

外部委託が進む中での、地方自治体職員の雇用の保護
**PROTECTION OF EMPLOYMENT FOR LOCAL GOVERNMENT
WORKERS UNDER OUTSOURCING**

概要

保守党のサッチャー政権は、「1980年地方自治体計画・土地法」と「1988年地方自治法」を通して、UKでの公共サービスの課題に取り組み、強制競争入札が一層導入され、自治体の内部組織でも民間との競争に勝たなければ公共サービスを実施することができなくなった。

労働党政権となって、「1999年地方自治法」では、ベスト・バリューの義務を設定し、自治体はその機能の経済性、効果、効率を改善していくようにした。自治体は、いかに公共サービスを改善していくかについて報告を作成しなければならず、国や地方の目標の達成に向けて、公共サービス利用者の要望に合ったサービスを提供していけるよう、業務を進めている。

このように自治体業務の民間への移転が進む中、政府は、一方で、民間への業務移転が行われた場合の職員の保護についても規定を設けた。

事業活動移転(労働保護)規則2006 (**Transfer of Undertakings (Protection of Employment) Regulations 2006**略称「TUPE」)はECの「既得権規則」の英国での実施規則であり、英国労働法の重要な部分である。他の会社に移動させられる被用者、例えば地方自治体の業務が民間に移管されたので、民間として同じサービスを行うことになった場合が対象となる。EC規則の改正に伴い、それまでの1981年規則をより強化し、PPPや民間委託等を進めるに当たっての自治体職員の保護に重点を置いた形で、規定が定められた。

この規則の主な目的は、従事する業務や公共サービスがある雇用主から他の雇用主へ移ったときに、被用者の雇用期間や条件を守るものである。新しい雇用主は、最初の雇用主の時から雇用が続いているものとして扱う必要がある。すなわち業務が移動したことを理由として、(経済的、技術的又は組織上の理由がない限り)その移動の前後を問わず失職することはない。また、被用者の最も重要な契約の期間や条件が移動の前後を問わず、(経済的、技術的又は組織上の理由がない限り)悪化することはない。

影響を受ける被用者は、必要な情報を伝えられ、相談を受けることができる。

これは、ただ会社の株式の売却によって、別の会社になったというような場合は適用されない。会社の実態は同じだからである。財産の売却やリースにより別の形式に変わったような場合、下請けに出されたような場合には適用される。保護される条項としては、労働時間、賃金、サービスの長さ等が含まれるが、年金資格は除外されている。(年金については、別の法規で保護される。)

政府や自治体には、民間との協力やパートナーシップを進めるに当たって、業務移転の対象となるスタッフが公平かつこれまでと同じように扱われ、権利が尊重されるようにする義務があるが、むしろ政府としては、このTUPEで職員の地位安定を図ることが、公共セクターの現代化につながる協力やパートナーシップを促進することとなり、結果的に全ての市民の利益となるとして、TUPEに対して積極的な姿勢をとっている。

このレポートは、ロンドン事務所のKeith Kelly調査助手が、Andrew Stevens調査員の協力により、調査・執筆したものであり、日本語の概要については、藤島所長と村瀬次長の監修を得ている。全文を参照されたい方は、別添の全文(英語)版をご覧ください。

**PROTECTION OF EMPLOYMENT FOR LOCAL GOVERNMENT
WORKERS UNDER OUTSOURCING**

CLAIR Report 2008/09

Keith Kelly

First introduced in 1981, the Transfer of Undertakings (Protection of employment) regulations were introduced to protect workers involved in transfers. They were introduced to comply with the following European Community Directives:

- European Community Acquired Rights Directive 77/187/EEC. This was amended by the European Community Acquired Rights Directive 98/50 EC and these two directives were consolidated in the European Community Acquired Rights Directive 2001/23/EC.

This came at a time when the Government of Margaret Thatcher decided to tackle the issue of public services in the UK through **the Local Government Planning and Land Act (1980)** and the **Local Government Act (1988)**, whereby local authorities were required to subject more and more of their services to competitive tendering. Services identified for this compulsory competitive tendering (CCT) could be carried out by a local authority's own employees only if the in-house organisation won the tender (bid) for the contract to provide those services against private sector competition. Local authority in-house organisations are known as direct service, or direct labour, organisations (DSO/DLOs).

During the incum Labour incumbency, The **Local Government Act 1999** placed a duty of "**Best Value**" on local authorities to secure continuous improvement in exercising all their functions having regard to economy, efficiency and effectiveness. Authorities must produce reports on their past and current performance and how they plan to improve their services in the future. They must also work towards meeting national and local targets, while consulting with users of their services to ensure that services provided match users requirements.

The **Transfer of Undertakings (Protection of Employment) Regulations 2006**, or "TUPE" (pronounced 2p) (SI 2006/246) are the United Kingdom's implementation of the European Community's new "Acquired Rights Directive" (2001/23/EC). It is an important part of UK labour law, protecting employees whose business is being transferred to another business, such as those services provided by the local authority when transferred into private ownership but continuing to provide the same service under contract from the local authority. The 2006 regulations replace the old 1981 regulations (SI 1981/1794) which implemented the original Directive (77/187/EEC). The regulations' main aims are to ensure that,

- just because of the transfer, employees are not dismissed before or after (unless there is an 'economic, technical or organisational' reason, r.7(1)(b))
- employees most important terms and conditions of contracts are not worsened before or after the transfer (unless there is an 'economic, technical or organisational' reason, r.4(4)(b))
- affected employees are informed and consulted through representatives

This does not apply to transfers which go merely through the sale of a company's shares. When that happens, because the company is still the same company, all contractual obligations stay the same. The Directive and Regulations apply to other forms of transfer, through sale of physical assets and leases. The regulations also apply in some cases for work transferred to contractors. This protected contract terms for workers include hours of work, pay, length of service and so on, but pension entitlement is excluded.

Cabinet Office

**STAFF TRANSFERS IN THE
PUBLIC SECTOR**

STATEMENT OF PRACTICE

**JANUARY 2000
(Revised November 2007)**

URL <http://www.gad.gov.uk/Documents/stafftransfers2.pdf>

SUMMARY

STAFF TRANSFERS IN THE PUBLIC SECTOR

STATEMENT OF PRACTICE

Guiding Principles

- The Government is committed to ensuring that the public sector is a good employer and model contractor and client. The people employed in the public sector, directly and indirectly, are its biggest asset and critical in developing modern, high quality, efficient, responsive, customer focused and environmentally friendly public services.
- The Government's approach to modernising public services is a pragmatic one, based on finding the best supplier who can deliver quality services and value for money for the taxpayer. This involves some services or functions being provided by, or in partnership with, the private or voluntary sector, or restructured and organised in a new way within the public sector. The involvement, commitment and motivation of staff are vital for achieving smooth and seamless transition during such organisational change.
- Public Private Partnerships and the process of modernisation through organisational change in the public sector will be best achieved by clarity and certainty about the treatment of staff involved. The Government is committed to ensuring that staff involved in all such transfers are treated fairly and consistently and their rights respected. This will encourage a co-operative, partnership approach to the modernisation of the public sector with consequential benefits for all citizens.

Introduction

1. In order to meet these guiding principles the Government believes that there must be a clear and consistent policy for the treatment of staff, founded upon the provisions of the Transfer of Undertaking (Protection of Employment) Regulations

2006 (TUPE), which replaces the Transfer of Undertaking (Protection of Employment) Regulations 1981. This Statement of Practice¹ sets out the framework that the Government expects all public sector organisations to work within to achieve this aim (see paragraph 6 for the coverage of this Statement).

2. TUPE implements the 2001 European Council Acquired Rights Directive. In broad terms, TUPE protects employees' terms and conditions (except certain occupational pension arrangements) when the business or service in which they work is transferred from one employer to another. Employment with the new employer is treated as continuous from the date of the employee's start with the first employer.

Terms and conditions cannot be changed where the operative reason for the change is the transfer although changes for other reasons may be negotiated, subject to certain conditions.

3. The Government takes a positive attitude towards TUPE, regarding it as an important aspect of employment rights legislation with the potential to promote a cooperative, partnership approach towards business restructuring and change in the public sector.

4. The Government's strategy in revising this legislation is based on the principle that it must be made to work effectively for all those whose interests depend upon it. This mirrors the Government's approach to employment relations issues generally.

5. In the area of Public Private Partnerships and change in the public sector, the consultations that the Government has undertaken and the representations which have been made, have showed a strong consensus between private sector employers, the voluntary sector, employee representatives and public sector organisations for the application of TUPE to situations where a service or function is contracted out, then retendered, brought back into the public sector, transferred within the public sector, or restructured and organised in a new way in a different part of the public sector. In any event, the TUPE Regulations 2006 have expanded the previous definition of what constitutes a transfer. It is accepted that there will still be some genuinely exceptional circumstances where TUPE will not apply but it is anticipated that there will be fewer than under the 1981 Regulations. Attempts to orchestrate a non-TUPE situation in other circumstances should not be tolerated.

Coverage

6. This Statement of Practice sets out a framework to be followed by public sector organisations to implement the Government's policy on the treatment of staff transfers where the public sector is the employer when contracting out or the client in a subsequent retendering situation. It applies directly to Central Government Departments and Agencies and to the NHS. The Government expects other public sector organisations to follow this Statement of Practice. Local government is subject to some different considerations particularly the current restrictions in legislation contained in Parts I and II of the Local Government Act 1988. However abolition of CCT from January 2000 and proposals to modify Section 17 of the 1988 Act, as part of the introduction of Best Value, will remove in part obstacles to local authorities following this Statement of Practice. However, in doing so, they must have regard to the need to comply with their best value duties. The Personnel and Human Resources panel of the Local Government Association support the principles set out in this Statement of Practice and have encouraged their adoption by individual local authorities.

7. The Statement of Practice covers the following types of situation that may involve

transfers of staff:

- Public Private Partnerships (e.g. following Better Quality Service reviews). This includes contracting-out; market testing; PFI; privatisation and other outsourcing and contracting exercises, (paragraphs 10-16);
- Second and subsequent generation contracting where, when the contract was first awarded, staff transferred from the public sector, (paragraph 12);
- Reorganisations and transfers from one part of the public sector to another, (paragraphs 17-20); and
- Reorganisations and transfers within the Civil Service (where TUPE cannot apply because there is no change in employer but TUPE principles should be followed), (paragraphs 21 and 22).

8. This Statement deals only with the policy framework for the treatment of staff involved in such transfers. It does not offer policy advice or guidance on: assessing the options for a particular service or function;

- project appraisal or procurement (except on the application of TUPE);
- managing a contracting exercise;
- how to discharge the obligations when TUPE applies or not;
- or how to secure appropriate pension provision, redundancy or severance terms.

Nor does it remove the need to seek legal advice in each individual case.

9. Detailed guidance on these aspects is provided separately, often tailored for different parts of the public sector to reflect their different needs, and for different types of Public Private Partnership.

Transfers as a Result of Public Private Partnerships

10. This section of the Statement deals with the policy that should be adopted for the transfer of staff from the public sector to a private sector employer or a voluntary sector body. This will be as a result of a Public Private Partnership where a service or function currently performed by the public sector will in future be carried out by a private sector organisation.

11. In such transfers the application of TUPE will always be a matter of law based on the individual circumstances of the particular transfer. However, the policy adopted in defining the terms of the contracting exercise can help ensure that staff should be protected by TUPE and that all parties have a clear understanding that TUPE should apply and will be followed. In such transfers, therefore, the public sector contracting authority should, except in genuinely exceptional circumstances (see paragraph 14), ensure that:

- at the earliest appropriate stage in the contracting exercise, it states that staff are to transfer and this should normally have the effect of causing TUPE to apply, although legal advice should always be taken to confirm the applicability of TUPE in individual cases;
- at the earliest appropriate stage staff and recognised unions (or, if none, other independent staff representatives) are informed in writing of the intention that staff will transfer (and where possible when the transfer will take place) and that TUPE should apply;
- potential bidders are then invited to tender, drawing their attention in the Invitation to Tender letter to the intention that staff will transfer and TUPE should apply. The public sector contracting authority should also be aware of the new requirement in the 2006 TUPE Regulations in relation to notification of employee

liability information, and legal advice should be taken as necessary. Potential bidders should be also advised that they can, if they wish, submit bids on the basis that staff do not transfer and TUPE does not apply, but that these will only be accepted if they fall within the genuinely exceptional circumstances i.e. unless the bid falls within one of the exceptions at paragraph 14 it must comply with the condition that staff transfer and TUPE should apply;

- the contracting exercise is then operated on the basis that the intention is that staff will transfer and TUPE should apply. Public sector contracting authorities should however consider all bids received. If a tenderer considers that staff should not transfer, they should be asked to give their reasons for this. Tenderers should be reminded if they do not consider that staff should transfer and the contract does not fall within the exceptions in paragraph 14, the contracting authority reserves the right not to accept the tender;
- in a very few cases bids made on the basis staff will not transfer and TUPE not apply will fall within the genuinely exceptional circumstances set out in paragraph 14 and cause the authority to accept the bid. The costs of redeploying staff and redundancies costs to the public sector employer must be taken into account when assessing such a bid. In all other cases the bid should not be accepted as it will not conform to the contracting authority's view that staff should transfer and TUPE apply; and
- where there is then a contractual requirement that staff should transfer, the requirements of TUPE should be scrupulously followed by the public sector contracting authority who should also ensure that it is satisfied that bidders' proposals fully meet the requirements of TUPE.

Second and subsequent transfers

12. This part of the Statement also extends to the retendering of contracts where, when the contract was first awarded staff transferred from the public sector (irrespective of whether TUPE applied at the time). Where a public contracting authority retenders such a contract then, except in exceptional circumstances (and where the incumbent contractor is successful), TUPE should apply and staff working on the contract should usually transfer.

Transfer of services or functions back into the public sector

13. There may also be circumstances that require a function contracted-out to a private sector contractor or voluntary sector body to be brought back into the public sector on the termination of the contract. If, when the contract was first awarded staff transferred from the public sector (irrespective of whether TUPE applied at the time), then the public sector organisation should ensure that staff working on the contract transfer (and TUPE should therefore apply) into its organisation unless there are genuinely exceptional reasons not to do so. Views should be sought from the current contractor as to whether, from their point of view, there are any exceptional circumstances why staff should not transfer (by reference to paragraph 14).

Exceptions

14. There may be a small number of cases where the policy set out in paragraphs 11-13 may not be followed and TUPE may not apply. There must be genuinely

exceptional reasons why this should be the case.

15. Where a public sector organisation believes such genuinely exceptional circumstances exist then it should be prepared to justify this, and the departure from the Government's policy (paras 11-13), publicly, if challenged. In central government, the agreement of the relevant departmental Ministers may need to be obtained before such an exception is made.

16. In such exceptional cases where staff do not transfer and TUPE does not apply, the public sector organisation should, in the case of first generation contracts, seek to identify as soon as possible with the contractor any staff that will be taken on voluntarily by the contractor(3); and then, where possible, to redeploy those members of staff remaining within the public sector organisation (the costs of such redeployments and possible resulting redundancy payments must be taken into account when evaluating the bid).

Transfers and Reorganisations within the public sector

17. TUPE can apply to the transfers of a function from one part of the public sector to another where there is a change of employer. This, for example, can include(4):

- Transfers between local government and civil service Departments and agencies
- Transfers between local government and NDPBs
- Transfers between local government and the NHS
- Transfers between the NHS and Civil Service Departments and Agencies
- Transfers between the NHS and NDPBs
- Transfers between NDPBs and civil service departments and agencies

18. The application of TUPE will, again, always be a matter of law based on the individual circumstances of the particular transfer. The amended Acquired Rights Directive directly legislates the *Henke* judgement of the European Court of Justice that: an administrative reorganisation of public administrative authorities or the transfer of administrative function is not a transfer and, therefore, as a matter of law, does not fall within the Directive. This provision in the Directive has been incorporated into the 2006 TUPE Regulations at 3(5). Case law⁵ suggests that it excludes from the legislation's application only a relatively limited range of situations involving the transfer of entities pursuing non-economic objectives within the public sector. Nevertheless the issue has still to be tested fully in the tribunals and courts.

19. However, transfers at the instigation and under the control of Central Government will usually be effected through legislation, in particular those involving Officeholders.

20. Section 38 of the Employment Relations Act also includes a power that can be used to apply the requirements of TUPE specifically to transfers outside the scope of the Directive e.g. Transfer of Undertakings (Protection of Employment) (Rent Officer Service) Regulations 1999 (SI 2511/1999). The DTI should be consulted about any proposal to exercise this power. Where, for whatever reason, this power or other legislation is not used there will be no legal requirement or obligation in such cases for staff to transfer to another part of the public sector where the function is to be performed (as to attempt to compel them would, in effect, constitute a unilateral change in their employment contract by imposing a change of employer). In such cases, as a matter of policy, public sector bodies should ensure that the principles underpinning TUPE are followed, so staff are offered the opportunity to transfer on terms that are, overall, no less favourable than had TUPE applied. They should also ensure appropriate pension provision and redundancy and severance terms. Staff who

choose not to transfer should, where possible, be redeployed within the transferring public sector organisation.

Transfers and Reorganisations within the Civil Service

21. Reorganisation and transfers between Central Government Departments and agencies (i.e. within the Civil Service) do not involve a change in employer and TUPE therefore cannot apply. However, terms and conditions of employment do vary between different departments and many of the considerations addressed in the Statement for other types of transfer may also apply.

22. As a matter of policy, therefore, such reorganisations and transfers between Central Government Departments will be conducted on the basis that:

- as a general rule, when functions are transferred from one department to another staff will be transferred with the work;
- departments should, however, make every effort to provide an opportunity for those who wish to stay with or return to their original department to do so, having regard to ensuring consistent treatment of staff affected and the needs of the work;
- departments should ensure that wherever possible the principles of TUPE are followed. The existing terms and conditions of staff cannot be changed unilaterally, over time; the receiving department may aim to move, through negotiation with staff, towards fuller alignment of the terms of transferred staff to those of the main body of staff.
- staff and their recognised unions are informed at the earliest appropriate stage of the reorganisation and transfer.

Cabinet Office

January 2000

(Revised November 2007)

**Cabinet Office
& Council of Civil Service Unions**

Good practice for managing the people consequences of outsourcing & privatisation

April 2008

URL http://beta.civilservice.gov.uk/Assets/Good_practice_tcm6-2419.doc

SUMMARY

Good practice

7. For projects involving the possible transfer of civil servants to new employers, there are good practices for managing the people consequences that should be followed:

(a) engage in early, meaningful, consultation with trades unions

Departments should consult with the trades unions at the earliest stage when undertaking efficiency reviews. Where the review could lead to the transfer of staff to a new employer, there should be full and open discussions with a view to achieving agreement on how the people consequences of the transfer will be managed.

(b) consider options for rationalisation prior to outsourcing

At the early stages of reviewing work areas for outsourcing or privatisation, it is good practice for Departments to give initial consideration to rationalising the work and the resources required with public service value in mind. The options to address any inefficiencies prior to work and employees being transferred should be carefully evaluated.

(c) consider the option of continued in-house delivery

Departments affected by a possible transfer of functions may wish to prepare an in-house bid alongside invitations to tender being made to third parties. The reasons for not allowing an in-house bid, where one has been requested, should be made clear to the relevant employees and the trades unions.

(d) consider a time limited commitment to the avoidance of compulsory redundancies post transfer

Whilst Departments cannot give a guarantee of job security in perpetuity after a transfer, they should try to avoid the situation of a third party making significant compulsory redundancies immediately after a transfer, particularly, if the prospect of compulsory redundancies could be anticipated. While a Department cannot make commitments to employees on behalf of the third party, consideration should be given to having a time based job security condition in the contract with the new employer

(e.g. requiring that transferred staff are not given notice of compulsory redundancy for a time limited period after the transfer) should be considered.

(e) provide clarity to all staff involved in a transfer to a new employer

It is important that all staff involved in a transfer have clarity on how the transfer will be managed and how it will affect them personally, including any potential benefits of being transferred to a new employer. From the outset of any outsourcing or privatisation exercise a senior manager should be designated as responsible for the employee issues and communication with those affected.

It should be acknowledged to staff that change can be a difficult and unsettling process. Minimising employee uncertainty should be a key management objective. Staff should be provided with appropriate information at the earliest and all other key stages. Information should be individualised where appropriate, clearly setting out the proposals, options, reasons for decisions, job security issues, protection of terms and conditions, etc.; the aim should be that employees understand how they are affected.

Oversight

8. There is a joint Cabinet Office and CCSU employee relations ‘Ovearching’ meeting that will provide oversight of this guidance and share good practices drawn from experience of applying the guidance, or any major unresolved difficulties.

Local Government Employers

Employment Relations Unit 2006

URL <http://www.lge.gov.uk/lge/aio/54843>

SUMMARY

Handling the TUPE process

This checklist, for senior managers, personnel professionals and line managers, sets out key messages in handling a TUPE transfer.

HR Strategy must ensure that:

- a mechanism is in place to keep staff fully informed and involved in the process from the outset
- staff are provided with the appropriate advice and assistance at all key stages
- TUPE will apply save in exceptional cases, see 'Staff Transfers in the Public Sector: Statement of Practice', January 2000
- a senior manager is designated as responsible for communication
- equal opportunities policies and principles are upheld at all stages of the process
- steps are taken to ensure that the change process is as smooth as possible by producing a transition plan or TUPE protocol which sets out responsibilities and key objectives

Informing and consulting the trade unions:

- notify the trade unions that the service will be subjected to a review
- ensure that the statutory consultation process is planned and managed and that specialist advice is sought, if necessary
- enter into full and proper discussions with the trade unions with a view to achieving consensus about the way the transfer will be carried out, and how its effect on employees will be managed; staff should be told if no 'measures' are to be taken, such as no immediate proposals to make redundancies in the new employment
- full consultation, and, where appropriate, negotiation, with the recognised trade union(s) or if none, other employee representatives to commence as soon as possible

The preliminary process:

- decide, with the employee if possible, whether staff working between two departments will transfer to the new service provider – ‘the percentage test’
- advise staff on ‘non-standard contracts’, such as part-time, temporary and casual, that they too will transfer
- consider staff on career breaks and sabbaticals and whether they will form part of the transfer
- staff on maternity, long-term sick leave and secondment are identified and involved in the process
- where the employee objects to being transferred, advise them of the consequences and obtain the employee’s written objection at the earliest opportunity
- consider professional counselling for staff

Disclosure of staff information:

- provide information on staff terms and conditions to bidders, subject to the council’s duty of confidentiality under the Data Protection Act
- make sure that staff are aware that the council propose to disclose anonymised information about them
- advise bidders for the council work that they will have to offer a broadly comparable occupational pension and release details of the Local Government Pension Scheme

Once the transfer is confirmed:

The information to be disclosed to the transferee once it is determined that employees will transfer could include:

- full list of employees to be transferred
- age, sex and identity of each employee
- job/title and job description
- details of untaken leave and any carry-forward arrangements
- remuneration, salary structure and progression and job evaluation and grading schemes in operation
- staff handbooks
- details of bonus schemes or other employee benefits such as car leasing, car allowances, mobile phones, health insurance, gym membership
- employees who are away on sick leave, maternity or paternity leave
- details of any outstanding claims for work-related injury
- details of loans made by the authority, such as car loans season ticket
- sick leave and sick pay schemes
- policies on equal opportunities, health and safety and agreed redundancy policy
- details of recognised trade unions and facilities arrangements

Also to note that:

Indemnities on future redundancies: Local authorities have no legal powers to grant indemnities against the possibility of redundancies after the transfer or on the subsequent re-let of the contract. Any agreed redundancy policy will transfer across to the new employer with the contract of employment.

Chartered Institute of Personnel and Development

Transfer of Undertakings (TUPE) Factsheet – May 2007

URL <http://www.cipd.co.uk/subjects/emplaw/tupe/tupe.htm>

SUMMARY

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 a business transfer and a service provision change.

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?

To decide if there is a stable economic entity that is capable of being transferred, the factors to consider include:

- Is the type of business being conducted by the transferee (incoming business) the same as the transferor's (outgoing business)?
- Has there been a transfer of tangible assets such as building and moveable property (although this is not essential)?
- What is the value of the intangible assets at the time of the transfer?
- Have the majority of employees been taken over by the new employer?
- Have the customers been transferred?
- What is the degree of similarity of the activities carried on before and after?

If the answer to all (or in some cases several of) the above questions is 'yes', it is safe to assume that there has been a transfer of a stable economic entity. The absence of a profit-motive is not a determinative factor.

SERVICE PROVISION CHARGES

A service provision change occurs when a client who engages a contractor to do work on its behalf is either:

- reassigning such a contract (whether by contracting out, outsourcing or re-tendering), or
- bringing the work 'in-house' (where a contract ends with the service being performed in-house by the client themselves)

It will not be a service provision change if:

- the contract is wholly or mainly for the supply of goods for the client's use, or
- the activities are carried out in connection with a single specific event or a task of short-term duration.

In what situations does TUPE apply?

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

- mergers
- sales of a 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.

The law on relevant transfers in the case of contracting out and changes of contractors for labour intensive activities, such as security, catering, refuse collection and cleaning, has given rise to confusion in the past. Many of these difficulties have been resolved by TUPE 2006.

Impact of a breach of the TUPE regulations

If a TUPE transfer applies, all terms and conditions of work 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 one year qualifying period, such a dismissal will be automatically unfair for a reason connected with the transfer unless it is for an 'economic, technical or organisational' (ETO) reason (see below).

The table below sets out three different categories of dismissal and whether they are fair or unfair.

Type of dismissal	Fair or unfair
Dismissals for which the sole or principal reason is the transfer	Automatically unfair under the unfair dismissal legislation.

itself, or a reason connected with the transfer that is not for an ETO reason.	
Dismissals for which the sole or principal reason is not the transfer itself, but is a reason connected with the transfer that is for an ETO reason.	Potentially fair subject to the normal test of reasonableness under the unfair dismissal legislation.
Dismissals for which the sole or principal reason is entirely unconnected with the transfer.	These 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.

Information

From 6 April 2006, transferors became obliged to give the transferee 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 transferor reasonably believes might be brought.

If the transferor does not provide this information, the transferee may apply to an employment tribunal for such amount as it considers just and equitable. Compensation starts at a minimum of £500 for each employee in respect of whom the information was not provided or was defective.

Consultation and notification

The transferor has a responsibility to conduct a full and meaningful consultation with employees at the earliest practicable time. Failure to conduct consultation results in liability for the payment of compensation which may be up to 13 weeks' pay. The transferor and transferee both liable for any award of compensation made by an employment tribunal for failure to inform and consult.

Liability passing on to the incoming contractor

The transferee 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.

Pensions

Strictly speaking, obligations relating to provisions about benefits for old age, invalidity or survivors in employees' occupational pension schemes do not transfer

under TUPE. However, the provisions of the Pensions Act 2004 sections 257 and 258 do apply to transfers taking place after 6 April 2005. In effect, this means that provisions equivalent to the TUPE regulations apply to pension rights from that date. In essence, if the previous employer provided a pension scheme then the new employer has to provide some form of pension arrangement for employees who were eligible for, or members of the old employer's scheme. It will not have to be the same as the arrangement provided by the previous employer but will have to be of a certain minimum standard specified under the Pensions Act.

Are there any 'defences' to prevent the TUPE regulations applying?

The economic, technical or organisational (ETO) reason relating to the entity which is being transferred is one of the few legitimate factors for the basis of a refusal to take on the transferor's workforce by the prospective transferee. The reason has to be the main cause of the dismissal, thus making the dismissal justifiable provided an employment tribunal decides that the employer acted reasonably in all circumstances. If it can be shown that the economic reasons were a 'sham' and that the workforce were not taken on in order to avoid the application of the TUPE regulations, then the transferee could be liable for potential claims.

Employees with less than one year's service cannot usually present claims under TUPE as employment protection rights have not been accrued.

CIPD comments on Government proposals for reform (September 2001)

URL <http://www.cipd.co.uk/about/tupe.htm?IsSrchRes=1>

SUMMARY

Service Provision

The Government seeks views on whether or not additional measures, going beyond the requirements of the Directive, should be taken in the regulations in relation to service provision changes, and if so what form these should take. One option proposed is the **general extension of the regulations' scope in relation to service provision changes for public and private sectors alike**, using the powers in section 38 of the 1999 Act para 11 (b).

The Institute endorses the intention to provide that, where "a service provision change... is to take place; and, prior to the change, there are employees assigned to an organised grouping the principal purpose of which is to perform the service activities in question specifically on behalf of the client concerned; then the employees assigned to the organised grouping should be treated in the same way as in cases where the TUPE regulations normally apply...." The appeal of such an approach is that it would increase the likelihood that, from the outset, all concerned would normally know where they stood and what rules would apply. It would also make contract bidding a lot easier by helping to ensure that bids are made on a comparable basis, and so promote competition. At the same time, the principles set out in the Government's statement of practice on Staff Transfers in the Public Sector would apply to employees in both public and private sectors. **The CIPD can see no basis on which public servants generally should enjoy more favourable terms in relation to transfer than people employed in the private sector and the same rules should therefore apply.** We are opposed to allowing individual government departments to adopt separate legislative or administrative measures for those parts of the public sector within their responsibility, underpinning the policy in Staff Transfers in the Public Sector.

Occupational Pensions

The case for treating public and private sector employees on a similar basis influences our views on the treatment of occupational pensions. In its response to the consultation paper three years ago, the Institute saw difficulties in requiring transferees to provide comparable pension to employees affected by a transfer, at least outside the public sector, because of the marked differences in the structure of schemes and the administrative costs of ensuring comparable provision. We also saw a risk that employees would lose out whether or not accrued benefits were left in an

existing scheme or transferred to some new scheme. We recognised however the possibility of tackling this issue through an amendment to existing pension law.

It is clear that the Government has subsequently taken advice on the detailed options available to it for securing a degree of protection for occupational pension rights on transfer, for public and private sector employees alike. **We welcome the Government's aim to strike a balance between protecting employees and minimising additional burdens on private sector employers.** Without the benefit of having detailed actuarial advice on the options presented, the Institute would be inclined to support option 1a (para 16) under which, where the transferor offered either a contracted out salary related scheme or a contracted out money purchase scheme, then the transferee would be required to offer a scheme of the same type meeting a certain minimum standard. If the transferor offered a contracted in scheme the transferee would be required to offer some form of occupational scheme.

In either case, it would be desirable to place some limit on the reduction in benefits an employee could suffer as a result of the transfer, otherwise the benefits of offering employees protection in this area would be significantly reduced. The Institute would however wish to see publication of worked examples showing the one-off and continuing costs to the transferee employer in a range of circumstances where employees enjoy existing pension provision of different types. **It is undesirable that transferee employers should be required to operate a number of mutually incompatible pension schemes for different groups of employees.**

An important point to bear in mind is the scale of the uncertainties affecting most pension schemes at present, including the trend away from final salary schemes. Many large companies are giving serious consideration to implementing significant changes to their schemes due to the difficulties in meeting minimum funding requirements. The effects of the drop in the value of assets brought about by recent falls in stock markets and the tax on pensions are prime reasons that have led companies to reconsider the type of scheme on offer. There seems to be quite a strong case for providing flexibility and allowing employers as much room as possible for manoeuvre in transfer cases.

Age-related payments on redundancy in the NHS

The Institute would see no objection to age-related payments to which an employee would become entitled on redundancy under terms and conditions applicable in the National Health Service passing across in a TUPE transfer.

Notification of employee liability information

The Government proposes to take advantage of the revised directive by providing that the transferor in a prospective transfer of an undertaking is required to give the transferee written notification of all the rights and obligations in relation to employees that are to be transferred. It is also proposing that if any of the rights or obligations change between the time of such notification and the completion of the transfer, the transferor is required to give the transferee written notification of the change. The CIPD supports the proposal for the transferor to be made jointly liable with the

transferee in any legal action brought by an employee against the transferee in relation to a liability arising from rights from obligations not notified to the transferee.

The CIPD would have no objection in principle to making the transmission of the notification via the client in service provision change cases a requirement rather than simply an option for the transferor. Effective notification of existing liabilities seems to be necessary in order to protect both employees and potential transferees. However there would be problems under the Data Protection Act, and although these could be cleared by legislative provision this would not be the case in relation to the Human Rights Act. The Information Commission currently recommends that personal information should not be transferred in a merger or TUPE transfer until there is at least a preferred bidder or a signature on the document. There might be particular problems in relation to information of a sensitive nature in cases of change of contractor, where the organisation contracting out the services might have no evident need to know.

The provision for the incoming employer to be informed about claims by the transferring employee may not go far enough. Many claims of a discriminatory nature may be unknown by the transferring employer at the time of transfer. This could occur for example in relation to claims of sexual harassment where transfer might free the employee from earlier inhibitions about claiming. The possibility that this should be dealt with via indemnities is unsatisfactory. The directive allows states to apply the joint and several liability rule and this would allow any loss to lie where it was caused.

Bernadone v Pall Mall established that although the liability transferred, the receiving employer had a right to claim on the original employer's liability insurance. Public sector bodies have however been able to avoid this liability, as they have no insurance arrangements in place, so the cost burden has fallen on the private sector. The CIPD would therefore support provision for the transferor and transferee to be jointly and severally liable for liabilities to employees arising from their pre-transfer employment in those cases where the transferor was a public sector employer exempt from the legal insurance requirements.

Dismissal by reason of a transfer of an undertaking

CIPD supports the proposal that it be made clear in the new regulations that where a dismissal takes place for economic, technical or organisational (ETO) reasons, these are a subset of reasons connected with the transfer. Existing case law has restricted employers' ability to dismiss employees for an ETO reason, even where employees are willing to sign new contracts. The new regulations would presumably encourage courts and tribunals to apply a wider interpretation of Article 4.1 of the original directive. This might be helpful in cases where employees' contractual redundancy terms are so generous that the transferee reasonably fears that if it had to make many redundancies it would risk becoming insolvent.

Changes to terms and conditions of affected employees

The Institute welcomes the proposal to improve the operation of the regulations by making clear that they do not preclude transfer-related changes to terms and conditions that are made for an ETO reason. Employers will often wish to simplify or

standardise the terms and conditions of existing and transferred employees for good business reasons. We endorse the comment by Lord Slynn in the *Wilson and Mead* cases that "there must, or at least may, come a time when the link with the transfer is broken or is no longer effective...". **Employers would appreciate more clarity about the circumstances in which consensual changes can be made to terms and conditions.**

Insolvency

The revised directive gives member states two new options in cases where its requirements apply in relation to insolvency proceedings. These are to provide that:

- the transferor's pre-existing debts towards the employees do not pass to the transferee
- employer and employee representatives may agree changes to terms and conditions of employment by reason of the transfer itself, provided that this is in accordance with national law and practice and with a view to ensuring the survival of the business and thereby preserving jobs.

The CIPD supports the proposal to set aside the full application of the TUPE regulations in the event of a take-over of an insolvent company. The effect should be to protect employment and this should reasonably have priority over the protection of terms and conditions in the interests of all parties. It will help a prospective new owner to identify a new economic and organisational basis for either integrating the insolvent company into the new parent company or continuing to operate the company within new commercial and employment parameters.

Essential and justifiable changes to staffing levels and terms and conditions of employment may be made as a result of negotiation with trade unions or other employee representatives. The prospective new employer should be required to consult and negotiate in confidence on a full disclosure basis about current constraints and how these will be overcome in future. In this way TUPE regulations will not stand in the way of company rescues, especially in areas where alternative employment opportunities may be limited. It will enable the company to continue to operate at the current location and possibly offer new employment opportunities when strict application of the present regulations would result in the closure and total loss of jobs in the insolvent company.

The Institute is however concerned that, by requiring that debts towards employees outside the limits in the insolvency payments provisions of the Employment Rights Act 1996 should pass to the transferee, the proposals would have a more limited impact in rescuing insolvent businesses. It may be that, by providing that such debts should not pass to the transferee but increasing the existing limits, employees' interests would be better protected, without prejudicing the wider effectiveness of the changes.

Continuity of employee representation

It is unclear why the Government is proposing to provide specifically that the effect of CAC decisions on union recognition should be preserved across a transfer. The

existing regulations provide that, where a trade union is recognised, this recognition should be deemed to transfer provided the transferred undertaking retains its identity. No special issues would seem to arise related to whether or not recognition is agreed voluntarily or following an award by the CAC. Employers' decisions on recognition will generally depend on the circumstances such as the relative size of the transferred undertaking.

Where the undertaking does not retain its identity, but is absorbed into the transferee business, the Institute would be concerned that new measures to secure continuity of representation could cause problems for transferee employers. The CIPD believes that the interests of good employee relations would not be served by imposing short-term recognition requirements on the transferee, which might be at variance with those already in operation and possibly lead to inter-union conflict. The statutory recognition provisions in the Employment Relations Act 1999 already appear to provide significant protection in this area.