

TRANSFER OF UNDERTAKINGS (TUPE)

GUIDANCE FOR MANAGERS

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[TUPE INFORMATION SPREADSHEET](#)
[TUPE TEMPLATE LETTERS](#)
[TUPE FORM - PROCUREMENT](#)

1 INTRODUCTION

This guidance has been designed to help managers leading on the transfer of undertakings either into the Council or out of the Council.

The People Management Service continuously learn from supporting TUPE transfers and hence it is essential for managers to liaise with their HR Adviser at the earliest opportunity when re contracting the service

GOOD PRACTICE TIPS - MANAGER

Managers should engage with all relevant services (LCC SPMAs, HRAs, Corporate Procurement Team etc.); at the earliest opportunity to ensure that TUPE transfers run as smoothly as possible.

In complex/large TUPE transfers the LCC SPMA may consider, in conjunction with the Manager, in setting a project group across all HR specialisms and other relevant departments, to facilitate a smooth transfer.

2 OVERVIEW

The Transfer of Undertakings (Protection of Employment) Regulations 2006, as amended 2014, is the main piece of legislation governing the transfer of an undertaking, or part of one, to another and includes the revision of provision changes. The regulations are designed to protect the rights of employees in a transfer situation enabling them to enjoy the same terms and conditions, with continuity of employment, as formerly. TUPE 2006, as amended by the 2014 Regulations, entirely replaces the Transfer of Undertakings (Protection of Employment) Regulations 1981 which have often been referred to as the TUPE regulations.

The TUPE regulations use the terms Transferor and Transferee as a way of defining the parties to a TUPE transfer. After consultation with managers it was felt that the terms Sender and Recipient would be easier to work with within the guidelines. You will find however that the FAQ's and reporting of case law will use the terms Transferor and Transferee. For these guidelines it is important to recognise that the Transferor is the Sender and the Transferee is the recipient.

2.1 What is a relevant transfer of an undertaking?

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 provisions changes. Some transfers will be both.

2.2 Business Transfers

The question here is whether there is a transfer of an economic entity that retains its identity. This can be broken into two parts:

- Is there a stable economic entity that is capable of being transferred?
- Will the economic entity retain its identity after the transfer in question?

An example of a business transfer would be the transfer of staff in a Local Authority going to an Academy.

2.3 Service provision changes

The service provision change provisions introduced by the 2006 TUPE Regulations as amended 2014 effectively include 3 situations:

- outsourcing
- contracting in or in-sourcing, and
- re-tendering

In order for there to be a service provision change the following conditions must apply:

- there must be an organised grouping of employees with a principal purpose (e.g. if a contractor was engaged to provide a courier service, but the collections and deliveries were carried out each day by various different couriers on an ad hoc basis rather than by an identifiable team of employees, there would be no service provision change.)
- it must not relate to a single specific (one-off) task (e.g. where a contractor is engaged to organise a single conference for a client, even if the contractor has established an organised group of staff to carry out activities involved in fulfilling that task, and the client subsequently holds a second conference using a different contractor, there would be no transfer)
- it must not be of a short-term duration (e.g. a contract relating to the security of a major sporting event concerning the provision of security advice over a period of years leading up to the event, and another contract concerns the hiring of security staff during the event itself, only the first contract would likely to be covered)
- the activities must not consist wholly or mainly of the supply of goods or services for the client's use (e.g., if a contractor is engaged to supply sandwiches and drinks to a client's canteen, for the client to sell on to its own staff, TUPE will not apply. If, however, the contract is for the contractor to run the client's staff canteen, TUPE may apply).

A grouping of employees can consist of just one person.

The principal purpose element is intended to confine the provisions to cases where the sender has in place a team carrying out the service activities and that team is essentially dedicated to carrying out the activities that are transferring.

The 2014 Regulations amended the TUPE Regulations to require that the activities carried out after the change must be fundamentally the same as the activities carried out before the change, in order for it to be a service provision change. This reflects the position taken in case law (which referred to the activities being “fundamentally or essentially” the same). This means that if the service requirement was changed fundamentally, there would be no service provision change. On the other hand, minor differences between the nature of the tasks would not normally on their own be sufficient to mean that the activities are not fundamentally the same.

Where the service provision change may include blocks of a service, it is possible that TUPE may apply to those specific elements. HR advice should be taken prior to entering into any discussions regarding such a change.

2.4 The situations in which TUPE does and does not apply

By way of broad guidance TUPE has been found to apply to:

- Mergers.
- Sales of businesses by sale of assets.
- A change of licensee or franchisee.
- The gift of a business through the execution of a will contracting out of services.
- Changing contractors.
- Where all or part of a sole trader's business or partnership is sold or otherwise transferred.

However, TUPE does not apply to:

- Transfers by share take-over.
- Transfers of assets only (for example, the sale of equipment alone would not be covered), but the sale of a going concern including equipment would be covered.
- Transfers of a contract to provide goods or services where this does not involve the transfer of a business or part of a business.
- The supply of goods for the client's use, for example, supplying food to a client to sell in its staff canteen, rather than a situation where the contractor runs the canteen for the client.

2.5 Who and what transfers

Except where an employee objects to a transfer, and their employment is therefore terminated, on completion of the transfer, the receiving organisation will take over all of the senders' employees, rights, powers, duties and liabilities and any act or omission before the transfer is completed.

The receiving employer will take over all of the rights and obligations arising from the contracts of employment of the transferring employees, except for criminal liabilities and some benefits under an occupational pension scheme

Liability for statutory claims existing prior to the transfer will transfer, e.g. a Recipient will become liable for a Sender's act of discrimination which occurred prior to the transfer.

Any trade union recognition will transfer so long as the transfer is of an organised group of employees who retain their identity distinct from the remainder of the receiving employers business. If they do not retain this identity then the recognition will lapse.

A service provision change will often capture situations where an existing service contract is re-tendered by the client and awarded to a new contractor. It would also potentially cover situations where just some of those activities in the original service contract are re-tendered and awarded to a new contractor, or where the original service contract is split up into two or more components, each of which is assigned to a different contractor. In each of these cases, it is necessary to consider whether the activities after the change are fundamentally the same as those carried out before it and then whether there was an organised grouping which had as its principal purpose the carrying out of the activities that are transferred. However, the activities might be divided up so much that there is no service provision change. This is often

called “fragmentation” of the service and it will depend upon the circumstances as to whether a service is so fragmented that it is not a service provision change.

Employment contracts may incorporate provisions of collective agreements as may be agreed from time to time. For example, collective agreements between the transferor (or sender) employer and the recognised union(s), or collective agreements agreed by a national body for the sector on which employers and unions are represented. Terms and conditions in new collective agreements, or changes to existing ones, may then be automatically incorporated into individual contracts of employment.

Under the amendments made by the 2014 Regulations, rights in relation to future collective agreements which have not been agreed at the time of transfer do not transfer if the transferee is not party to the later collective agreement, nor a party to the collective bargaining for it. If the transferee does participate in that collective bargaining, then the employee does have rights to any terms and conditions which would be incorporated from it.

2.6 Impact of a breach of the TUPE regulations

If a TUPE transfer applies, all terms and conditions and continuity of employment should be preserved. This principle applies to all employees who were employed in the entity transferred immediately before the transfer; and those who would have been so employed if they had not been unfairly dismissed for a reason connected with the transfer.

Subject to a two year qualifying period for an Unfair Dismissal claim, such a dismissal will be automatically unfair for a reason connected with the transfer unless it is an ‘economic, technical or organisational’ (ETO) reason entailing a change in the workforce. (NB Anyone employed prior to April 2012 will have a one year qualifying period for an unfair dismissal claim.)

2.7 Employment Checks

Both the TUPE Regulations and the Immigration, Asylum and Nationality Act 2006 are silent on the obligations of transferees that inherit employees, in the event of a TUPE transfer, to check the right of those employees to work in the UK. However, the UK Border Agency in its Comprehensive Guidance for Employers on “Preventing Illegal Working” (on the UK Border Agency website) states that, “Employers who acquire staff as a result of a TUPE transfer are provided with a grace period of 28 days in which to undertake the appropriate document checks and establish an excuse, following the date of transfer”.

Upon receipt of Due Diligence, where it is indicated that an individual is not a UK resident, it is important that the processes are followed to establish what paper work should be completed.

If an application for a licence is required and this application is unsuccessful then [letter 9](#) should be used to write to the individual terminating their employment

There are Right to Work champions within the HR Adviser teams and these can be consulted in the event that clarity is required

2.8 Pension Arrangements

Pension arrangements **must be determined before** any Invite to Tender document is published.

Managers must contact the HR Adviser early in the process who will arrange a meeting with **all** relevant parties (including the Pensions Section) involved to establish the position as this is a **complex area**.

The reason why it is so important to understand the various options around pension early in the TUPE process is that the liabilities associated with pension provision for any new provider can be extremely costly.

Managers must consider how much of the cost will be transferred to the new provider and what liability will remain with LCC.

At the point of considering a transfer and prior to any discussions with Procurement, managers need to ensure that the Pre-Tender Pensions Checklist have been taken into account fully by management and liaised with Pensions/Legal/HR, as appropriate

The pre tender checklist and a glossary of pension terms can be found in [Appendix 3](#) and [Appendix 4](#) respectively

Arrangements for staff, who are members of, or who are eligible to be members of, a public service pension scheme who are compulsorily transferred from the public sector are covered in the HMT guidance “Fair Deal for staff pensions: staff transfer from central government (2013)” and refers to those in the Civil Service. This policy also covers staff who are members of a public service pension scheme, excluding Local Authority Pension Schemes, who are compulsorily transferred to a public service mutual or to other new models of public service delivery.

For Local Authorities the applicable document is 'Best Value Authorities Staff Transfers (Pensions) Direction 2007'.

Staff who are members of a public service pension scheme, excluding Local Authority Pension Schemes and who are compulsorily transferred out of the public sector will normally retain the right to participate in the relevant public service pension scheme in their new employment for so long as they continue to provide the outsourced services or function. Eligibility will depend on the pension scheme rules. Also in a retender situation where services were originally compulsorily transferred out under Fair Deal (1999 or 2004) if any remaining eligible employees exist, bidders will usually be required to provide them with access to the appropriate public sector scheme. They will continue to be eligible to accrue further pension benefits in that scheme in respect of their new employment and their pensionable service will be treated as though it were continuous.

Both employees and employers will be required to pay contributions to the pension scheme. Employees will be required to pay employee contributions in line with those paid by members of the scheme working in the public sector. These will be determined under the scheme regulations and may change following an actuarial

valuation of the scheme. Employer contributions will usually be set at the same level as the employer contribution rate paid by all other employers in the scheme (see 2.12 below concerning the GAD Certified Scheme).

In situations where the pension arrangements are unclear, alternative arrangements may be considered, such as seconding the employees

2.9 Data Protection - Legal Requirements

In a TUPE situation the sender is not required to obtain its employees' consent before passing on information about them to the recipient. Sharing information in this way is necessary to comply with a legal obligation and as such consent is not required but this does not negate the requirement to inform individuals that their data will be shared in this way. The sender must consider the implications of data protection legislation when disclosing information in the context of a TUPE transfer.

The Information Commissioner's Office has produced a Data Protection good practice note – disclosure of employee information under TUPE (on the Information Commissioner's Office website), which explains what employers should do to ensure that they comply with statutory requirements when providing information required by TUPE, and information that may fall outside that required by TUPE.

The Employment Practices Data Protection Code sets out a number of good practice recommendations to enable employers to comply with the requirements of data protection legislation. These provide, amongst other things, that wherever practicable senders should ensure that information handed over to another organisation in connection with a prospective acquisition, merger or business reorganisation is anonymous, and that employees are advised that their employment records are to be disclosed to another organisation before an acquisition or merger takes place.

The transferor will need to ensure that any Occupational Health records, where these exist, transfer from their provider to the new employer's provider as part of any transfer process. By their nature these records would not be anonymous. It will be for the employer to notify the individuals that their records are transferring to the new employer.

2.10 Role of Legal Services

The Council's Legal Services will ensure that robust terms and conditions of the service contract are in place to aid contract management and to facilitate smooth transitions of staff from one employer to another. In particular, Legal Services, or those drafting any contract between the Council and an external service provider, may wish to include specific contractual provisions, whereby the external service provider is placed under obligations to provide employee liability information more than 28 days prior to any transfer and, where necessary, for such information to be more comprehensive than the minimum required by the TUPE Regulations. In addition, consideration may be given to requiring indemnities to be provided by the parties.

2.11 Role of the HR Administration Service

This is another important part of the transfer so it is necessary that the HR Administration Service (HR Admin) **are contacted at the earliest opportunity.**

- A HR Admin representative must be involved in the information collection to ensure that any Business World On! configurations changes are identified and the workload demands can be measured.
- Any changes to the Business World On! configuration will be raised by the appropriate HR Admin team leader following the 'Business World On! change request' procedure.
- Any Organisational Structure information will be inputted by the HR Admin Builders team before the transfer. This is necessary to ensure that the records can be inputted before the first payroll run following the transfer.
- HR Admin will be required to assign the additional records to an assistant who will input the payroll information.
- Storage space will be identified for additional personal files.
- It is not necessary for HR Admin to produce contracts unless in exceptional circumstances.

2.12 Role of Procurement Lincolnshire

When procurement involves the potential transfer of staff, the manager will first need to determine if a TUPE situation exists by reference to Legal Services and People Management. This determination will need to be made prior to any notice being put out for the service.

Procurement Lincolnshire is responsible for all major procurement activities within Lincolnshire and they work to the Council's Contract and Procurement Procedure Rules (CPPR's).

Procurement will work with the manager to ensure that TUPE is built into any tendering process.

Procurement will ensure adherence to obligations under TUPE and will include provisions in its contracts giving effect to these obligations.

When undertaking a procurement exercise that may involve TUPE it is important that the corporately agreed standard documents are used. These are available Procurement Lincolnshire website at: Procurement.Lincolnshire@lincolnshire.gov.uk

To the extent that it can, procurement will require the incumbent contractor to provide TUPE information about employees affected by the transfer should the incumbent contractor bid for but not be awarded the contract. If the current provider is LCC then Procurement documentation will provide details of the information required.

As a part of the tendering process the council may assess bidder's past experience in delivering similar contracts, which may include their track record in managing TUPE transfers.

Failure to provide sufficient assurances may result in a contractor's tender not proceeding to the second stage.

The following documents, in relation to TUPE will be sent with the Invitation to Tender:

- The anonymised TUPE information about any affected employees.
- Where the tender involves a transfer of staff from the authority to an external organisation a Pensions Information Memorandum including an actuarial assessment of the likely employer contribution rate should a contractor become an admitted body to the LGPS together with a suggested amount for any bond or indemnity (if necessary). Details of contractor's obligations in relation to pensions including the requirement to provide a broadly comparable pension scheme for LA employees will be provided. This would include within it the following information:

Admitted Body Status

If you wish to become an admitted body in the LGPS to ensure the employees transferring from local government (or who have transferred in the past from local government) can remain entitled to access that scheme, you will need to obtain "admitted body status" through entering into an Admission Agreement with the Council. Procurement will provide you with the level of employer contribution that would be required in relation to the Transferring Employees together with the amount of any indemnity or bond required to cover default situations. You will then be able to factor in the costs of providing the pension into your bid.

Admitted Bodies must comply with the terms of the Admission Agreement and in particular, must ensure that it informs the Council if any of the scheme members cease to work on the Council's contract.

The following link should be used to access the WYPF website for Admitted Body Status:

<http://www.wypf.org.uk/Member/Administration/contractorSeekingAdmission/contractorSeekingAdmission.aspx>

GAD Certified Scheme

If the new employer offers its own scheme, the Council will require a Certificate from the Government Actuary's Department stating that the benefits are broadly

comparable to those which the employees would have received under the LGPS.
(See 2.8 Pension Arrangements.)

2.13 Financial Matters

Whether receiving or moving staff to another organisation there will be a number of financial matters to consider, including the funding of posts and the transfer of relevant budgets.

Managers will need to work with their financial advisers to ensure that all possible financial matters are addressed before a transfer is undertaken.

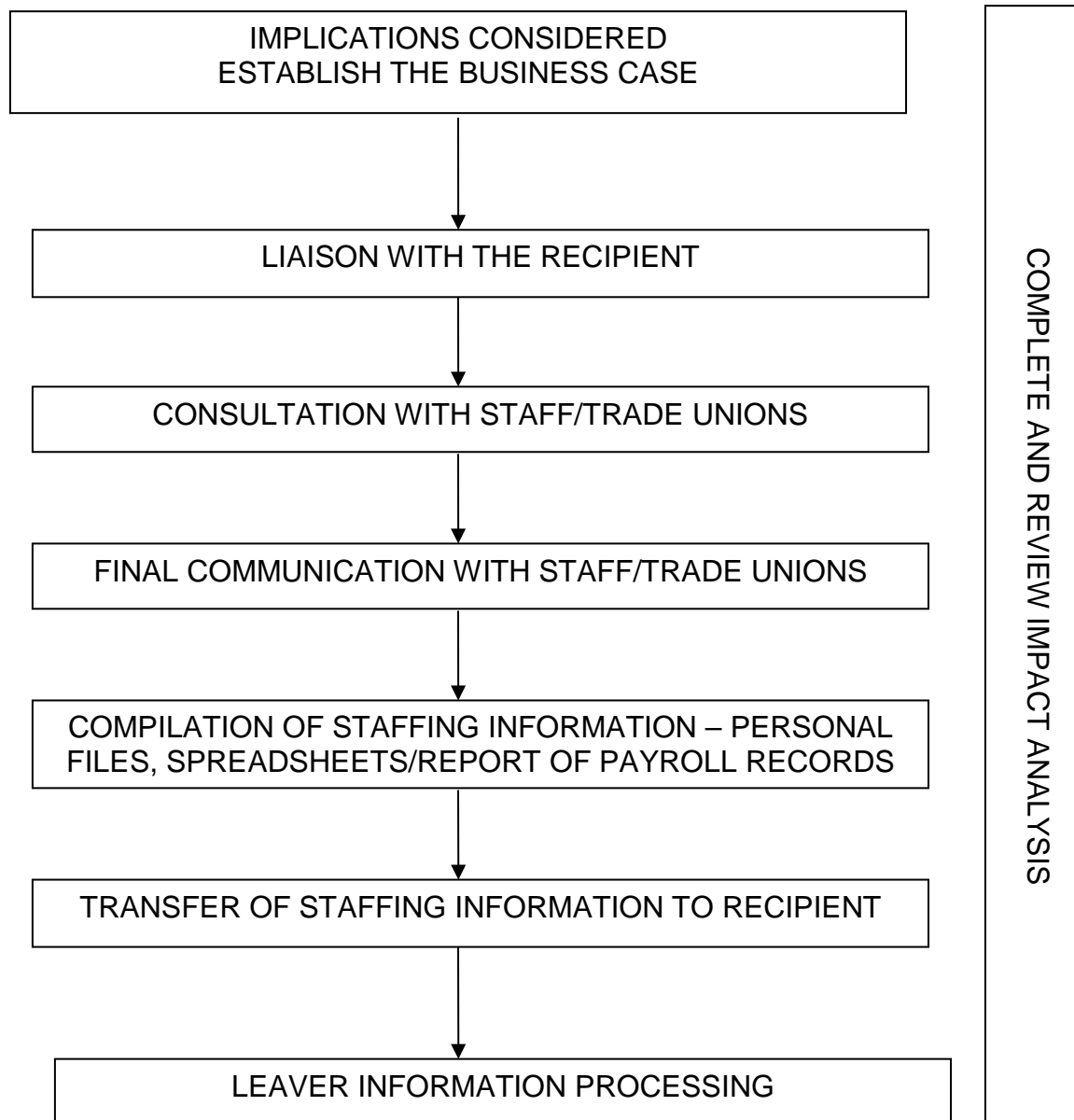
GOOD PRACTICE TIPS - MANAGER

It is critical that Managers take the lead in co-ordinating all Pre Tender work, particularly in relation to pension costs, BEFORE Procurement becomes involved in the TUPE transfer.

SEE APPENDIX 3 – PRE-TENDER CHECKLIST

3 LCC AS THE SENDER

3.1 Flowchart – Transfers Out (Sender)



3.2 Standard Operating Procedure – TUPE Transfer Out (Sender)

STEP	MANAGER RESPONSIBILITY	HR ADVISER RESPONSIBILITY
Impact Analysis	Start Impact Analysis	
Transfer situation identified, including staff in scope of transfer. Obtain advice that TUPE does apply	Manager contacts HR Adviser when TUPE transfer situation identified, staff in scope	Advise on processes to follow. Refer to sections 2.1 to 2.6
Implications considered	Considers impact of TUPE out on the Council and service	Continuing advice on TUPE transfer process
Ensure that others are aware of the possibility of a transfer	Make contact with <u>Pensions Dept prior to</u> contacting Procurement to ensure that everything that needs to be considered is included in the tender documentation. Refer to pre-tender checklist APPENDIX 3	Ensure Pensions and HR Admin are aware of potential TUPE transfer
Liaison with the recipient	Contact with recipient, transfer of initial information.	Work with HR Adviser in recipient to ensure understanding and smooth transition. See Section 3.3
Consider any measures envisaged by the recipient post transfer. Incorporate into consultation document	Receive information from recipient on the measures post transfer, consider and include in consultation document. (Note to delete from the consultation document what is not needed)	Consider measures and advise on impact of these on the staff post transfer. See Section 3.4
Consider any indemnities that may be required by the Council as sender and any requests from the proposed receiver	Determine the stance on risk and level of liability for which indemnity will be sought	Ensure that legal advice is sought
Draft consultation document, agree methods of selection/assimilation, HR processes, agree timescales	Manager to finalise consultation document	Advise on timescales and appropriate HR processes. See Sections 3.5
Finalise consultation document	Send final draft to HR adviser for comment/ addition of HR processes	Advise on wording in consultation document.

STEP	MANAGER RESPONSIBILITY	HR ADVISER RESPONSIBILITY
Arrange consultation meeting with staff and unions	Identify dates and venue for meeting with staff	Check diary for availability if necessary to attend consultation meeting
Issue final consultation document and revised job descriptions (if these are being amended as part of measures) to Union representatives	Send consultation document to relevant trade union representatives	Provide information and advice as necessary
Issue consultation document to staff and unions	Email/post consultation document to staff affected	Provide information and advice as necessary.
Hold consultation meeting with affected staff	Lead consultation meeting, answer questions raised and take away questions	Support manager at meeting to answer HR queries raised by staff
Consultation period. Good practice would be to consult for 30 days. However, depending on the circumstances of the individual case, this period may be greater or shorter. Any consultation must be meaningful regardless of its duration	Collate responses from staff. Review during the progress	Be available to respond to HR queries
Consider comments from staff following consultation period	Consider all responses from staff and draft responses	Meet with manager to discuss employee responses and the response from management
Final communication with staff/trade unions	Reply to staff comments and amend consultation document if appropriate	Advise manager on changes to consultation document
Obtain legal advice about liabilities which may transfer	Consult with legal services about what liabilities will transfer, such as building, equipment, finances	Liaise with legal services and manager about liabilities which may affect employees, e.g. change of location etc. See Section 3.9
Transfer of staffing information to recipient	Complete TUPE List – Personal Information spreadsheet with information required under TUPE regulations	Provide information and advice as necessary. Provide HR policies and terms and conditions to new employer. See Section 3.6, 3.7

STEP	MANAGER RESPONSIBILITY	HR ADVISER RESPONSIBILITY
Leaver information processing	Notify HR Admin of staff transferring to remove from payroll at least one month before transfer occurs and then send confirmation the day after transfer	Arrange for personal files to be transferred to new employer. These should be checked and only essential information retained. See Section 3.8

3.3 Introduction

The Council's Procurement Team will have been involved in any arrangement to outsource a Council service. Please see overview section on Procurement. All staff and their recognised trade union representatives should be informed at the earliest opportunity if they may be subject to a transfer out of the Council.

At the earliest opportunity an Impact Analysis should be completed.

A consultation document should be produced in liaison with the recipient organisation.

Following the consultation period affected employees and trade union representatives should be informed of the following:

1. The outcome of the consultation process.
2. When the transfer will take place.
3. Reassurance of future terms and conditions.
4. Further details of the new employer.
5. Details of pension arrangements.

It is important at this point to ensure that any employees that do not wish to transfer have clarified their reasons and will in effect terminate their contract. The reason for termination should not be because of a substantial and detrimental change to working conditions as a result of the transfer. If an employee believes that this is the case, they may claim that they have been unfairly dismissed. In effect, the employee has chosen to resign rather than transfer to a new employer, and their only recourse would be to claim that the changes being proposed were so detrimental to them that they had no choice other than to resign and claim unfair dismissal.

Once all copies of signed contracts between the Council and a new employer have been received, the HR Adviser should arrange a final meeting with the affected employees to confirm the actual date of transfer.

At least one month before the transfer the manager should inform HR Admin of the staff members that are transferring to the new employer through Business World On! Leaver form. This process could also be completed using a table or spreadsheet if there is a large number of staff involved.

3.4 Measures/legal and social implications

Regulation 13(2) of the TUPE Regulations 2006 as amended 2014, provides that an employer of affected employees should consult with appropriate representatives of affected employees on the legal, economic and social implications of the transfer for any affected employees. For example the new employer may be seeking to consult on changes affecting the transferring terms and conditions of employment such as job descriptions, the pay date or a specific procedure such as redundancy. At Employment Tribunal, case law has indicated that the following things should be considered.

- The 2014 regulations allow the transferee (receiver) to work with the transferor (sender) on redundancy post transfer. However, decisions to dismiss must be taken post transfer and hence notice will start when the receiver takes the staff group on. This should be agreed in writing as per letter 11.
- The 2014 change means that a piece of legislation applying to that particular staff group can no longer apply in this case. The Employment Rights Act Section 218(7) specifically covered staff retaining continuous service when they moved from local authority schools to local government roles. This could no longer apply once the staff had been TUPE transferred to an academy and therefore were no longer employees of a local authority school.
- Where the organisation being transferred to is not covered by overarching legislation which applies to the sender organisation.
- Where the organisation being transferred to is no longer part of the collective bargaining machinery that determined some terms and conditions.

If you feel that these or similar circumstances may apply they should be included as an additional section in the consultation document.

3.5 Consultation and notification

The sender has a responsibility to conduct a full and meaningful consultation with employees and recognised Trade Unions at the earliest practicable time. Failure to conduct consultation, with both affected employees and recognised Trade Unions, results in liability for the payment of compensation which may be up to 13 actual weeks' pay. The sender and the recipient are both liable for any award of compensation made by an Employment Tribunal for failure to inform and consult.

A reasonable period of consultation should be given to employees concerned and should be in line with the terms of statutory redundancy consultation i.e. at least 30 days. If the transfer would affect 100 or more employees, the consultation should be at least 45 days.

3.6 Information about employees transferring

From 6 April 2006, senders became obliged to give the recipient written information about the employees who are to transfer and all the associated rights and obligations towards them. This information includes, for example, 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 and details of any claims that the sender reasonably believes might be brought.

The 2014 Regulations confirm that information should be provided at least 28 days prior to the transfer and ideally earlier than that for practical reasons. The headings of a spreadsheet are provided in [Appendix 1](#).

It is advisable for the sender to obtain formal assurances from the prospective recipient with regard to the use and safekeeping of the information and its return if the transfer does not proceed.

3.7 Transfer out employment checks

The Council will notify any new employer that the necessary employment checks have been carried out and will complete any due diligence questions asked by the new employer.

If any staff who are scheduled to transfer are from outside the European Union, the Council will ensure that any new employer holds an Employer Sponsorship Licence under the points based system for UK Immigration. The new employer will then be responsible for making a new application.

3.8 Files being transferred

There is no requirement for the sender to give the recipient the entire personnel files for the transferring employees. In practical terms, the Council has found it convenient to do so as long as the files have previously been checked for irrelevant data.

HR Admin will check the staff files of any employees transferring to a new employer under a TUPE transfer, before they are sent to the new employer. They will remove any items which should not transfer, such as records of expired grievances, disciplinarys and items that relate to other employees.

If an individual has been subject to a safeguarding investigation, the investigation file must be maintained within the existing filing system within Human Resources.

3.9 Liability passing on to the incoming contractor

The recipient takes over the liability for all statutory rights, claims and liabilities arising from the contract of employment, for example, liabilities in tort, unfair dismissal and discrimination claims. The exception to this rule applies to criminal liabilities.

It is possible to create specific warranties that arise out of due diligence and/or disclosure of information provided by the sender to the recipient. These will help to protect the recipient in cases where appropriate information was not disclosed to the recipient and subsequent legal action is taken by a transferring employee against the recipient for failings by the sender. However before any legal agreements between both parties are considered it is important that appropriate legal advice is taken.

3.10 Pensions

In summary, the Pensions Act 2004 provides that, 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
- this minimum “safety net” requires the new employer to match employee contributions, up to 6% of salary, into a stakeholder pension, or offer an equivalent alternative
- Local authority employees transferring to a private employer should be offered a “broadly comparable” scheme (in accordance with the Best Value Authorities Staff Transfers (Pensions) Direction 2007 and the Cabinet Office’s Statement of Practice – Staff Transfers in the Public Sector)

3.11 Staff on Secondment

Any staff on secondment will return to their substantive post in terms of any transfer out of staff from the Council.

Any secondment arrangement due to come to an end before the date of transfer will mean that the employee will revert to their substantive post and, if this is within scope of the transfer, they will transfer with all other employees.

The recipient will be informed of any staff on secondment whose arrangement is due to continue beyond the date of transfer and whose substantive post is within scope of that transfer. The relevant manager will need to negotiate with the receiving organisation if they wish this arrangement to continue. However, if it does continue after the date of transfer, when it does come to an end, the employee will revert to their substantive post which may be with a new employer.

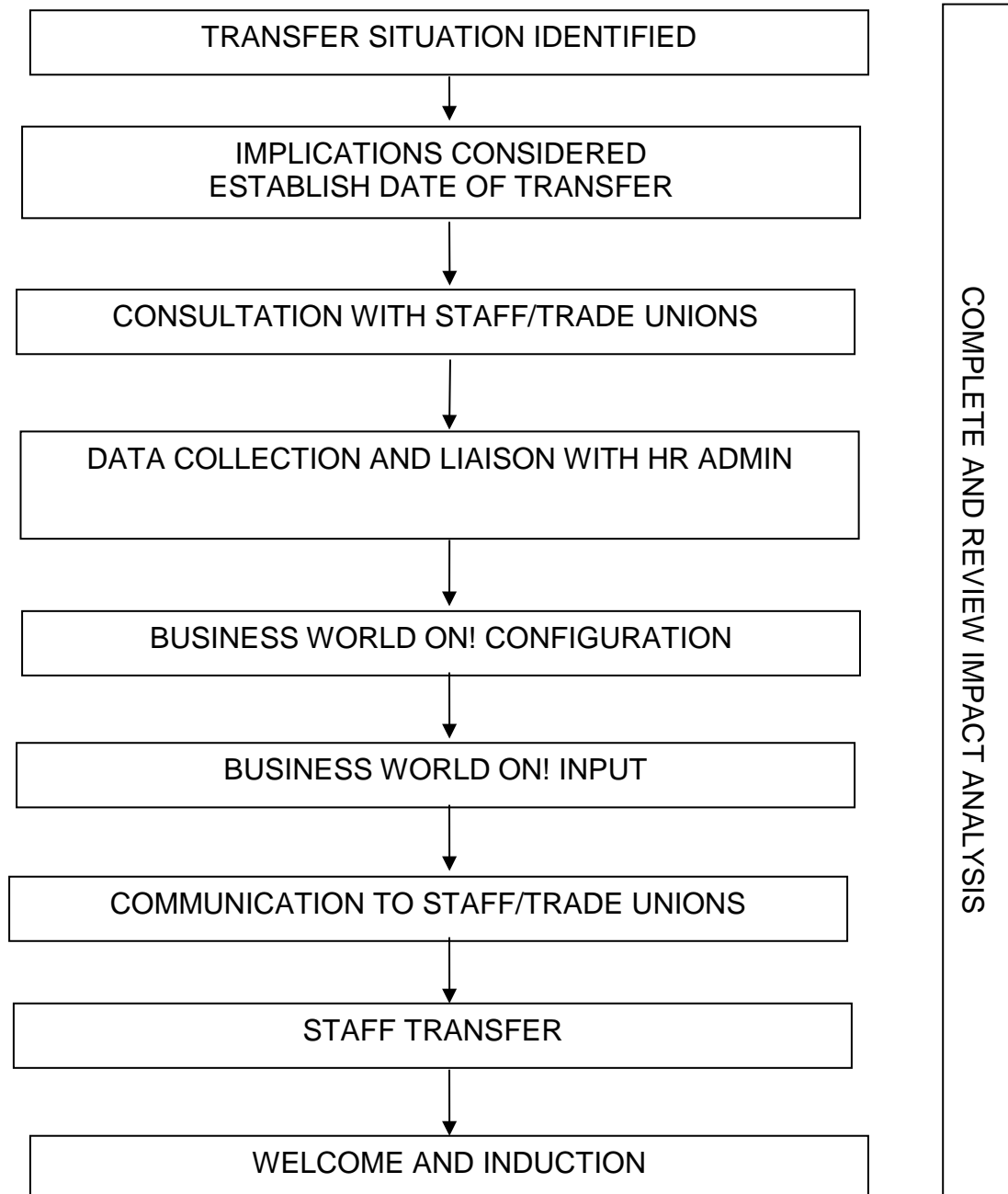
If a receiving organisation refuses to continue with the secondment of a transferring employee the secondment arrangement must come to an end at the date of transfer and the employee will revert to their substantive post which will then be transferred. Adequate notice will need to be provided in these circumstances.

3.12 A Last Minute Delay

An organisation receiving staff can until the last minute of transfer put forward issues/ questions which result in a delay being transferred. This may sometimes occur after consultation has closed and letters have been sent to staff confirming a decision to transfer. In such circumstances the affected staff will need to be notified. Where possible this should be carried out in person and a letter provided to the individual to confirm their employment status during the period of delay and how they will be kept updated. A sample letter for this purpose can be found within [letter 10](#).

4. THE COUNCIL AS THE RECIPIENT

4.1 FLOWCHART – TRANSFERS IN (RECIPIENT)



4.2 Standard Operating Procedure – TUPE Transfer In Recipient

STEP	MANAGER RESPONSIBILITY	HR ADVISER RESPONSIBILITY
Impact Assessment on proposed change to service delivery	To carry out the initial impact assessment and plan for its continued review throughout the process	To support the IA as necessary
Transfer situation identified, including staff in scope of transfer. Obtain advice that TUPE does apply	Manager contacts HR Adviser when TUPE transfer situation identified, staff in scope	Advise on processes to follow
Implications considered	Considers impact of TUPE into the Council and the service. Consider completing an Impact Analysis	Continuing advice on TUPE transfer process
Consider any measures envisaged as the recipient post transfer via a measures letter. Incorporate into consultation document	Provide information to the sender on the measures post transfer. Consider and include in consultation document	Consider measures and advice on impact of these on the staff post transfer. Request HR policies, pay scales, terms and conditions from sender. See Sections 4.4, 4.5 and 4.7 Use letter 11 to inform the sender or confirm changes with letter 12
Communicate with staff/trade unions	Send consultation document to relevant trade union representatives	Provide information and advice as necessary
Data collection and liaison with HR Admin. Complete terms and conditions comparison table	To review due diligence and terms and conditions info received and understand the effect this will have on service delivery. Sender completes TUPE List – Personal Information spreadsheet with information required under TUPE regulations. Information required as early as possible but at least 2 months before transfer	Request due diligence info if possible 2 months before date of transfer. Complete all due diligence information and identify any gaps where further information is required. Provide info and advice as necessary. Complete terms and conditions table ensuring all columns are populated Retain all columns in spreadsheet regardless of whether detail is available
Business World On! Configuration	Establish posts for transferring staff at least 1 month prior to receiving staff	Provide advice on structure and posts to HR Admin.

STEP	MANAGER RESPONSIBILITY	HR ADVISER RESPONSIBILITY
Business World On! input	Liaise with HR Admin to input staff details	Provide information and advice as necessary
Communication to staff/trade unions	Reply to staff comments and amend consultation document if appropriate	Advise manager on changes to consultation document
Obtain legal advice about liabilities which may transfer	Consult with legal services about liabilities such as building, equipment, finances	Liaise with legal services and manager about liabilities which may affect employees, e.g. change of location etc.
Staff transfer	Provide transfer information for staff in scope to HR Admin, arrange for email accounts, logins etc.	Liaise with HR in outgoing organisation for smooth transition to determine any anomalies with pay etc. which could affect future pay levels
		Provide transfer information for staff in scope to OD & Learning Services
Welcome and introduction	Arrange welcome/ induction meeting and on-going induction for incoming staff	Attend meetings if required
First days post transfer		Ensure on-going arrangements are in place for pay awards from sender are implemented when due. Inform manager of changes. Confirm which aspects of the T and Cs will remain static. Ensure a record is kept of all the T and C's people transfer across on and the location of relevant documents by completing the final column of the comparison of terms and conditions document.

4.3 Introduction

The Council may find that staff are joining the organisation under TUPE as the result of a number of possible situations.

Examples of this could be a decision to bring a service in house, contractor liquidation or government initiative to transfer in a public service not currently under the remit of Local Government.

4.4 Consultation and notification

With assistance from People Management, a manager will need to liaise with the transferring organisation and arrange to attend a meeting or meetings with them including any consultation meetings as agreed by the sender. They will need to ensure that appropriate information is provided to LCC. It is important

for information to be gathered from the transferring organisation before the consultation begins. This will ensure that the current terms and conditions of the staff can be continued post transfer. It will also help inform any measures we may wish to take.

4.5 TUPE and Redundancy

Dismissals on the grounds of redundancy are permitted by TUPE, as they will normally be for an ETO reason, although the Council will need to make sure that the redundancy is fair within other employment legislation, e.g. that selection for redundancy is fair and not based simply on the fact that the person is a transferred employee.

Existing protections for employees facing redundancy will continue to apply as will protections relating to relocation for redundancies arising out of a change in the place where employees are employed. Dismissed employees may be entitled to redundancy payment if they have the required two years of service or more. The Council must also ensure that the required period of consultation with employees' representatives is allowed. Entitlement to redundancy payments will not be affected by the failure of any claim which an employee may make for unfair dismissal compensation.

Where there are redundancies and it is unclear whether the regulations apply, it will also be unclear whether the sender or the Council is responsible for making redundancy payments. In such cases employees may consider making claims against both employers at an employment tribunal.

This is unlikely in service provision transfer due to the identification of the number of individuals. It may be more relevant if we take on a new service. Advice should be sought from Legal Services.

4.6 Information

The HR Adviser should outline at the meeting what Council policies and procedures will be applicable, giving copies of the key policies regarding discipline, grievance, health and safety and managing attendance, unless out-going contractor policies are to be used. Some policies may be within an organisation's contracts so any proposals to use LCC's should be included within the measures (see measures [letter 11](#)).

Information checklist to include:

- Payment method / pay day.
- Pay scales / increments.
- Hours of work, any flexi scheme.
- Annual Leave entitlements.
- Changes to place of work / travel requirements.
- Whether pre-employment/CRB checks/Entitlement to work in the UK have been undertaken/completed. This should not stop an employee transferring but will provide essential safeguarding information.
- Whether there are any liabilities to transfer for example personal injury claims or claims for discrimination.
- Any outstanding ER issues e.g. discipline, grievance, capability, Ill-Health etc.

If any changes to the above points are necessary, the appropriate information should be included in the consultation documents distributed by the transferring organisation. These changes should also be justifiable for either an economic, technical or organisational reason.

The manager and HR Adviser will ensure that the requirements of the HR Checklist and Due Diligence Questionnaire are complied with. This includes both the statutory data required by the regulations and the information required for due diligence to be undertaken.

4.7 Transfer in Employment Checks

The Council should consider seeking a warranty and indemnity cover from the sender in respect of liabilities incurred to the point of the transfer, and should carry out appropriate due diligence regarding the processes that the sender had in place to prevent illegal working.

The status of Criminal Record Bureau (CRB) checks is not one of the statutory questions. However, any liability for CRB and other safeguarding checks would be picked up and we would ask about the CRB status of the transferring staff during due diligence. If a CRB check is valid and within date (i.e. has been checked within 3 years of the transfer date) this may be accepted if the person is transferring in a role which requires a CRB check. If the CRB check is older than 3 years and the role requires a check this should be undertaken by LCC immediately upon transfer.

Where a migrant sponsored under Tier 2 or Tier 5 transfers to the County Council, they will bring their leave to stay with them. However, if they move to a new job outside of their Standard Occupational Classification (SOC) code, either as a result of a TUPE transfer or subsequently, the Council will be responsible for making a further application for leave to stay. This has to be done within 28 days of the transfer.

4.8 Measures/ Legal and Social Implications and Liabilities

The Chief Officer/Head of Service will confirm what (if any) action they envisage taking in connection with the transfer as well as any other implications of the transfer, both for transferring employees and for existing Council staff. These are detailed as measures, examples of which may be recruitment across organisations, processes for joint working, or reporting on specific areas. It is therefore extremely important for the Council in cases where it is the recipient to liaise with the sender and undertake appropriate “due diligence” in relation to the employees transferring. This would include discussion regarding issues such as: disciplinaries, capability cases, long-term sickness absence cases, any claims or potential claims which could progress through an Employment Tribunal process or civil court. A draft letter is included within the appendices letters section ([letter 11](#)).

It is possible to create specific warranties that arise out of due diligence and/or disclosure of information provided by the sender to the recipient. These will help to protect the recipient in cases where appropriate information was not disclosed to the recipient and subsequent legal action is taken by a transferring employee against the recipient for failings by the sender.

However before any legal agreements between both parties are considered it is important that appropriate legal advice is taken.

In Addition Regulation 13(2) of the TUPE Regulations 2006 as amended 2014, provides that an employer of affected employees should consult with appropriate representatives of affected employees on the legal, economic and social implications of the transfer for any affected employees. There is little guidance or case law around this duty. However, at Employment Tribunal, case law has indicated that the following things should be considered.

- The change means that a piece of legislation applying to that particular staff group can no longer apply in this case. The Employment Rights Act Section 218(7) specifically covered staff retaining continuous service when they moved from local authority schools to local government roles. This could no longer apply once the staff had been TUPE transferred to an academy and therefore were no longer employees of a local authority school.
- Where the organisation being transferred to is not covered by overarching legislation which applies to the sender organisation.
- Where the organisation being transferred to is no longer part of the collective bargaining machinery that determined some terms and conditions.

If you feel that these or similar circumstances may apply they should be included as an additional section in the consultation document.

4.9 Pension

In the case of staff transferring to the Council already in the Local Government Pension Scheme with their current employer, a bulk transfer value will be agreed by the actuaries representing the funds.

All new employees transferring to the Council will become members of the Council's Local Government Pension Scheme unless they actively decide to opt-out of the scheme.

If transferring employees retain membership of another pension scheme, the decision on any early retirement provision contained within the scheme, becomes the duty of the Council. Notify payroll and pensions if this is the course to be taken and identify any practical issues this may cause.

4.10 Preparation for Staff Transfer to the Council

Once the consultation period has ended it is necessary for the appropriate manager to ensure that the following staffing information is received at least 1 month before the transfer.

They should liaise with HR Admin on the necessary timescale.

- Organisational structure information.
- Terms and conditions information (to ensure that their pay can be actioned within current Business World On! configuration).
- Personal Files.

- Involve OD & Learning Services
- Appointment forms completed or a multiple record sheet where a large number of staff are transferring.
- Pre-employment/CRB checks where considered necessary.
- Information on Right to Work.
- P45s if applicable.

Spread sheet to be completed for HR Admin, retaining all columns.

The manager will also ensure that the appropriate welcome letter is produced and distributed to the transferring staff (see [letter 6](#)).

4.11 The situation in an emergency transfer

In a situation where a business is failing and the employees are transferring to the Council, the TUPE Regulations make special provisions where the sender organisation is subject to insolvency proceedings.

The Regulations ensure that some of the sending employer's debts do not pass to the Council. These concern any obligations to pay employees statutory redundancy pay, arrears of pay, payment in lieu of notice, holiday pay, or a basic award for unfair dismissal. These will be met by the Secretary of State through the National Insurance Fund. However any debts over and above these will pass to the Council.

The Regulations also provide greater scope in these circumstances to vary terms and conditions of employment after the transfer. These changes must be agreed with representatives of the employees, or trade union representatives or non-union representatives empowered by the employees to agree changes. If the changes are agreed with non-trade union representatives these must be confirmed in writing and signed by that representative and a copy of the changes proposed provided to all affected employees. The changes proposed must not breach other statutory entitlements, e.g. National Minimum Wage.

The purpose of this is to enable the safeguarding of employment.

Special arrangements will also need to be put into place to consult with employees in the situation of an emergency transfer. Depending on the time available, meetings with staff and representatives should be arranged, even if the transfer has been undertaken to safeguard employment. Letters will still need to be sent to new employees to inform them of the transfer, welcome them to the County Council, and inform them of emergency measures which may have been taken.

4.12 The situation concerning future changes

In August 2013, the European Court of Justice (ECJ) held that a receiving employer is not bound by clauses in contracts of employment referring to collective agreements negotiated after a transfer, where that receiving employer cannot participate in the negotiation process.

The Council has previously taken the view that employees transferring to the Council will be subject to any changes agreed by the previous employer, even

when these occur after the transfer. This ECJ case has altered this view. In particular, this will relate to cost of living increases negotiated by employers outside of local government, which will not therefore be implemented, post transfer.

However, where the transfer is between one local authority and another the previous “dynamic” view is still held. Human Resources and HR Admin will need to put measures in place to be informed of any such changes by the previous local government employer and forward details of such changes to the appropriate team for action.

4.13 Keeping a record of TUPE T and Cs and relevant documents

It is important that Terms and Conditions that relate to staff brought into the organisation via a TUPE transfer are easy to locate at any time, and also available for use by those who manage the pay, pension etc. arrangements for that group of staff, or support the management of them using relevant HR policies and procedures.

4.14 Car Loan Schemes

Any employer who is transferring employees to the Council will need to be asked the Due Diligence questions. One question asks them to give details of any Car Loan Scheme. If a transferring employer has such a scheme then there is no facility for this to be replicated in the Council so action will need to be taken by the transferring employer to manage this situation before the employee transfers.

4.15 Lease Car Schemes

In addition, an employer who is transferring employees to the Council may indicate that a lease car arrangement is in place. These need to be identified as early as possible, detail sought and advice obtained if the Council is able or unable to transfer these. That advice should be obtained from Serco Finance Department on 01522 555396

APPENDIX 1 INFORMATION SPREADSHEET

Spreadsheet headings for obtaining information necessary to conform with the Regulations and to pay transferring employees.

There are 18 headings to construct a spreadsheet of this type ([see TUPE Information Spreadsheet](#)).

The headings are:

- Vacant posts
- Location
- Employee Reference
- Post Title
- Start Date of Employment
- Date of Continuous Employment
- Contract Type (Permanent, Temporary, Fixed Term)
- If Temporary or Fixed Term, date due to end
- Date of Birth
- Minimum and Maximum salary range
- Current Annual Salary
- Notice Periods
- First Aid Allowance
- Union Deductions from salary
- Allowances/Benefits
- Contracted Hours per Week
- Type of Pension Scheme
- Member of Pension Scheme (Yes/No)

All headings and columns should remain on the spreadsheet, even where there is no information available.

APPENDIX 2 FREQUENTLY ASKED QUESTIONS

What are the TUPE Regulations?

The Regulations provide that upon a relevant transfer of an undertaking or part of an undertaking, the following legal consequences apply:

- All employees who were employed in the undertaking before the transfer automatically transfer from the old employer (the transferor) to the new employer (the transferee). An employer cannot just pick and choose which employees to take on.
- The new employer takes over all rights and obligations arising from those contracts of employment, except criminal liabilities. Any liabilities relating to employees who were dismissed before the transfer (for a reason connected with it) also transfer to the transferee.
- Any collective agreements made with recognised trade unions and any recognition agreements following the transfer will also transfer.
- Neither the new employer nor the previous one may fairly dismiss an employee because of the transfer or a reason connected with it, unless the reason for the dismissal is an Economic, Technical or Organisational (ETO) reason entailing changes in the workforce. If there is no such reason, the dismissal will be unfair.
- If there is an ETO reason, and it is the cause or main cause of the dismissal, the dismissal will then be fair provided that the employer acted reasonably in the circumstances in treating that reason as sufficient to justify dismissal.

Other consequences include:

- 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.
- The employees' representatives have the right to certain information and to consultation regarding the transfer.
- Employees may object to the transfer or resign and claim unfair dismissal (but not payment in lieu of notice) if the transfer involves a substantial change in their working conditions to their material detriment. (Employees can resign and claim constructive dismissal where there is a repudiatory breach of their contract in the usual way). The new employer may not, unless the contract of employment so provides, unilaterally worsen the terms of conditions of employment of any transferred employee.

Do collective agreements transfer?

This changed when the 2014 Regulations came into effect. Basically, all terms and conditions subject to a collective agreement, relevant at the time of the transfer move to the new employer. However, once transferred those conditions do not alter unless the new employer is part of a negotiating process that agrees those changes. For example, If the Council was employing some former NHS staff whose previous employer negotiated a salary increase, then the Council would be under no obligation to honour that award as they were not part of the negotiating process.

What is the ETO defence under TUPE?

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

Examples include:

- **Economic reasons** - where the demand for output has fallen to such an extent that profitability of the entity is 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.

ETO reasons have an impact in two main areas: dismissal and variations to terms and conditions.

Variations to terms and conditions for which the sole or principal reason is not the transfer itself, but is for an ETO reason connected with the transfer may be effective subject to being agreed between the parties (or their representatives).

How can an employer avoid TUPE altogether, or at least minimise its impact?

The whole point of the Regulations is that they apply to protect the employees regardless of whether the transferee wants the employees or not.

The issue of whether TUPE applies at all can be a complex one and those involved in a transaction should take detailed HR/legal advice.

Two main ways the parties may address the impact of TUPE are to:

- (i) Ascertain whether there is an economic, technical or organisational (ETO) reason for any proposed dismissals or variations to terms and conditions. A dismissal of an employee by either the transferor or recipient because of the transfer will be automatically unfair unless there is an ETO reason entailing changes in the workforce. This will not avoid the application of TUPE but may minimise its impact. ETO reasons are explained in the question above on the ETO defence and variations to terms and conditions.
- (ii) Negotiate indemnities. A variety of indemnities may be negotiated in a TUPE situation:

The recipient may seek to limit liability for actions of the transferor which took place before the undertaking transferred, by requiring an indemnity from the transferor prior to the transfer.

There may be mutual indemnities whereby the transferor provides an indemnity with respect to claims from retained employees who allege their contract has transferred to the recipient and the recipient provides an

indemnity with respect to claims from transferring employees who allege their contract did not transfer from the transferor.

Warranties and indemnities in the transfer agreement should cover the obligation to inform and consult as TUPE 2006 introduced joint and several liabilities for a failure to do this. The parties should either agree to do this collaboratively or, if the transferor agrees to take responsibility for this, appropriate warranties and indemnities should be included.

In a TUPE situation, what information should be given by the transferor to the recipient concerning the transferor's rights, powers, duties and liabilities towards any employees who are to transfer?

In practice, even before a legal requirement was imposed on the transferor to pass any information to the recipient, information was made available voluntarily in writing to the recipient in most cases. From 6 April 2006 this practice was given legal force in that transferors became obliged to give the recipient written information about the employees who are to transfer and all the associated rights and obligations towards them. It is not possible to contract out this obligation.

There is a checklist of information provided as part of this advice.

Information to be supplied

From April 2006 the transferor must provide the following information to the recipient before the transfer, namely:

- 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.
- Information on any collective agreements affecting the employees that will apply after the transfer.
- Any disciplinary proceedings taken against the employees or grievances brought by them in the last two years.
- Any claims brought by the employees against the transferor in the last two years.
- Any claims that the transferor reasonably believes might be brought.

Relevant Time Limits

The information should be given at least 14 days before the transfer (in very rare special circumstances a shorter period may be permissible). As a matter of best practice, where reasonably possible, it is helpful for a transferor to try and supply the information in advance of the 14 days to give the recipient ample time to consider it.

Once the relevant information has been provided, the transferor must provide written notification of any changes which occur between the time they have first been notified to the recipient and the actual completion of the transfer.

Information must be no more than two weeks old.

Remedies

If the transferor does not provide this information then the recipient may apply to an employment tribunal for: such amount as it considers just and equitable (having regard to the recipient's loss and any contractual terms between the recipient and transferor), and compensation starting at a minimum of £500 for each employee in respect of whom the information was not provided (or was defective), or a lesser sum that the tribunal considers that it would be unjust or inequitable to award this minimum payment.

The information may be notified indirectly through a third party. This latter provision will allow the information to be passed between the contractors via the client in a service provision change case involving the reassignment of the contract, but will not require it.

In a TUPE situation, what information should be given by the transferor and the recipient to the employees affected?

The employer of employees affected by the transfer (i.e. either the transferor or the recipient) must inform the appropriate representatives of any affected employees of the following:

- The fact that there is a transfer happening.
- Approximately when it is happening.
- The reasons why it is happening.
- The legal, social and economic implications for the affected employees.
- The measures which the employer intends to take in relation to those employees.
- If no measures will be taken, the fact that there won't be any such measures.
- If the employer is the transferor, the measures, which the recipient envisages that they will take in relation to those employees who are to be assigned to the transfer.
- If the employer is the transferor and the recipient envisages no measures will be taken then that fact.

Additional points to note:

- Where an employer proposes to take any measures in relation to affected employees, they must consult with the appropriate representatives in 'good time' before the transfer.
- The transferor and recipient are jointly and severally liable for any award of compensation for failure to inform and consult made by an employment tribunal for failure by the transferor to comply with these information and consultation requirements. (If such a liability were to pass wholly to the recipient, there would arguably be little or no incentive for the transferor to comply with the relevant information and consultation requirements.)
- If there is a claim against the transferor for failing to comply with its obligations to inform and consult, the transferor may assert that the reason that they did not comply was the recipient's failure to provide information on its proposed measures in time. If the transferor intends to argue this it must tell the recipient and the recipient will then become a party to the proceedings.

- Employee representatives (or, in some cases, employees) seeking redress for breach of the information and consultation provisions can choose whether to take action against the transferor or the recipient or both. In practice it is likely that the choice will be strongly influenced by the consideration of which party is best able to pay.

When should consultation regarding a transfer of an undertaking take place?

The Regulations place a duty on both the transferor and the new employer to inform and consult representatives of their employees who may be affected by the transfer, or measures taken in connection with the transfer.

To enable the employer to consult with employees' representatives, the employer must, long enough before the transfer to allow consultation, 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 intends to take any action (re-organisation for example) in connection with the transfer which will affect the employees and if so, what action is envisaged.
- Where the previous employer is required to give the information, they must disclose whether the prospective new employer intends to carry out any action which will affect employees and, if so, what. The new employer must give the previous employer the necessary information to enable the previous employer to meet this requirement.

If action is envisaged which will affect the employees, the employer must consult the representative of the employees affected about the action. The consultation must be undertaken with a view to seeking agreement of the employee representatives to the intended measures.

What happens if the employer fails to comply with their duty to inform and consult employees affected by the transfer of an undertaking?

A complaint may be brought by the following persons:

- In the case of failure relating to consulting or informing representatives of a trade union – by the trade union.
- In any other case – by any of the affected employees.

Which employees do the TUPE regulations protect?

The Regulations protect employees who are either assigned to the undertaking or the part of the undertaking that is being transferred, and who are employed immediately before the moment of transfer, or who would have been employed at the moment of transfer but for the fact that they were unfairly dismissed for a reason connected with the transfer, and there was not an economic, technical or organisational (ETO) reason for such a dismissal.

Which rights and liabilities transfer to the recipient under TUPE?

The safeguards for employees are contained within the Regulations. These provisions apply to ensure that the employees are therefore protected by the fact that their contracts are assigned to the recipient. The date of commencement of employment for continuity of employment purposes will be preserved from the date of commencement of employment with the transferor. The recipient inherits all civil liabilities and obligations, including:

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

Can the new owner of an undertaking change the terms and conditions of employment of the employees who have transferred?

This is one of the areas that was significantly overhauled by the Transfer of Undertakings (Protection of Employment) Regulations 2006. Under TUPE 2006 employers can only change employment terms where there is an ETO reason. However, the employer must, at the same time, establish a change in the workforce, normally a workforce reduction. If the employer wishes simply to harmonise terms and conditions of employment then that will not be sufficient to implement the changes. The issue of enforceability of beneficial changes to terms and conditions where there is no ETO reason is dealt with in the question below.

Under TUPE 1981 any variations to employees' terms and conditions for a reason connected to the transfer were void. However, TUPE 2006 confirms that a change for a transfer-connected economic, technical or organisational (ETO) reason can be validly made provided that the employees consent.

Under TUPE 2006 variations will only be void if the sole or principal reason is: the transfer itself, or a reason connected with a transfer that is not an ETO reason entailing changes in the numbers or functions of the workforce.

This means that employment terms may be changed 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.

If the reason for the change to the terms and conditions is the transfer, then even if the employees agree to the change it will be void and unenforceable. This difficulty often arises where the transferor wishes to dispose of an unprofitable undertaking. The recipient will take it on but needs to rationalise to make it profitable, perhaps harmonizing the terms and conditions of employment. If the variation is due to the transfer and no other reason then the changes will be invalid. If, however, there is an economic, technical or organisational (ETO) reason for the changes the variations may not be solely due to the transfer.

The guidance produced by the Department for Business, Enterprise and Regulatory Reform (BERR) provides some indication of when the reason for a change is transfer-connected and when it isn't. The guidance states that where an employer changes terms and conditions simply because of the transfer and there are no extenuating circumstances linked to the reason for that decision, then the change is by reason of the transfer itself.

Example of a reason unconnected with the transfer

The recipient needs to re-qualify staff to use the different machinery used by the recipient. Here the reason for the change is prompted by the knock-on effect of the transfer and not solely the transfer itself. The reason is not exclusively connected to the transfer and the change is therefore permissible.

Example of a reason connected to the transfer

The recipient wishes to make changes to harmonise terms with those of the recipient's existing workforce. These changes are by reason of the transfer itself and are therefore void. (Such changes may not fall within the definition of an ETO reason anyway.) The employer and employee may therefore agree a variation of the contract if the sole or principal reason for the variation is a reason connected with the transfer that is an economic, technical or organisational (ETO) reason entailing changes in the workforce.

Is it possible to dismiss employees following the transfer of an undertaking if there is an ETO reason?

The essential point is that dismissals as a result of the transfer may be automatically unfair. However, where there is an ETO reason the dismissals may be fair.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 set out three different categories of dismissal:

- Dismissals for which the sole or principal reason is the transfer itself or a reason connected with the transfer that is not an ETO reason – these dismissals remain automatically unfair under the unfair dismissal legislation.
- Dismissals for which the sole or principal reason is unconnected with the transfer – these dismissals fall outside TUPE as they are unrelated to a relevant transfer and the usual unfair dismissal principles will apply. This is the case even though the dismissals may be made around the time of such a transfer.

Employees must still have one year's service to bring a claim under TUPE 2006 unless they can argue unfair dismissal for asserting their statutory rights.

Can a transferor dismiss employees in anticipation of a TUPE transfer and rely on the recipient's ETO reasons?

A transferor is exposed if they dismiss employees in anticipation of a TUPE transfer and then seek to justify the dismissals by relying on the recipient's ETO reasons.

The ETO reason must therefore relate to the transferor's future conduct of the business.

Accordingly an ETO reason is only established where the employer dismisses the employee for reasons relating to its own future conduct of the business, entailing a change in its own workforce. There is a greater chance of establishing an ETO where redundancies arising on a transfer are implemented by the transferor rather than the recipient.

Practical points to note include:

- Employees who were dismissed before a business transfer will normally sue both the new owner of the business and the former employer.
- Transferors should not make any pre-transfer dismissals in reliance on the recipient's post-transfer ETO reason unless the recipient agrees to indemnify the transferor against any liability.
- Recipients may make such dismissals post-transfer if a valid ETO reason exists.
- Recipients must however follow the statutory dismissal procedure in full and a fair overall procedure which will often entail pooling the transferred employees with their own existing workforce before selecting the redundant employees.

Can an employee pick and choose from transferring terms and conditions and new ones which may be more advantageous?

- Despite the fact that it appears to fly in the face of TUPE, an employee can pick and choose terms and conditions that they consider to be more favourable. The Employment Appeal Tribunal (EAT) stated in the case of *Power v Regent Security Services Ltd* (2007) that an employee could take advantage of a favourable variation even if he had not agreed to that change – in this case the employee used the retirement age of his new employer rather than his old employer's earlier date.

APPENDIX 3 PRE TENDER CHECKLIST – PENSIONS

PRE-TENDER PENSIONS CHECKLIST	
At the point of considering a transfer and prior to any discussions with Procurement, need to ensure that the below have been taken into account by management and liaised with Pensions/Legal/HR, as appropriate.	
<p>Are staff transferring out? Management to liaise with HR & Legal to determine those individuals that would be in scope of TUPE.</p> <p>If staff not transferring, nothing needed on pensions and therefore the below questions are not relevant.</p>	Yes/No
<p>Management to check if they have the budget for the recharges that will be incurred (check figures with Pensions team)?</p> <p>Costs will be recharged for actuarial reports providing the employer contribution rate (indicative and final) and any legal fees in drawing up the admission agreement.</p>	
<p>Management to discuss with WYPF re the questions asked at the top of the TUPE Enquiry spreadsheet.</p> <p>Assumptions need to be made on:</p> <ul style="list-style-type: none"> • Whether it will be open or closed to new entrants. • What type of guarantee are LCC willing to offer? <ol style="list-style-type: none"> 1. Cover all liabilities should the supplier fail and take back any deficit (shortfall following a cessation calculation) at contract end 2. Cover all liabilities should the supplier fail but require the supplier to pay any cessation value at contract end (if there is a shortfall in the pensions pot) 3. Guarantor of last resort but require the supplier to provide an insurance bond (or equivalent) to cover the risk of being unable to pay, and the supplier must pay any cessation value at contract end <p>If 3) above, has a bond value been requested from Pensions team, alongside the contribution rate?</p> <p>Since May 2018, any surplus (greater than 100% funded following a cessation calculation) at the end of a contract must be repaid to the employer. Consideration must be given (and included in contract) about what will happen to either a deficit or a surplus.</p>	

PRE-TENDER PENSIONS CHECKLIST	
<p>HR to complete WYPF TUPE Enquiry spreadsheet in relation to data for individuals deemed to be in scope of TUPE.</p> <p>Completed WYPF TUPE Enquiry spreadsheet to be sent to WYPF in order to progress an indicative employer contribution rate and if appropriate a bond value.</p>	
<p>Once determined, what employer contribution rate is the supplier going to pay? How much risk is LCC transferring, accepting that it will impact the contract pricing.</p> <ol style="list-style-type: none"> 1) The true rate as provided by the Pensions team (risk is with the supplier), and reassessed every three years as part of the Pension Fund valuation process 2) A cap and collar rate, with the difference being adjusted through contract payments (risk is shared to some degree) 3) A pooled rate, where the supplier is included with LCC for valuation and accounting purposes, and therefore pays the LCC rate (risk is with LCC) 	
<p>If (3) above, is there anything over and above that you would expect the supplier to pay that needs to be captured in the contract?</p> <ul style="list-style-type: none"> • Redundancies (pension strain)– all or just after an initial reorganisation • Ill health over and above the norm 	
<p>Assumptions that have been used in calculating the employer contribution rate should then be included in the tender document. Management to ensure that Procurement are aware of this.</p>	

APPENDIX 4 PENSIONS GLOSSARY

PENSIONS ADMITTED BODY QUESTIONNAIRE GLOSSARY

Admission agreement type Open (i.e. new entrants allowed to join fund)

This means that anyone joining the supplier to work on the contract post transfer will be opted into the LGPS. This can increase the liabilities but will also increase the assets as contributions continue coming in. Generally this leads to a lower contribution rate for the employer.

Admission agreement type Closed (i.e. new entrants not allowed to join fund)

This means that only those individuals who are named in the original transfer will be offered access to the LGPS. Even those not currently in the scheme at point of transfer will be able to access it at a later date if they wish to, and also in any second stage transfer. However, any individuals recruited post transfer, will not be eligible to join the LGPS and will have to be offered other pension options by the employer.

Transferred service to be fully funded

Generally admitted bodies are set up as fully funded (100% funding level). This means that as the existing accrued pension liabilities for the staff already in the pension scheme will transfer to the new employer, an equivalent amount of assets are also transferred from LCC's sub-fund to match them. This is as per the value of the liabilities at the point of transfer. The employer will not necessarily remain fully funded, and could end the contract in a deficit or surplus position.

Transferred service to be partially funded

This is generally used for schools leaving to become Academies, rather than for admitted bodies. As the pension fund is currently in deficit (i.e. it does not have enough assets to match its liabilities), the new employer takes on a share of the deficit rather than being allocated matching assets to the liabilities transferring. In addition to the normal (primary) employer contribution rate, the employer will also have to pay a secondary cash amount to cover the deficit, over a time period agreed by the Fund and the Actuary.

Liabilities 'subsumed' on termination of the admission

At the end of the contract, a cessation value is calculated by the Fund's Actuary, identifying the assets and liabilities at that date. The employer's sub-fund might be in a position of deficit (not enough assets) or surplus.

If the liabilities are subsumed at the contract end, this means that any deficit position falls back to LCC. This does not require a cash payment to be made by LCC; the liabilities will just go back into LCC's sub-fund.

The alternative is that the employer is responsible for the cessation value, and must make a cash payment into the Fund.

If the contract is in surplus at the termination date, any surplus is paid over to the employer (not LCC).