

APPENDIX D – IMPLICATIONS IF TUPE APPLIES

1. Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE¹)

- 1.1. Broadly speaking TUPE provides protection for employees when the business in which they are employed change ownership or there is a change in service provider from one organisation to another in relation to activities that employees have been carrying out.
- 1.2. The effect of TUPE is to preserve the continuity of employment and terms and conditions of those employees who are transferred to a new employer when a relevant transfer takes place.
- 1.3. Here as any transfer would likely be from one NHS employer to another there should be minimal impact upon terms (subject to any proposed new structure).

2. When does TUPE apply?

- 2.1. TUPE applies where there is one of two types of "relevant transfer":
 - A "business transfer": the transfer of a business, undertaking or part of a business or undertaking where there is a transfer of an economic entity that retains its identity.
 - An economic entity is "an organised grouping of resources that has the objective of pursuing an economic activity". This can include part of a business. The business or part of a business does not have to be profitable.
 - How the transfer takes place is not relevant. Indeed, it can result from a series of transactions.
 - In deciding if the economic entity has retained its identity, the test is whether the economic entity is still in existence after the transfer. This should be apparent from the fact that the operation is being continued, or has been taken over, by the new owner carrying on with the same or similar economic activities. A mere change in the way it is carried out does not necessarily change its identity.
 - A change in service provider, for example a client engaging a contractor to do work on its behalf, reassigning such a contract or bringing the work in-house.
 - There must be an organised group of employees before the change whose principal purpose is to carry out the relevant activities on behalf of the client. A single employee can be an organised grouping.
 - It does not cover a contractor providing the services for a single specific event or a task of short-term duration.
 - It does not cover the supply of goods for the client's use.

¹ Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) as amended by Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (SI 2014/16)

- There is no need for the entity to retain its identity; it is merely necessary for one person to cease to provide the activities and for another to take them over. This means that it is not possible for the incoming service provider to avoid TUPE by performing the services in a different way or by not taking over the workforce.

It is possible for a transfer to be both a business transfer and a service provision change.

3. Transfers within public administrations

- 3.1. TUPE provides that the concept of a "relevant transfer" specifically excludes the "administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities" (regulation 3(5)).
- 3.2. There is no statutory definition of what constitutes a public administrative authority or administrative function, and the application of this exclusion may be determined on a case by case basis subject to the whether the activities undertaken belonged to mutually exclusive categories of "exercising public powers" or "carrying on an economic activity".
- 3.3. Here, while The Partnership and Management Change Agreement issued by the Welsh Assembly Government Workforce Forum effectively requires the public sector to treat equivalent TUPE provision as applicable upon any change of employer as a result of reorganisation in the public sector it may be that consideration is given to whether an order from WG is required to offer a definitive position.

4. TUPE Implications

4.1. If TUPE applies then:

- Anyone employed by the transferor in the "organised grouping of resources or employees" immediately before the transfer automatically becomes the transferee's (new service provider's) employee on all their existing terms of employment (including their existing rate of pay) and without a break in their period of employment.
- The automatic transfer of employees to the transferee will also catch any employees who are dismissed before the transfer, but by reason of the transfer and not for an "economic, technical or organisational reason entailing changes in the workforce" (commonly known as an ETO reason).
- All rights, powers, duties and liabilities under the employment contracts pass to the transferee/new service provider.
- Any changes to employees' terms will be void if the sole or principal reason for the change is the transfer itself and is not an ETO reason. However, changes are permissible if there is an existing contractual right to vary. Separate provisions apply with regard to changes to terms incorporated by a collective agreement.
- Any dismissal will be automatically unfair where the sole or principal reason for the dismissal is the transfer itself and is not an ETO reason. It will also be

necessary to show that the dismissal was procedurally fair. This will include any resignations in response to a repudiatory breach of contract or to substantial changes in working conditions to the employee's material detriment.

- Employees may refuse to transfer (known as objecting), but the effect can be to terminate their employment without any right to compensation.
- Both the transferor and transferee must inform and (if it is proposed to take any "measures" in relation to the employees) consult representatives of their own affected employees in relation to the transfer. If they fail to do so, an employment tribunal can award up to 13 weeks' actual pay for each affected employee.
- Additional provisions may apply for consultation where a collective redundancies result from an ETO following a transfer.

5. TUPE Key Considerations

- The application of the Organisational Change Policy generally, but notably Appendix 4 – Transfer to a new employer. While TUPE contains a based level requirement to inform and consult our policies and union obligations will effectively require a higher standard.
- Will TUPE apply – is there a relevant transfer, does the exclusion and regulation 3(5) apply and if so we will look to proceed on the basis of The Partnership and Management Change Agreement or seek a Welsh Government order to provide protection/assurance to affected staff.
- What services are transferring and who is assigned to those services – a clear understanding of what services are being transferred will help identify those employees affected by any transfer.
- Careful planning will need to be considered to ensure consultation requirements are met in line with the provisions of TUPE, the Organisational Change policy, Union requirements and the redundancy provision. Here there be varying requirements across multiple organisations.
- Liability, who is responsible for what. The accrued liabilities of the current service provider relating to the transferring employees will automatically transfer to new service provider under TUPE. Consideration should be given to who will be responsible for what liability and whether suitable indemnities are required.
- Who will transfer:
 - the genuinely self-employed working under a contract for services are generally not covered by TUPE, although whether their relationship amounts to a contract for services or a contract of employment will be up to the courts or tribunals to decide;
 - recent case law has suggested that workers may also be caught by TUPE. As this decision has not (yet) been confirmed on appeal, there remains some uncertainty about the position,

- whether the person is “assigned to the organised grouping of resources or employees”. Here problems can arise where employees perform multiple functions and not all of them are part of the transferring service;
- Employees have the right to object to their transfer to a new employer by informing either the transferor or transferee (*regulation 4(7), TUPE*). If they do so, their contracts of employment and the rights, powers, duties and liabilities under or in connection with them will not transfer to the transferee.
- Where, TUPE does not apply or staff object what will happen to the (e.g. redundancy/redeployment), where will liability for that rest and how will they be managed.