transferor and transferee organisations can co-operate, the smoother will be the transfer.

It would be good practice for the transferring employees, their representative(s) and their manager, to meet with the managers of the transferee organisation, to discuss the above. This direct communication with employees could be in addition to the statutory information that needs to be provided to workplace representatives. However, you should discuss and agree this approach with workplace representatives first, so that there is no miscommunication.

### **5.3. Obligations of both transferor and transferee to consult**

Where actions ('measures') are proposed in relation to affected employees, the present employer of these employees must consult with the appropriate representatives in 'good time' before the transfer. An action might include a proposed change of rota arrangements or management structure, for example. No exact time is specified in the Regulations, although from an employee relations point of view, it is good practice to consult at the earliest opportunity. Actions, or 'measures' means any alteration to the status quo, such as proposals to change work location or to restructure.

If no actions are envisaged, then there is no obligation to consult, only to inform (see above). However, if no 'actions' are proposed, this should be confirmed. The consultation on any actions to be taken must be with a view to seeking agreement. During the consultation, the employer must consider and respond to any representations made by the representatives. If the employer rejects these representations, the employer must also give reasons.

### **5.4. Appropriate representatives**

The Regulations state that consultation should be with 'appropriate representatives' of employees.

If your organisation recognises an independent trade union, the appropriate representatives will normally be trade union representatives. In the event there is no recognition agreement, or any other elected consultation forum for consultation, you are required to make arrangements for employees to elect representatives for consultation purposes. This may seem inappropriate to you if the project to transfer only has, say, 3 employees. However, in practice, it is not as complicated as it seems.

If there is no recognised union and there are no employee representatives, you must invite employees to elect a representative or representatives for the purpose of

conducting the TUPE information and consultation process. If the employees then fail to do so within a reasonable time, you must consult all the employees potentially affected by the transfer on an individual basis. So in the above case of 3 employees, the options are either that the employees elect one of themselves to be a representative, or if they fail to do so, you will consult with all 3 of them individually.

Further information about electing representative and about the rights of representatives is contained in the Department of Trade and Industry's publication: 'A Guide to the 2006 TUPE Regulations for Employees, Employers and Representatives', available from the DTI website at: [www.dti.gov.uk](http://www.dti.gov.uk).

### **5.5. Failure to comply with the information and consultation regulations**

The transferor and transferee are jointly and severally liable for any award of compensation made by an employment tribunal for failure to inform and consult. Any possible award of compensation would be triggered by an employment tribunal claim raised by employee representatives or, in some cases, employees. The award is of up to 13 weeks' pay per employee.

## **6. Points of detail about TUPE**

Below are a number of points of detail that may apply to the TUPE situation you are dealing with.

### **6.1. Pensions**

Occupational pension rights earned up to the time of the transfer are protected by social security legislation and pension trust arrangements.

Strictly speaking, ongoing pension provisions do not transfer under TUPE (although retirement-related terms and conditions such as the right to early retirement may transfer).

For pension provisions after the transfer, the Pensions Act 2004 states certain minimum requirements. It states that where transferred employees were entitled to participate in an occupational pension scheme prior to the transfer, the transferee employer must establish a minimum level of pension provision for the transferred employees. This minimum 'safety net' requires the transferee to match employee contributions, up to 6 per cent of salary, into a stakeholder pension, or offer an equivalent alternative. Further information on these aspects of the Pensions Act can be found on the Department for Work and Pensions (DWP) website at: [www.dwp.gov.uk](http://www.dwp.gov.uk).

### **6.2. Trade union recognition**

There are a number of scenarios that may occur with trade unions:

#### **6.2.1. Neither employer recognises a trade union.**

There are no particular TUPE issues that arise in this scenario. The transferee employer continues to deal directly with employees.

### **6.2.2. Both employers recognise the same trade union.**

The same trade union will continue to be recognised post-transfer, for the service that is transferring. Note, however, that there will be two different recognition agreements (that of the transferor and that of the transferee). It is appropriate to review the agreements and consider whether a single agreement can be reached.

### **6.2.3. The transferor employer does not recognise a trade union, but the transferee employer does.**

In this case, the transferee employer can invite employees in the transferring service to join the trade union and, if they wish, to be covered by collective bargaining.

### **6.2.4. The transferor employer recognises a trade union, but the transferee employer: either does not recognise a trade union; or recognises a different union.**

Where the transferor employer voluntarily recognises an independent trade union in respect of some or all of the transferred employees, then at the point of transfer and subsequently, the transferee employer will also be required to recognise that union to the same extent. It is, however, open to the transferee employer to later initiate a process of de-recognition, in the same way that any employer could de-recognise.

However, this requirement to recognise the union of the transferring employees only applies if the organised grouping of transferred employees maintains an identity distinct from the remainder of the transferee's business. If there is no distinct identity, the previous trade union recognition lapses, and it will then be up to the union and the employer to renegotiate a new recognition arrangement.

### **6.3. Dismissal of employees for a reason connected with the transfer**

A dismissal of an employee by either the transferor or transferee because of the transfer will be automatically unfair unless there is an 'economic, technical or organisational' (ETO) reason entailing change in the workforce.

This means that a dismissal may only occur before or after a transfer where the sole or principal reason is either:

- Entirely unconnected with the transfer, or
- Connected with the transfer, but for an ETO reason.

Examples of ETO reasons for dismissal include:

- Economic reasons - where the demand for a service has fallen to such an extent that the service becomes unsustainable without dismissing staff.
- Technical reasons - where the transferee wishes to use new technology and the staff employed by the transferor in the entity do not have the requisite skills.
- Organisational reasons - where the transferee operates at a different location and it is not practical to transfer staff.

As with any dismissal, an employer must also act reasonably and follow a fair procedure. Please note that employees with less than one year's service cannot present unfair dismissal claims under TUPE, as employment protection rights have not been accrued (claims for discrimination, for example on the grounds of race, sex, disability etc, can however be made).

#### **6.4. Changing an employee's terms and conditions for a reason connected with the transfer.**

The changing of an employee's terms and conditions for a reason related to the transfer is prohibited under TUPE. A desire to harmonise the terms and conditions of existing and newly-transferred staff in your organisation is therefore NOT a legitimate ground for changing terms and conditions.

If there is a need to change the terms and conditions of employees for a reason related to the transfer, this is only possible if there is an 'economic, technical or organisational' (ETO) reason that also entails changes to the workforce.

The change might be a change to the numbers of employees employed or their functions. For example, a functional change might be a new requirement on an employee who held a managerial position to move to a non-managerial position – or vice-versa. This may be considered to be a valid ETO reason justifying the change of terms and conditions.

Even if there is a valid ETO reason, the employee's agreement to changing the terms and conditions still needs to be gained. The employment contract, as with other contracts, is between two parties and agreement must be reached for the change to be made. In practice, an employee may only agree to a change in terms and conditions if the new terms are equal to, or better than, his/her existing terms. If you are contemplating changing terms and conditions for an ETO reason as outlined above, then you will need to consult with the employee and gain agreement to the change.

#### **6.5. Insolvency**

If you acquire all or part of an organisation that was insolvent, there are special rules that apply which are designed to make it easier to rescue aspects of insolvent organisations. Changes to terms and conditions may be agreed even where there are no economic, technical or organisational (ETO) reasons. There are certain conditions. The changes:

- Must be designed to safeguard employment opportunities by ensuring the survival of the undertaking;
- Must be agreed with appropriate representatives of the employees; and
- Must not contravene UK law, for example the Working Time Regulations.

#### **6.6. Employees with public sector contracts of employment**

If the employees transferring to your organisation have public sector contracts, then the Code of Practice 'Workforce Matters in Local Authority Service Contracts' applies. The Code is intended to prevent a 'two tier workforce' within a particular project, where transferred staff may be on better terms and conditions than staff recruited subsequently.

The Code says that if you recruit new employees into a project, these employees must be offered terms and conditions of employment which are overall no less favourable than those of the transferred employees.

These requirements may lead to increased costs for your organisation in running the project, so it is really important that you are aware of the costs in advance and agree appropriate funding to be able to meet these costs.

Please note that the Code applies both to service transfers from the public sector and to 'second generation' transfers between non-public sector employers. To see the full Code, use the following link:

[http://archive.cabinetoffice.gov.uk/opsr/workforce\\_reform/code\\_of\\_practice/index.asp](http://archive.cabinetoffice.gov.uk/opsr/workforce_reform/code_of_practice/index.asp).

### **6.7. Volunteers**

The Transfer of Undertakings Regulations relates to employment and therefore does not cover volunteers. However, if there are volunteers in the service that is to be transferred, consider the following:

- If you are the transferor, consult with the volunteers about what they want. Do they wish to continue volunteering in the service, once it has transferred, or do they wish to stay with your organisation? Speak with the transferee organisation about the wishes of the volunteers and arrange a meeting between the transferee and the volunteers.
- If you are the transferee, consider how you might welcome volunteers who wish to continue volunteering in the service. Make sure they know of any changes and feel valued for their contribution.

## **7. Some hints and tips**

Below are some suggestions which, although not legally required, may help to ensure that the transfer is successful.

### **7.1. Resources required managing the transfer**

Do not underestimate the resources required to manage a transfer of an undertaking. At the point of tendering for the transfer of a project to your organisation, make sure that the advantages of taking on the service outweigh the resource requirements (e.g. management time, cost of legal/human resources advice etc).

### **7.2. Transfer agreements and liabilities**

Whether your organisation is a transferor or a transferee, you are strongly advised to enter into a legally-binding transfer agreement. This is particularly important if you are the transferee, since you will inherit all civil liabilities and obligations, including:

- Liability for personal injury claims against the transferor
- Liability for sex, race, disability discrimination claims against the transferor
- Liabilities for any breach of contract, such as arrears of overtime payments or salary
- All statutory rights and liabilities, such as unfair dismissal claims.

It is a relatively common practice for the transferee employer to require the transferor employer to indemnify him against any losses from any pre transfer

breaches of contracts or employment law. A legal adviser may be able to negotiate an appropriate indemnity on your behalf.

### 7.3. After the transfer

Having done all the work for a transfer of an undertaking, it might be tempting to sit back and consider the job done. However, there are further areas to consider:

- If you are the transferee employer remember that the transferring employees are moving to a new environment, with some new ways of doing things, new colleagues and perhaps different standards and expectations. Treat their induction as carefully as the induction of any new employee.
- If you are the transferor employer, consider the possible impact on morale of the loss of a service. Make sure you communicate with the remaining staff about the transfer, so that you are aware of, and can deal with, staff concerns.

## 8. Checklist

✓	Check whether TUPE applies to your particular transfer – note that the coverage of TUPE is wide and will apply to most service provision transfers.
✓	If TUPE does apply, be aware that all employees in the undertaking will transfer to the transferee and that their existing terms and conditions of employment, plus length of service, will continue.
✓	If you are the transferor, meet your legal obligations to provide written information to the transferee about the employees who are to transfer.
✓	Both transferor and transferee must inform the representatives of their employees who are affected by the transfer.
✓	If any measures/actions are envisaged in connection with the transfer, then there is also an obligation to consult with representatives.
✓	Take advice if you are considering dismissing employees or changing their terms and conditions for a reason connected with the transfer – such actions are permitted in only limited circumstances.
✓	Do not underestimate the resources required to manage a transfer. Remember that TUPE is a complicated area of the law. You are advised to take legal or HR advice on any TUPE situation you are contemplating or involved in.
✓	Remember the human element of TUPE. Staff may be anxious about a transfer. Do your best to reassure them.

## **FURTHER INFORMATION**

1. 'A Guide to the 2006 TUPE Regulations for Employees, Employers and Representatives', available from the Department for Business, Innovation and Skills website (formerly BERR) at <http://www.berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page16073.html>.
2. Information about pensions on a transfer of an undertaking and the Pensions Act can be found on the Department for Work and Pensions (DWP) website: [www.dwp.gov.uk](http://www.dwp.gov.uk).
3. Good Guide to Employment: Managing People in Voluntary and Community Organisations – for general information about employing people. Available from NCVO at: [www.ncvo-vol.org.uk/publications](http://www.ncvo-vol.org.uk/publications).
4. The Acas advisory handbook on 'Employing people for small firms', available from [www.acas.org.uk](http://www.acas.org.uk).