

Handling TUPE transfers



The Acas guide

inform

advise

train

work
with you

We inform, *advise, train and work with you*

Every year Acas helps employers and employees from thousands of workplaces. That means we keep right up-to-date with today's employment relations issues – such as discipline and grievance handling, preventing discrimination and communicating effectively in workplaces. Make the most of our practical experience for your organisation – find out what we can do for you.

We inform

We answer your questions, give you the facts you need and talk through your options. You can then make informed decisions. Contact us to keep on top of what employment rights legislation means in practice – before it gets on top of you. Call our helpline 0300 123 1100 for free confidential advice (open 8am-6pm, Monday to Friday) or visit our website www.acas.org.uk.

We advise and guide

We give you practical know-how on setting up and keeping good relations in your organisation. Download one of our helpful publications from our website or call our Customer Services Team on 0300 123 1150 and ask to be put you in touch with your local Acas adviser.

We train

From a two-hour session on the key points of new legislation or employing people to courses specially designed for people in your organisation, we offer training to suit you. Go to www.acas.org.uk/training to find out more.

We work with you

We offer hands-on practical help and support to tackle issues in your business with you. This might be through one of our well-known problem-solving services. Or a programme we have worked out together to put your business firmly on track for effective employment relations. You will meet your Acas adviser and discuss exactly what is needed before giving any go-ahead. Go to www.acas.org.uk/businesssolutions for more details.

Why not keep up-to-date with Acas news and notifications by signing up for our popular e-newsletter. Visit www.acas.org.uk/subscribe.

Contents

1	Introducing TUPE	3
	What is TUPE?	4
	How has TUPE developed?	4
2	When does TUPE apply?	6
	Business transfers	6
	Service Provision Changes	7
	Who transfers?	10
	Which employment rights and liabilities transfer?	11
3	Get the TUPE process right	13
	STAGE 1: Before committing to the transfer	16
	STAGE 2: Preparing for the transfer	20
	STAGE 3: The transfer	25
	STAGE 4: After the transfer	27
4	Employee liability information and due diligence	30
	Employee liability information	30
	Due diligence	31
	TUPE Measures	33
5	Terms and conditions of employment and TUPE	34
	Which terms and conditions transfer?	34
	Collective terms and conditions	36
	Changing terms and conditions	37
6	TUPE and terminating employment	40
	TUPE and dismissal	40
	TUPE and redundancy	41
	Employees objecting to the transfer	42
7	Information and consultation requirements	44
	What information must be provided to employees?	44
	Who must get the information?	44
	What must consultation cover?	45
	Consulting through elected representatives	45
	Employers with no elected representatives	46
	The role of the representative	47
	Failure to inform or consult	48

8	Other considerations	50
	TUPE and the public sector	50
	TUPE and pensions	50
	TUPE and insolvency	51
	TUPE and international employment	52
9	Appendix 1: TUPE glossary	53
10	Appendix 2: TUPE process plan template	57
11	Appendix 3: Sample Employee Liability Information and Due Diligence document	64
12	Appendix 4: Important changes to making employment tribunal claims	69

Introducing TUPE

This guidance is primarily aimed at:

- employers of all sizes who are new to TUPE transfers
- employers of all sizes who wish to refresh their understanding of employment relations issues in TUPE transfer situations
- managers and supervisors who require a practical understanding of how TUPE transfers work.

It provides a step-by-step process of how to conduct a TUPE transfer primarily from an employment relations perspective, but also covers legal and good practice guidance to provide a more rounded view of the topic.

Although the guidance is accurate at the date of publication, it is not a substitute for legal advice relating to individual transfers.

For a more technical overview of TUPE, the Department for Business, Innovation & Skills (BIS) has guidance available.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/275252/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf

Where the guidance refers to “employer”, this includes all types of employer including businesses, organisations, charities, schools and public bodies.

Where the guidance refers to “representatives” it means whichever of the following is appropriate in the circumstances:

- representatives of a recognised trade union
- workplace representatives
- employees specifically elected for the purposes of the TUPE transfer concerned.

Throughout the guide, legal requirements are indicated by the word “must”, for example, “employers must consult...” and the word “should” indicates what Acas considers to be good employment practice.

Other key terms and definitions can be found in the TUPE glossary in Appendix 1.

What is TUPE?

TUPE refers to the “Transfer of Undertakings (Protection of Employment) Regulations 2006” as amended by the “Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014”. They apply to organisations of all sizes and protect employees’ rights when the organisation or service they work for transfers to a new employer.

The TUPE regulations can apply when a company is sold, activities are outsourced, brought in-house, transferred or a contract for services is moved from one provider to another.

Employees from the newly-acquired business, service or contract will transfer automatically to the incoming employer. Their terms and conditions of employment (apart from occupational pensions) and continuity of service transfer with them and they also receive certain protections around dismissal and redundancy.

There are impacts for:

- the employer who is making the transfer (also known as the *outgoing employer*, the ‘old employer’ or the transferor)
- the employer who is taking on the transfer (also known as the *incoming employer*, the ‘new employer’ or the transferee)
- the affected employees, including any employees remaining with the outgoing employer and existing employees of the incoming employer as well as those who are transferring.

How has TUPE developed?

Rules about employee rights in transfer situations have been around for a long time, originating from European legislation in 1977 which resulted in what is now known as the Acquired Rights Directive.

In order to implement that directive, the UK government first enacted TUPE regulations in 1981. Further regulations took effect in 2006, and included the introduction of ‘service provision changes’ (outsourcing, in sourcing and re-tendering) and changes concerning the supply of information to incoming employers in insolvency situations and contract variation.

In 2014, further amendments were made to the 2006 regulations, with new rules including those around collective agreements, an earlier deadline for supplying information and simplified consultation rules for micro businesses.

TUPE transfers have grown

A 2013 government impact assessment indicated “there are currently between 26,500 and 48,000 TUPE transfers taking place each year, with the number of employees affected likely to be between 1.42 million and 2.11 million per year. The number of transfers is unlikely to reduce in the future”.

Source: Transfer of Undertakings (Protection of Employment) Regulations 2006: consultation on proposed changes to the Regulations, January 2013.

When does TUPE apply?

TUPE applies to the private sector, the public sector and the third/not-for profit sector. There are two situations when the regulations may apply; business transfers and service provision changes. Collectively these are called “relevant transfers”. In some situations a service provision change can also qualify as a business transfer.

Business transfers

The TUPE regulations apply if a business or part of a business moves to a new owner or merges with another business to make a brand new employer. A part of a business might for example be a distribution function of a larger organisation.

Under the TUPE regulations, a business is not judged by its name but by the use made of its assets such as the:

- premises
- equipment
- work in progress
- goodwill (such as the value of a brand name or a customer base)
- intellectual property
- employees.

To test whether a business has transferred, a useful guide is to see whether the core assets of the business have transferred to the incoming employer and are being used in essentially the same kind of business activity as previously. For labour intensive businesses the core asset is the workforce, so a business transfer may occur just by reason of the transfer of the majority of the staff.

TUPE business transfers may occur even where the transfer is within the same group of companies.

It is possible for a transferring business (or part of it) to have just one employee. If this is a labour intensive business, there can be a TUPE business transfer.

However TUPE will not apply if there are just shares, limited assets and/or equipment transferring to a different owner.

These types of transfers are called “business transfers” and employers should take legal advice about whether TUPE applies to their own situations.

For example

- 1) CleanCo buys SweepCo. CleanCo takes over the premises, equipment and staff, and continues to offer the same services and products to existing customers of SweepCo and SweepCo ceases to exist. The TUPE regulations are likely to apply here.
- 2) The shares in SweepLtd were bought out by BrushCo International PLC but SweepLtd continued to operate under its own name and with its own management team. TUPE is unlikely to apply because this is an acquisition of shares only and the business itself has not transferred.

These types of transfer are called “service provision changes” and can involve organisations, charities, the public sector and academies as well as the public to private outsourcing of public services.

The service provision change rules under TUPE will not apply if there is just a supply of goods: the transfer must include a supply of services as well. TUPE will also not apply if the service is for single-event activities, or for activities of short-term duration (such as an exhibition, a contract for the repair of a factory roof, or a conference).

Additionally, the following must exist immediately before the transfer for the TUPE regulations to apply:

- **an organised grouping of employees**
- **employees should be assigned to the group**
- **the client should remain the same**
- **the activities should not become overly fragmented**
- **the activities should remain fundamentally the same.**

Service Provision Changes

The TUPE regulations apply in the following situations:

- a contractor takes over activities from a client (known as outsourcing)
- a new contractor takes over activities from another contractor (known as re-tendering)
- a client takes over activities from a contractor (known as in-sourcing).

- **An organised grouping of employees.** The group has to be deliberately organised by the employer to provide a service for a particular client (some groups may include just one person). Employees working together randomly on a client contract are unlikely to meet this requirement. Similarly employees who happen to have been working on the same contract for the same client will not necessarily be regarded as being in an organised grouping of workers for that client.

For example

FixitCo has a contract to perform regular maintenance tasks at the Shopping Centre for ShopCo and other tasks under a separate contract at the Leisure Centre for SwimCo. The employees at FixitCo are organised in such a way that each employee works for a specific client only.

Should FixitCo decide to re-tender for either contract, then under TUPE rules it is easy to see the organised groupings of employees whose main purpose is to carry out activities for the two clients.

- **Employees should be assigned to the group.** The roles that transfer should be linked to the delivery of services for a particular client. Employees who carry out activities not related to the contract are unlikely to be part of the group. This could include managers who work on maintaining relations with the client.

For example

Magda works for FixitCo and spends all of her time working on the contract at the Shopping Centre for ShopCo. She is one of a group of employees who have been specifically recruited only for this contract on an ongoing basis. ShopCo decide to re-tender the contract and a new company wins it.

The TUPE regulations are likely to apply because Magda and other employees were deliberately assigned to work on the Shopping Centre contract.

- **The client should remain the same.** If the client changes there will be no TUPE transfer.

For example

Jed worked for StreetAgents managing a property for their client HomeCo.

HomeCo later went into administration and the property was sold by the administrator to another client called PropertyCo. PropertyCo decided to tender for property management services and StreetAgents were unsuccessful in their bid. The contract to manage the property was awarded to ManagementCo.

Jed did not transfer to ManagementCo under TUPE because it did not apply in this situation as there had been a change of client from HomeCo to PropertyCo.

For example

PublicserviceCo contracted their care services to four providers including SupportCo who carried out work (“work package A”) on their behalf. On expiry of the contract PublicserviceCo re-tendered the work and SupportCo lost the contract. The work previously carried out was randomly divided amongst the other successful providers, so “work package A” was no longer a single identifiable activity.

The TUPE regulations are not likely to apply because the work had become fragmented across a number of different contracts and the employees would be unlikely to be doing the same work.

- **The activities should not become overly fragmented.** The more split up the activities become between different providers the less likely it is that the TUPE regulations will apply.
- **The activities should remain fundamentally the same.** If the same work is being performed, with the same equipment at the same premises then TUPE is likely to apply. However if the work activities are fundamentally different after the transfer then TUPE will not apply.

For example

CateringCo served hot dinners in SACA Systems canteen. When the contract expired SACA Systems decided to change the terms to provide and stock self-service fridges containing pre-prepared sandwiches, salads and drinks. FoodprepCo won the tender but TUPE is unlikely to apply to the staff of CateringCo because the activities are not 'fundamentally the same'.

There are exceptions which mean TUPE may not apply to some service provision situations such as:

- those working temporarily in the group
- if there is a supply of goods only
- if the service is intended to be for single-event activities (such as an exhibition or a conference)
- if the service is intended to be for activities of short-term duration.

If any of these exceptions could apply to your transfer, it is advisable to seek legal advice for certainty on the matter.

Who transfers?

Business transfers: All employees assigned to the business (or part) that is transferring will transfer with it. It is usually clear who these people are, but it also makes good business sense if the outgoing and incoming employers liaise over who is included in the transferring group.

Service provision transfers: The position becomes complicated for employees who have split job functions, some of which fall within the transferring business and some which don't. The amount of time spent on each activity may be a guide but might not be an accurate indicator in all cases. Sometimes it may be necessary to look at the nature of the job and identify core/key tasks, as these situations are almost always based on individual facts.

For example

Mary was employed as a personal assistant to Josh, who was manager of divisions A and B. The employer IndustCo decided to sell division A to a third party CommCo, but retain division B. IndustCo asked Josh to continue to run division B.

Mary spent most of her working day supporting Josh's activities in relation to division A and argued that she should have transferred to CommCo.

The tribunal decided that Mary was not assigned to division A and CommCo because her role was defined as personal assistant to Josh. Since Josh was being retained by IndustCo to run division B TUPE did not apply to her.

Sometimes an outgoing employer will include staff in the group who the incoming employer believes does not belong there. In this situation, the incoming employer should attempt to reach agreement with the outgoing employer about who ought to be in the group as early as possible, and before the transfer takes place. If there is a failure to agree, the incoming employer is advised to seek legal advice on the matter.

When a **business transfer** takes place, all employees engaged by the outgoing employer automatically transfer to the incoming employer at the point of transfer.

In a business transfer where only part of the business transfers, all employees assigned to that part of the business automatically transfer to the incoming employer at the point of transfer.

In a **service provision change**, employees assigned to the organised grouping of employees automatically transfer to the incoming employer at the point of transfer.

Which employment rights and liabilities transfer?

Where an employee transfers under the TUPE regulations, the following rights and obligations, powers and liabilities also transfer with them to the incoming employer:

- contracts of employment, including all terms and conditions of employment such as pay, commission and bonus entitlements, holidays, job title and function, and sick pay provisions. There are special rules regarding pensions (see page 50)

- the employers' contractual provisions such as job or workplace flexibility or mobility, restrictive covenants, or restrictions on outside work where this applies
- continuity of service
- accrued entitlements such as where a bonus or holiday entitlement has built up over a period of time, but has yet to be taken or paid
- liability for the outgoing employers' acts and omissions in respect of the transferring employees are passed across under the TUPE regulations to the incoming employer.

Employees who transfer from the outgoing employer to the incoming employer are not regarded as dismissed under TUPE, so a transfer does not trigger an entitlement to redundancy pay or pay in lieu of notice unless there is an actual dismissal.

The incoming employer takes over any collective agreements made by or on behalf of the outgoing employer in respect of any of the transferring employees and which were in force at the point of transfer*. These will include terms and conditions of employment negotiated through collective bargaining as well as the wider employment relations arrangements. Examples include the collective disputes procedure, time off facilities, training for union representatives, negotiated redundancy procedures or job security arrangements and flexible working arrangements (see page 36).

Under the TUPE regulations, union recognition only transfers where the business unit keeps its identity and is not merged into the incoming employers' wider organisation. However to maintain good employment relations, the incoming employer should discuss ongoing collective representation arrangements for the transferring employees with the appropriate trade unions, ideally ahead of the transfer.

*At the date of publication there is no definitive case law covering this area; Acas is following guidance from BIS with regard to this point.

Get the TUPE process right

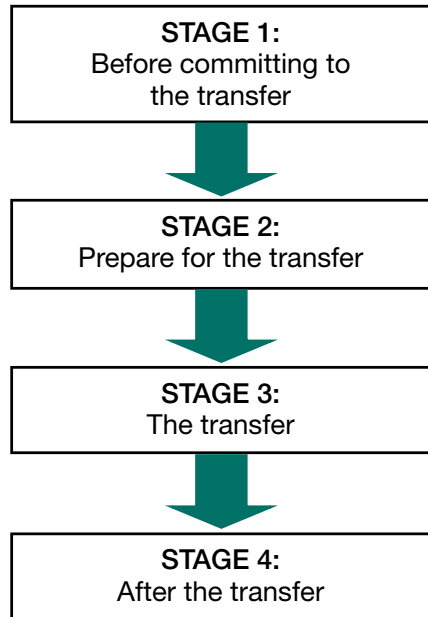
Businesses will always want a transfer to go smoothly, be cost effective and bring benefits in the long term. They will want productivity, efficiency and customer satisfaction to continue throughout the process and after the transfer to ensure success.

TUPE transfers vary. Some are complex and take a long time to complete, whereas others are straightforward and only involve a few people. However, transfers can be stressful and may not always deliver the benefits which were intended.

Following a clear process in a TUPE transfer will help deliver the aims of the transfer with minimal disruption to the employer and to the work. The first part of this guide focuses on the basic steps an employer might take when going through the TUPE transfer process. The steps are not exhaustive nor are they applicable to all situations. Whilst the regulations must be observed, employers should adapt the information to suit their own needs.

To give you an idea of how the TUPE process works, it can be broken down into four key stages:

A template of a TUPE process plan can be found at Appendix 2 but should only be used as a starting point for incoming employers to develop into their own plan. Incoming employers will still need to seek legal advice to ensure their actions are legally compliant and to help manage the risks and potential liabilities within the commercial context of TUPE.



STAGE 1:
Before
committing



STAGE 2:
Prepare for
the transfer



STAGE 3:
The transfer



STAGE 4:
After
the transfer

Outgoing Employer

At this stage the outgoing employer **should** consider whether to:

- Inform representatives/employees of a potential sale/expiry
- Consider whether to bid or rebid for a contract or service (in service provision changes).

At this stage the outgoing employer **must**:

- Inform/consult about the transfer and any measures
- Identify who will transfer
- Provide ELI to the incoming employer.

Transfer Occurs

At this stage the outgoing employer loses the transferring staff and:

- **Must** inform/consult about the transfer with remaining staff
- **Should** ensure that all remaining employees are managed, settled and clear about their duties.

At this stage the outgoing employer:

- **Must** inform/consult about potential redundancies (if any)
- **Should** inform/consult in general as good practice to preserve good morale
- **Should** address concerns to avoid drops/falls in performance and quality of work.

Incoming Employer

At this stage the incoming employer **should**

- Consider informing trade unions and employee representatives/employees of a potential purchase/bid
- Weigh up the pros and cons of committing to a transfer/service provision
- Begin to construct a TUPE process plan.

At this stage the incoming employer **must**:

- Inform/consult about the transfer and any measures
- Identify who will transfer
- Request ELI from the outgoing employer.

Transfer Occurs

At this stage the incoming employer gains the transferring staff and:

- **Must** inform/consult about the transfer
- **Should** ensure that all employees/teams are managed, settled and clear about their duties.

At this stage the incoming employer:

- **Must** inform/consult about potential redundancies (if any)
- **Should** inform/consult in general and ensure reasonable allowances are made whilst employees adjust and integrate
- **Should** review the effectiveness of procedures.

STAGE 1:
Before committing



STAGE 2:
Prepare for the transfer



STAGE 3:
The transfer



STAGE 4:
After the transfer

STAGE 1: Before committing to the transfer

Where an incoming employer has the opportunity to take on a business or service, there are a number of considerations to help inform them whether or not it is the right decision.

Value for money?

Extensive research has shown that perhaps only one-fifth of mergers and acquisitions add to shareholder value. Many of the reasons for this can be traced to people issues, and to the lack of early involvement of people management expertise.

Source: CIPD

Weigh up the pros and cons

Employers thinking about acquiring a business or contract should consider the following questions:

- Do the benefits of the transfer outweigh the risks?
 - Do I have sufficient work for two sets of staff?
 - How much (if anything) do I bid for the contract or the business?
 - Will I have to make redundancies?
 - What are the actual and potential employment liabilities, and who should be responsible for them
- under the transfer agreement, the outgoing employer or the incoming employer?
- What is the total employment cost of the transferring staff?
 - Will TUPE apply to this transfer or not?
 - Will I be able to keep all affected employees motivated about the transfer and in their work?
 - Will I be able to ensure that the work gets done to the required standard before, during and after a TUPE transfer?
 - Will I have to take any measures after the transfer? And can I make those changes?
 - Will I be able to maintain client confidence in my ability to provide excellent service before during and after the transfer?
 - Who will be responsible for managing the TUPE transfer process?
 - Is there already an appropriate channel for union/employee information and consultation or does one need to be created?

Seek advice and information

Employers looking to buy all or part of a business should gather information to determine whether it

will be worthwhile and to get a clearer picture of what they will be taking on. This can start by checking out the business, looking at the books and speaking with as many people in the business as possible, as part of a due diligence exercise.

In some transfer situations it is beneficial to keep employees and representatives fully informed of any developments before a commitment to the transfer has been made, whereas in others (such as how tender prices are calculated or if customers could be lost to competitors) it may not be. Employers should judge each transfer on its own merits and take advice where unsure.

A word to the wise...

“I have encountered many transfers that have not delivered the benefits that were intended at the planning stage and my view is that much of this is down to lack of communication.

“My advice to any employer considering acquiring a business or a contract is to start talking to their employees about it straight away. You need to keep staff on board so they know what’s happening, it keeps them motivated to do their work and it’s the only way to ensure a smooth transfer.”

Jon Dews, Acas Senior Adviser

Keeping staff informed early on can help raise important matters which employers may not have considered. Often operational matters – such as whether or not the business has the equipment or skills to meet the new contract requirements can be flagged up and addressed. On the other hand it can sometimes be difficult balancing between keeping employees informed early on and managing what can be an unsettling time if they learn about a transfer too early in the process.

Employers bidding for a service should gather as much information as they can from the client. This can help determine what is important to them, and establish whether they are looking for a good service, the lowest bid or a combination of both. This in turn gives an indication of the implications for the employer and any affected employees.

Bidding for a contract can involve making changes which make a service more efficient and affordable to run without disrupting the service. Under TUPE these changes are called “**measures**”. Employers often base their calculations for the bid on bringing in measures to show the client how they will run the contract more efficiently. Under the TUPE regulations, employers must consult with representatives and employees on any measures they anticipate taking as a result of the transfer in respect of their own employees (see page 33).

For companies listed on the UK Listing Authority (UKLA – or the **stock exchange rules**) there are restrictions on information that can be disclosed which could affect the company's share price. The rule is that listed companies cannot tell anyone about price sensitive transactions without first posting it on the regulatory news service (RNS). This applies to very large TUPE transfers, but is unlikely to apply to smaller ones.

This means that listed companies may not be allowed to tell their workforce of a proposed transaction as early as they might wish. However the UKLA rules do allow the company to inform certain categories of persons at an early stage including professional advisers such as lawyers and accountants etc and also **workers' representatives**. Representatives must keep the information strictly confidential, as failure to do so may be a criminal offence.

Listed companies who are unsure whether the secrecy rule applies to them should seek professional advice.

For further information visit www.fsa.gov.uk/Pages/Doing/UKLA/index.shtml

Begin to construct a potential transfer plan/overview

Before making a decision to bid for a contract, think ahead there will be a number of unknown factors at this stage so it is best to draw up a transfer process plan based on known facts. As more information becomes available, the plan can be adapted and updated accordingly.

A template for a TUPE process plan is available in Appendix 2 of this booklet, which can be amended as the stages of a transfer progress.

Where it can go wrong

Employers who don't put plans in place face many risks, such as unforeseen staffing numbers, and unexpected terms and conditions which lead to higher costs and the risk of legal disputes. Longer term concerns include the risk of the transfer becoming unprofitable or disruption to the overall work performance.

How it might not work

LegalCo run the shared legal services contract for four local authorities and hear of another one becoming available to bid for. However, time and work commitments are tight so they make a bid for the service with very little planning.

LegalCo are successful but soon discover that transferring staff are entitled to early retirement provisions and a productivity bonus payable on a monthly basis. LegalCo had not factored these costs into the bid and after six months find they are only just breaking even on the contract. In addition, all staff found the process stressful, resulting in higher than normal absence levels and performance issues.

LegalCo are worried about providing acceptable levels of service across all five contracts and are concerned they may lose some of their best staff.

Get it right

Thinking things through can make a significant difference and ensure the transfer works in the interest of the employer and the workforce. Seeking early advice/information about the viability of a transfer provides a more rounded view of the situation. It raises vital questions and ensures that key employees are engaged as early as possible.

Sometimes after careful planning an employer may choose not to enter into/bid for a transfer for valid business reasons. Similarly, an employer who plans ahead will be able to accurately calculate the value and risks of the service and this will allow them to submit a more resilient and successful bid.

How it might work

LegalCo run the shared legal service contract for four local authorities and hear of another one becoming available to bid for. They study the bid document carefully and liaise with the client to work out their priorities for the service. They calculate all associated costs and learn that they need to take account of early retirement and bonus provisions.

LegalCo discuss the possibility of taking on a fifth service with their existing employees, this exposes them to the idea of a transfer and gives LegalCo an indication of the measures they will need to take if successful. LegalCo submit a well planned bid which meet their own needs as well as those of the client.

LegalCo are successful and implement the transfer plan straight away. Six months later the contract is running well and is profitable. All employees found the process challenging but less stressful than it might have been without careful planning. They indicate they have no plans to leave legalCo and the client is satisfied with the service.

STAGE 2: Preparing for the transfer

Once it has been decided that a transfer is to take place, the incoming and outgoing employers should meet/speak to agree the way forward. In some transfer situations this may be difficult but it is beneficial for both employers to discuss the following:

- whether TUPE applies to the transfer (see page 6)
- which employees are in the group to transfer (see page 8)
- the transfer date.

Developing and investing time in a good plan at this stage is important. Acting on as many of the points as possible early on will free up time to spend dealing with issues which may arise at the point of transfer. The day of the transfer is the most demanding stage of the transfer to manage.

Actions for both incoming and outgoing employers

Identify who will manage the transfer and make sure they have time to deal with it effectively. Employers will need someone to make, follow and modify plans as the transfer progresses. It's often best for one person to have this responsibility.

- Engage with each other about the transfer, and set up a channel of

communication to ensure a smooth transition.

- Engage with any trade union officials and elected representatives. Inform/consult with staff about the transfer on a one to one basis. Representatives may be able to help staff with any questions or worries they may have about the transfer. They may also be able to find solutions to problems which may otherwise lead to conflict and tribunal claims.
- Arrange for the election of employee representatives if appropriate representation is not already in place (see page 46).
- Offer representatives training for their role, and provide facilities to enable them to carry out their duties (see page 47).
- Use existing communication channels to provide information directly to employees. This can be through representatives, and in addition through FAQ's put on noticeboards, or on the employer's intranet, or circulars given directly to affected employees. Put feedback channels in place so that employers can answer questions and address employee concerns throughout the process.
- Continue to actively consult with representatives about the transfer. If employers leave gaps in their

communication plans about transfers, employees usually fill the lack of communication with rumours which may encourage negative messages to be passed around causing poor morale. Even if there is nothing new to communicate, employers should tell affected employees of this.

Actions for the outgoing employer

- If the business or service is to continue after the transfer, ensure that plans are developed to capture any knowledge/experience that may be lost with transferring employees. Similarly, identify any tasks that may need reallocating/adjusting after the transfer. It can also be useful to identify whether there are any existing vacancies in the organisation, and consider if staff with reduced duties after the transfer could be offered any of these roles.
- Employers should also consider speaking regularly with those who will not transfer as they will be unsettled too; they may be concerned about their job security, worry about how the work will get done, or what impact the transfer will have on the organisation.
- Provide employee liability and due diligence information to the incoming employer at least 28 days before the transfer (see page

30). However, it is good practice and in all parties best interests if the information is delivered at the earliest opportunity.

- Upon receipt of employee liability and due diligence information the incoming employer must inform the affected employees about any measures the incoming employer intends taking after the transfer.
- Consider inviting the incoming employer to meet with the affected employees and their recognised trade union and representatives before the transfer. The incoming employer could answer questions and provide information directly, which may allay employee concerns. They may also help by providing input into the outgoing employers' FAQ for transferring staff. Both employers should agree what they want to say in advance of meetings to avoid misunderstandings.
- Arrange for a few employees to visit the new site if appropriate and feed back to colleagues about what it is like.

Actions for the incoming employer

- Request employee liability and due diligence information from the outgoing employer. This will help determine the terms and conditions of the transferring staff and provide for accurate

budgetary planning. The information will also allow other requirements to be put in place such as human resource systems and adjustments for any disabled employees (see page 30).

- Identify any measures which may need to be taken in respect of transferring employees (if any).
- Provide the outgoing employer with information about the transfer and any measures they intend taking to allow them to consult with the affected employees.
- Inform the affected staff and their representatives about the transfer so they understand what is happening and why, particularly if they will be working with new employees (see page 44).
- Consult with representatives of existing employees affected by the transfer about the measures which are being considered and may need to be taken in respect of the employees.
- Consider asking the outgoing employer whether they would like to meet up with the relevant trade unions and representatives before the transfer.
- Consider asking the outgoing employer for permission to meet the new employees before the transfer. It is beneficial to have

one-to-ones with them to make them feel welcome and to answer their questions about the transfer. It is also helpful to check that their terms and conditions correspond to information provided by the outgoing employer at this stage. Any discrepancies can be investigated and differences resolved at an early stage thus avoiding misunderstanding and disappointment which may lead to problems later.

- Contact the client in situations where the outgoing employer refuses access to the affected employees before the transfer. This can occur in service provision transfers, so if the incoming employer makes this known to the client, they are usually able to help as there is often a clause in their contract which requires the outgoing employer to allow access to the affected employees in TUPE situations.
- Consider whether there will be sufficient work for all employees or whether change or redundancies might be required.
- Draw up plans to integrate new staff, plan where they will sit or be based and how the work will be carried out.
- Ensure that all equipment such as phones or IT systems have been

set up and are ready and working for the day of the transfer.

- Plan an induction process and consider whether it would be good to appoint mentors to help new employees.

Where it can go wrong

Employers who don't have initial actions completed by the transfer date often find that problems arise on this day which take up valuable time and effort.

How it might not work

Bronwyn was asked to organise the TUPE transfer of staff into ServiceCo. Bronwyn had no experience of TUPE so she did not discuss with the outgoing employer which staff members were in the transfer pool nor did she request the employee information in advance of the transfer.

On the transfer date 20 more employees arrived for work than were expected. Bronwyn was so busy raising issues with the outgoing employer and dealing with payroll matters that she had no time to arrange for the new employees to be welcomed and inducted into the organisation. In addition, she was not sure if she would have sufficient work for them all.

Get it right

This is the time when a well organised employer who has carried out all initial actions is now able to plan how they will:

- focus on welcoming staff into the organisation if they are the incoming employer
- focus on maintaining staff morale and allocate remaining duties if they are the outgoing employer
- ensure that new or restructured teams work well together.

How it might work

Bronwyn was asked to organise the integration of staff being transferred under TUPE. Her lack of TUPE experience was identified at an early stage so she attended a training course and spoke with colleagues who had TUPE experience before she took on the responsibility.

This enabled her to agree with the outgoing employer which staff members were in the transfer pool and check that she had sufficient work for existing and transferring staff before the transfer. This allowed her to process contract records and payroll matters in advance.

On the transfer date only anticipated employees arrived for work. Bronwyn had time to arrange for the new employees to be welcomed and inducted into the organisation successfully.

STAGE 3: The transfer

The actions for incoming and outgoing employers will be different at this stage but the emphasis should be on settling employees into work and getting them used to the change.

Actions for the incoming employer

The day of the transfer is likely to be stressful so to make a good impression; incoming employers may want to consider greeting employees on the day of the transfer with a focused welcome and induction session telling them about the company they are joining, its culture and how they will fit in. This should help to gain the trust of all affected employees and begin the relationship on a positive note.

It is important for incoming employers to concentrate on maintaining employee morale and performance to successfully integrate all staff and ensure that any newly created team performs well. This can be challenging if the employees have to work together especially if they don't know each other, have never worked together before, and will be working to different terms and conditions.

On day one the incoming employer should:

- Welcome the new staff and introduce them to the organisation, for example by

holding a full meeting of all affected employees. Incoming employers could give a presentation welcoming new staff, introducing the management team and sharing the culture/ethos of the organisation.

- Use the induction process to introduce rules, policies and standards so that employees know what is expected from them and how things are done. Employers should adopt the same induction process for all staff but be mindful that problems may arise if existing staff did not go through an induction programme.
- Talk to new employees to check their understanding of the terms which transferred across with them.

Actions for the outgoing employer

At this stage, the outgoing employer (providing that some of the business and employees remain) should continue to engage with any remaining employees on a regular basis to ensure that:

- the post transfer reorganisation has been properly and effectively implemented
- they are coping well after the transfer
- all the work is covered

- there are no problems arising from the transfer
- they have sufficient work and support to perform their contractual requirements.

Where it can go wrong

It is often said that people are every organisation's most important asset. Ignoring this throughout a TUPE transfer can be to the detriment of both the incoming employer and the outgoing employer.

How it might not work

The staff of ITsolutions came to their new place of work at Brown Electronics on Monday to work on the same contract as with their previous employer.

They were introduced to new work colleagues engaged on different contracts and it quickly became clear that working practices at ITsolutions were different from the processes in Brown Electronics. This led to avoidable conflict because each team believed their way of working to be correct.

Get it right

Employees are often alert to workplace problems and can think of informal solutions to them. The incoming employer should ensure there are systems in place which pick

up on issues at the point of transfer. This will encourage quicker and more informal resolutions saving potentially time-intensive formal processes and legal disputes.

How it might work

The staff of ITsolutions came to their new place of work at Brown Electronics on Monday to work on the same contract as with their previous employer.

They were introduced to their work colleagues engaged on different contracts and began their induction. They had a meeting with the senior manager who gave a presentation explaining about the company and how the work they do fits in. The next day their line manager held a team meeting which included all the staff who work on the contract. They discussed work practices and found them to be different, but shared ideas and agreed the best way to perform each task. The line manager made notes of agreed actions and copied in all team members. Morale was improved and performance was good.

Consideration of the people factor can be useful in all situations. For further guidance on this area see the Acas guide **The People Factor – engage your employees for business success**

www.acas.org.uk/peoplefactor

STAGE 4: After a transfer

Where good preparation and appropriate actions have been taken at stages 1, 2 and 3, more issues are likely to have been resolved early on. However, problems can still arise after the transfer and it's only when employees are working productively together (especially if there have been team reorganisations, merges or splits) that employers get to know of any remaining or developing contentions. There can even be teething problems where there is only one set of employees, so time is needed for everyone to adjust following a transfer.

Actions for both incoming and outgoing employers

Initiate any redundancy consultations where required (if not started earlier) and dismissal processes, giving full consideration to any suggestions for alternatives to redundancies (see page 41). Bear in mind that sometimes unexpected changes arising from the transfer may mean that redundancies are no longer necessary.

Actions for the outgoing employer

Morale can sometimes drop at this stage as employees miss their colleagues or struggle with different work requirements and/or working for a different organisation.

The outgoing employers should:

- continue to engage with any remaining affected employees after the transfer on an ongoing basis
- listen to and address concerns to avoid drops/falls in performance and quality of work
- consider the benefits and practicalities of focusing on team building activities and group incentives.

Actions for the incoming employer

New employees need time to adjust to the culture of their new organisation and line managers should hold regular team meetings to discuss how the work should be done going forward. Where teams from the outgoing and incoming employers are merged, they may have different ways of doing the same job.

The incoming employer should:

- Listen to employee suggestions and consider holding discussions to generate ideas to improve processes. Discussion will also help identify and resolve problems before they escalate.
- Ensure line managers make reasonable allowances during periods of adjustment. There is

little or no benefit to reprimanding employees when they are trying to adapt to change and are likely to adjust in time with encouragement and support.

- Consider appointing buddies or mentors for new employees. They will be able to deal with queries and identify problems as soon they arise.
- Have an escalation route to get trickier questions and problems answered or resolved quickly by senior managers where consistency of approach is required.
- Document and send to transferred employees any changes in their employment particulars such as the name and address of their new employer and what is happening to their pension arrangements (see page 50).

Where it can go wrong

Problems are likely to arise unless employers continue to engage with employees and representatives regularly after the transfer. They should continue to work through plans developed in the earlier stages to ensure a successful transfer in the long term.

If an employer fails to engage with employees after the transfer there are likely to be negative consequences including:

- lack of understanding
- drop in quality of work
- drop in employee morale
- reduced team performance.

These can lead to poorer customer service, poorer quality of work, complaints and loss of business which in turn increases the risk of job losses.

How it might not work

Mari came to work the day after the transfer and was surprised to see that her desk had been moved to the end of the office. She had to walk through a large empty space where her colleagues had once sat to get to it.

Mari had not been told much about the transfer except that colleagues were leaving, everything felt different but not good. No one was really sure what work they were supposed to be doing and there was no one around to ask...

Get it right

Employers should continue to engage with all affected employees on an ongoing basis after the transfer. However if there are potential redundancies to be made, the employer must continue to inform and consult with representatives and employees as appropriate.

How it might work

Having been fully informed about the practicalities of the transfer, Mari came to work the day after the transfer ready to occupy a new space and pass through vacated areas.

Although sad to see the loss of colleagues, Mari was reassured they would be okay as she had been told that the transferring staff were keeping their jobs with the incoming employer. Also, her manager had communicated a post-transfer duty list and action plan, which meant Mari knew what to do right away and that other remaining colleagues would be arriving shortly.

Employee liability information and due diligence

As part of the transfer process, the incoming employer inherits employment-related liabilities as part of the transfer including any outstanding claims presented against the outgoing employer. It is therefore in the interest of the incoming employer to gather information to determine whether the overall deal provides a good commercial investment or not.

Under the TUPE regulations, outgoing employers must provide information about transferring employees to the incoming employer, and this is called Employee Liability Information (ELI). However employers often seek additional information when considering a transfer, and this is called due diligence. These two methods of gathering information should be treated as part of the same process and run together. However, the due diligence additional information is voluntary and is only effective where there is a commercial contract between the outgoing and incoming employers. This is because the information delivered as part of a due diligence process forms the basis of warranties and indemnities in the commercial agreement concerning the TUPE transfer.

Employee liability information

Under TUPE regulations the following employee liability information must be provided:

- identities of the transferring employees
- age of the transferring employees
- employment particulars of the transferring employees
- active/live disciplinary and grievance records from the last two years of the transferring employees
- any collective agreements which are in force
- any outstanding claims the transferring employees have against the outgoing employer.

A sample document that an employer may use or adapt to provide ELI and due diligence information can be found at Appendix 3.

The information must be accurate, up-to-date and secure, and must be provided not less than 28 days

before the transfer. If the information is not provided within this time, the incoming employer may apply to an employment tribunal for compensation which starts at a minimum of **£500 for each employee** for whom the information was not provided or was incorrect.

For example

When they lost the contract, SecurityCo did not provide employee liability information to GuardCo within the required time and despite numerous requests. GuardCo was unable to set up systems to welcome their 20 new employees in time for the transfer, they did not know how many employees they were acquiring or what their terms and conditions of employment were. GuardCo subsequently submitted a claim to the tribunal likely to result in a minimum award of £10,000.

Outgoing employers often receive requests for information either not included within the TUPE requirements or at the early stage of the bidding process. Where possible they should release the information in an anonymised form so that the individuals cannot be identified but otherwise only with the consent of individual affected employees. Further information can be found in the Information Commissioner's *Disclosure of Employee Information under TUPE* guide at www.ico.gov.uk

Due diligence

In addition to ELI, incoming employers often carry out a more in-depth investigation of the business or contract by seeking additional information from the client or the outgoing employer about a transfer. Although this is not a requirement of the TUPE regulations, this is a legal process called due diligence. They frequently seek **indemnities and warranties** from the client or outgoing employer to ensure that the information supplied is correct. Employers often start to seek ELI and due diligence information at the same time and a sample form is available at Appendix 3.

In a **business transfer** this information is used to assess risk, confirm the viability of the transfer, and identify employment costs and inherited liabilities. An outgoing employer also has an interest in carrying out due diligence on employees within the transfer group. This will allow it to provide accurate ELI and the due diligence information will provide the basis of indemnities and warranties which are normally required to be provided to the incoming employer as part of the transfer deal. If an outgoing employer supplies inaccurate information under due diligence it could be sued under the commercial agreement on the warranties and indemnities it has provided.

For example

Guardco bought the business of SecurityCo and employees working for securityCo transferred to GuardCo. GuardCo requested and received employee liability information but did not obtain indemnities and warranties against outstanding claims presented by SecurityCo staff before the transfer. GuardCo found themselves liable for a claim for discrimination and unfair dismissal presented by a SecurityCo employee before the transfer. They had not factored this cost into the price they paid for the company.

In a **service provision transfer** due diligence is used to assess risk, determine the level at which to put in a bid, identify employment costs and inherited liabilities, and decide whether the service can be performed with the monies available.

Warranties and indemnities are less common in service provision transfers because there has to be a contract in existence between the parties in order for these to be effective. In second generation and subsequent service provision transfers there is generally no contract between the incoming and outgoing employers so indemnities or warranties are unlikely in these situations.

However in first generation transfers where a client is outsourcing a service or function for the first time, a new contractor can seek warranties and indemnities from the client that the information they provide in respect of the transferring employees is correct.

For example

GuardCo outsourced their cleaning function for the first time, and MoppitCo took on the contract. The two cleaners who worked for GuardCo transferred under TUPE to MoppitCo. MoppitCo requested and received employee liability information and also obtained indemnities and warranties against outstanding claims presented by GuardCo staff before the transfer. MoppitCo found themselves liable for a claim for discrimination and unfair dismissal presented by a GuardCo employee before the transfer. As they had negotiated warranties and indemnities they were able to claim reimbursement of their costs from GuardCo.

TUPE Measures

Incoming employers often have plans to make changes to employment arrangements after the transfer, and under the TUPE regulations these are called “**measures**”. Employers must consult about any measures they are thinking about or intend taking as a result of the transfer. Measures can include:

- redundancies
- workplace relocation
- changes to staff pay dates
- different working patterns
- different pension arrangements.

Some minor changes to terms and conditions may be included as measures although there are tight restrictions under TUPE on when terms and conditions may be altered (see page 37).

Measures are often interpreted widely and include non-contractual and organisational matters. If there are no measures, employers should inform employees and provide information about the transfer only, although this is likely to be infrequent.

Terms and conditions of employment and TUPE

When TUPE applies, the employees of the outgoing employer automatically become employees of the incoming employer at the point of transfer. Employees carry with them their continuous service from the outgoing employer, and should continue to enjoy the same terms and conditions of employment with the incoming employer.

Which terms and conditions transfer?

Once the identity of the incoming employer is determined, it's essential that as part of the ELI (see page 30) they receive comprehensive details of the employment terms and conditions of the transferring employees. Sometimes outgoing employers overlook terms, so it is often worth checking the following:

- Have all the appropriate outgoing employer's policies, staff handbooks etc been sent over? These often contain terms and conditions of employment which may have been incorporated into individual contracts.
- Have any recently agreed changes to terms and conditions been fully agreed, implemented and are they reflected in the employment contracts? This can help remove any confusion prior to transfer.
- Are there any terms and conditions that may have been orally agreed and/or established by custom and practice but not recorded in writing? These are just as binding as written terms and need factoring in.
- Are there any trade unions recognised for bargaining purposes amongst the transferring staff? Secure details of collective agreements, recognition agreements, agreed facility time for union representatives and information and consultation agreements.
- Have variations to standard terms and conditions been agreed for particular employees, such as flexible working arrangements?

The incoming employer should assume that all employee terms and conditions will transfer over unless they receive a legal opinion stating otherwise.

Examples of what can transfer include:

- **Terms and conditions of employment:** Examples include, pay, commission, bonuses, allowances, overtime pay, sick leave and pay, holiday leave and pay, and insurance based benefits. These will normally be found in individual contracts of employment or written statements of employment particulars, and employee handbooks. Terms and conditions also include any implied terms such as a lorry driver needing a valid driving licence to operate.
- **Continuity of employment:** all previous continuous employment will transfer to the incoming employer.
- **Financial obligations and liabilities:** arrears of pay or unpaid bonuses transfer to the incoming employer. For example if the outgoing employer usually pays a bonus for the preceding calendar year in March of the next year, and the transfer occurs in January, the incoming employer will be responsible for making the bonus payment. Even if the incoming employer is unaware of any entitlements they will still be liable, although they may have the option to take up their own claim against the outgoing employer if indemnities and warranties were

supplied as part of a due diligence process (see page 31).

- **Pensions and early retirement:** pensions have special rules attached to them (see page 50). Existing early retirement provisions may transfer over and should be handled by the incoming employer in a manner consistent with previous practice. The law is complicated in this area and employers should seek specialist pensions advice.
- **Holiday entitlement:** outstanding holiday pay, carry over arrangements or contractually enhanced amounts of annual leave will transfer.
- **Discipline and grievance records:** records of active/live disciplinary and grievance procedures for the two years preceding the TUPE transfer should be given to the incoming employer. The incoming employer will take over responsibility for them when the transfer takes effect.
- **Court claims:** existing and potential employment tribunal or court claims, or other outstanding claims against the outgoing employer.

- **Restrictive covenants:** providing that the covenant is still relevant and enforceable as a result of the transfer, they will transfer.

Criminal liabilities and some benefits under an occupational pension scheme do not transfer.

Collective terms and conditions

The incoming employer takes over any collective agreements made by or on behalf of the outgoing employer in respect of any of the transferring employees and which were in force at the point of transfer*. These will include terms and conditions of employment negotiated through collective bargaining as well as the wider employment relations arrangements. Examples include the collective disputes procedure, time off facilities, training for union representatives, negotiated redundancy procedures or job security arrangements and flexible working arrangements.

Many collective agreements continue indefinitely whilst some cover specific periods.

After one year, employers can seek to renegotiate terms and conditions that derive from collective agreements provided that the overall

contract is no less favourable to the employee. However, employers should consider the impact of the changes on individual employees and be mindful that this only applies to the part of their terms and conditions that are covered by collective agreements. Other changes are subject to standard TUPE protection. This rule only applies to TUPE transfers which took place after 31 January 2014.

Employee terms and conditions are sometimes covered by national or sector level collective agreements to which their employer is not a direct party. In some circumstances, future contractual changes arising from new collective agreements agreed by the outgoing employer or a collective bargaining body are not required to be incorporated after a transfer. In such situations, the incoming employer is:

- still bound by the collective agreement in force at the time of transfer, but
- no longer bound by changes negotiated and agreed by the outgoing employer **after** the date of transfer where they are not a participant to the negotiations.

However, in the interest of maintaining good employment

*At the date of publication there is no definitive case law covering this area; Acas is following guidance from BIS with regard to this point.

relations, it is good practice to consult with recognised trade unions or the affected employees about any intentions.

Changing terms and conditions

Following a transfer, employers often find they have employees with different terms and conditions working alongside each other and wish to change/harmonise terms and conditions. However, TUPE protects against change/harmonisation for an indefinite period if the sole or principal reason for the change is the transfer. Any such changes will be void.

If employers and employees agree changes/harmonisation between themselves and the changes are challenged at tribunal, they are unlikely to be binding because the rights provided by the TUPE regulations cannot be signed away. This is so even if both parties have agreed the changes.

Employers seeking to change employee terms and conditions after a transfer sometimes offer other terms that are no less favourable or better than the employee's TUPE terms and conditions. However, case law has established that employees may accept as binding those changes which are to their benefit whilst rejecting and challenging those which are less favourable.

Sometimes change may be valid if:

- The reason for the change is not the transfer, for example the employer has secured a new order.
- The terms of the contract allow the employer to make the change and the changes are not because of the transfer, such as a flexibility or mobility clause.
- The sole or principal reason for the change is an economic, technical or organisational reason entailing changes in the workforce (ETO). However, the employee must agree the change.

Changes for an ETO reason can only be binding:

- **IF** there is an economic technical or organisational reason (ETO) for the change, for example to do with the day-to-day running of the business.
- **AND** the ETO reason “entails changes in the workforce”. This means there have to be changes to the numbers in the workforce (usually a reduction) or changes to job functions. Changes in financial terms and conditions will not be regarded as entailing changes in the workforce. For this reason the ETO is of limited use in practice when an employer just wants to change terms and conditions as

no change in the workforce will be required or entailed. The ETO reason will, however work in redundancy situations because it will entail a change in the number or composition of the workforce.

For example

WidgetCo is in a poor financial position and decides to sell its engineering division; it makes some redundancies to make the business more attractive to a potential buyer. This will **not** be a valid ETO reason because the reason for the redundancies is not related to the day-to-day running of the business.

WidgetCo is in a poor financial position and decides to sell its engineering division; it makes some redundancies to reduce costs and avoid going into wrongful trading. This **is likely** to be an ETO reason.

Employers must consult and seek agreement about any change in advance.

For example

Saint Colette Sixth Form College had staff working to six different sets of terms and conditions resulting from TUPE transfers so wanted to harmonise them for ease of administration and to cut costs.

They dismissed and re-engaged Laura with a reduction in her pay which she refused to accept. This was found to be automatically unfair at tribunal, the reason for the dismissal was the transfer; it could not be an ETO because it did not entail changes in the workforce.

Change in the location of the work

Changes to the location of the work are now covered as an ETO reason under TUPE. This means that TUPE-related relocations will not be treated as automatically unfair but should still be treated in line with normal employment principles. Employers organising relocations will still need to comply with existing rules and procedures for relocations and redundancies, including consulting with representatives and affected employees about the relocation.

For example

EcoBus won the contract to provide a bus service. Following the transfer employees were required to work from a different depot 16 miles away. During consultation prior to the transfer, EcoBus put forward a range of support proposals to reduce the effects of the location change, including a severance package. The transfer was successful, it was concluded smoothly and the risk of unfair dismissal was reduced.

TUPE and terminating employment

TUPE and dismissal

If an employee is dismissed by either the outgoing or incoming employer before or after a transfer and the sole or principal reason for the dismissal is the transfer, it will be automatically unfair.

For example

Mr Smith bought Mr Singh's newsagents and two employees transferred across under TUPE. Mr Smith dismissed both employees on the day of the transfer and engaged two members of his own family to do their work instead. The dismissals were found to be automatically unfair in this case because the employees were dismissed as a direct result of the transfer.

If the reason for the dismissal isn't the transfer, it won't be automatically unfair but it may still be an unfair dismissal if the employer hasn't followed a proper redundancy or dismissal procedure.

Dismissals for ETO reasons may be fair if they fulfil the requirements.

For example

HousingCo won a contract and acquired staff from HomeCo. However, changes to the terms of the contract by the client meant that HousingCo had too many staff after the transfer.

HousingCo concluded they needed to make some redundancies. They carried out proper consultation with elected representatives and made selections for redundancy from both organisations. The dismissals were fair.

Employees who believe that their terms and conditions have been substantially changed to their detriment before, during or after a transfer have the right to terminate their employment and claim **constructive unfair dismissal** at a tribunal. TUPE classifies these types of resignations as dismissals. If the sole or principal reason for the change was the transfer, the dismissal will be automatically unfair. If the reason for the change is not the transfer the dismissal will be unfair if the employer acted unreasonably.

For example

Ahmed worked for ExcavateCo who lost the contract to DiggitCo. After the transfer DiggitCo announced that it had harmonised Ahmed's sickness pay and annual leave entitlements with DiggitCo's procedures to make the administration simpler. Ahmed had not been consulted about the changes and calculated that he would be financially worse off. Ahmed resigned and successfully claimed constructive unfair dismissal. His dismissal was found to be automatically unfair because the reason for the changes had been the transfer.

TUPE and redundancy

Employers are often able to minimise or prevent redundancies and other dismissals when transfers take place. However, there will be occasions when they cannot be avoided.

Where a potential redundancy situation arises as a result of a transfer, employers must consult directly with affected employees and indirectly through representatives when the incoming employer is making (or intending to make) 20 or more redundancies within a 90-day period. Where there are fewer than 20 employees being made redundant within a 90-day period, there is still a legal requirement to consult with employees individually but there are

no prescribed time limits in which to do so. Employers must first consult with a recognised trade union where they exist, and if there is no recognised union then with elected employee representatives.

Where the incoming employer intends making 20 or more redundancies after the transfer, collective redundancy consultation may begin before the transfer **if the outgoing employer agrees** but the redundancies must only be made after the transfer by the incoming employer. If the outgoing employer makes pre-transfer redundancies at the request of the incoming employer, these are likely to be unfair dismissals. This is because the law does not allow the outgoing employer to rely on the incoming employer's reasons for the dismissal. The two employers should try and agree between them who pays the termination costs as part of the commercial agreement.

Employers should consider whether there may be employment relations implications to pre-transfer collective redundancy consultation, especially in unionised workplaces.

If employers begin collective redundancy consultation before the transfer they:

- must not select or dismiss any individual for redundancy before the transfer takes place

- must consult with existing representatives in their own workplace after the transfer. Employers should clearly explain the purpose of the consultation to avoid any confusion and tension
- must carry out individual consultation with affected employees after the transfer takes place.

For example

DiggitCo win a contract to carry out pipe work in the area for UtilityCo. They will acquire staff from ExcavateCo as part of the transfer but know there will not be sufficient work for both sets of employees, concluding that there is potential for redundancies.

Before the transfer, DiggitCo and ExcavateCo agree to pre-transfer redundancy consultation. They begin consultation at an early stage with elected representatives and employees about the transfer and redundancies at the same time.

For more information on redundancy, go to www.acas.org.uk/redundancy

Employees objecting to the transfer

Some employees may tell their employer that they refuse to transfer. If the employee then wishes to resign

before the transfer they should submit their objection to the transfer of their employment to the outgoing employer as this will prevent them from transferring and their employment will cease. In these situations:

- They will be treated as having resigned from their current employment. This would usually involve a need for them to work and be paid for their notice period.
- They will lose any continuity of employment under their current contract of employment and any associated employment rights that have accrued.
- Their employment will come to an end at the point of transfer.
- They will not become an employee of the incoming employer and they will not remain an employee of the outgoing employer.
- They will not be entitled to any additional payments such as a redundancy payment.
- They will be entitled to any outstanding wages owed and payment for any accrued but untaken annual leave when their employment ends.

In these situations where the resignation is not a valid constructive dismissal, the employee will not be

entitled to claim unfair dismissal (see page 40).

If a transfer has not yet taken place, the outgoing employer may – if they choose – offer alternative vacancies to any employee (objecting or otherwise) who is assigned to the group but does not wish to transfer. If the outgoing employer does make such an offer, the employee's continuity of employment will remain, provided that the new role starts before the point of transfer. If such a decision takes place after the Employer Liability Information has been provided to the incoming employer, the outgoing employer will need to inform the incoming employer that the employee will no longer be transferring.

If an employee resigns after the transfer their employment will have already transferred, they will therefore not normally be able to object to the transfer and will be resigning from the incoming employer. However, if an employee had not been told about a TUPE transfer or given the name of the incoming employer, employment tribunals may allow post-transfer objections to be heard provided they are made as soon as the employee learns of the transfer.

Employers should not assume that an informal protest or grievance is enough of an indication that the employee has both objected and resigned from employment. They

should ask for confirmation in writing that the employee has formally objected to the transfer of their employment. Similarly, employees should ensure they submit their objections in writing. A record makes it clear the employee has understood the implications of objecting in case there is any subsequent dispute over the matter.

For example

Ahmed works for CountitCo who have just lost the audit services contract to AuditCo, Ahmed does not wish to transfer and tells his manager. Ahmed sends his letter of objection to the transfer of his employment to CountitCo before the transfer and leaves employment the day before the transfer. Ahmed is paid all outstanding wages and holiday pay by CountitCo but is not entitled to a redundancy payment.

Information and consultation requirements

Incoming and outgoing employers must inform/consult with affected employees about every TUPE transfer and any measures they intend taking, regardless of the numbers of employees affected. This will include all employees who may be affected by the transfer such as those who will transfer, colleagues of those who will transfer, and colleagues in the new organisation who will be working alongside those who transfer.

What information must be provided to employees?

Incoming and outgoing employers must inform all employees affected by the transfer in writing about the details of the transfer including why the transfer is taking place. This is not the same as consultation because there is no requirement for the employer to discuss or debate these points. The information must be given in writing and include:

- the fact that the transfer is going to take place, approximately when and why
- any social, legal or economic implications for the affected

employees for example a change in location or risk of redundancies

- any measures that the outgoing and incoming employers expect to take in respect of their own employees (even if this is nothing)
- the number of agency workers employed, the departments they are working in and the type of work they are doing if agency workers are used
- the outgoing employer must provide information about any measures which the incoming employer is considering taking in respect of affected employees.

Who must get the information?

Where there is a recognised trade union for the affected employees, the information should be given in writing to them. Where there is no recognised trade union the employer should deliver the information to the elected employee representatives (see page 45). When the employer has facilitated elections and where the employees fail to elect representatives the information

should be delivered in writing directly to all affected employees.

It is good practice for employers to keep all affected employees up-to-date with information about the transfer, even where there are representatives in place.

There is no set period of time by when the information must be delivered. The TUPE regulations state “long enough before the transfer to enable consultation to take place”. Even if consultation is not legally required (see page 44), it is good practice to talk with employees and representatives about the transfer. If employers are able to provide information and answer questions about the transfer it will make for a smoother transition.

What must consultation cover?

Employers must consult with recognised trade unions or elected representatives about measures which they are considering taking for their own employees in respect of the transfer. These will be the measures which have been specified in the information given to representatives.

Through discussion, they must properly consider the views of affected employees and take them into account before final decisions about changes are made. Consultation does not require an

employer to accept employee suggestions, but it must be with a view to seeking agreement. If an agreement cannot be reached, employers should provide business reasons for rejecting employee suggestions and explain why in writing.

Unlike the collective redundancy rules there are no set timescales within TUPE to inform/consult. However both employers must inform/consult long enough before the transfer to allow for proper consultation to take place. The larger and more controversial the proposed measures are, the more time should be made available for consultation.

The information must be given to each representative either in person or posted out to them.

Consulting through elected representatives

Employers must inform/consult with employees through “appropriate” elected representatives who are recognised trade union representatives or, in the absence of a recognised trade union for the employees in question, formally elected employee representatives. Elected representatives are deemed appropriate if they are either existing employee representatives who have the authority of the employees to consult and receive information on their behalf, or representatives

elected specifically for consultation during the TUPE transfer.

Where an employer recognises a trade union, incoming and outgoing employers must consult with representatives from the union about the transfer and not with any other group. This only applies to affected employees who are within the bargaining unit.

Where there is no recognised union but a pre-existing agreement with representatives and/or a works committee or staff forum already in place, employers must use these for TUPE consultation.

Representatives must have the authority to represent employees and be fit for the task. For example, it would not be appropriate for representatives who are set up to discuss the operation of a staff canteen to be consulting about TUPE unless they had appropriate training.

For example

The elected representatives were **informed** that EngineerCo is being taken over by MechanicalCo on 1 July so the two companies can pool resources and fulfil larger contracts.

EngineerCo told representatives about expansion plans for a new purpose-built factory nearby and that both sets of staff plus some new recruits would move in over the next two years. EngineerCo **consulted** by asking representatives to seek employee views about the change. The representatives came back with a list of questions, concerns and suggestions which EngineerCo addressed on an ongoing basis as part of the TUPE transfer process.

Employers with no elected representatives

Where there are no recognised trade unions or employee representatives in place, employers must arrange elections amongst the affected employees for the purpose of electing representatives to consult about the transfer.

Whilst arranging elections the employer has a duty to:

- ensure that elections are fair
- decide how many representatives are needed to represent the interests of all affected employees
- decide how long representatives should remain in office to adequately give information and comply with all requirements
- ensure that candidates for election are amongst the affected employees and that no-one is excluded from election
- ensure that the election is conducted so voting is in secret and that votes are accurately counted
- if a representative drops out the employer must arrange for the election of a replacement to ensure employees are represented.

If the employees don't elect representatives within a reasonable time the employer must give the information directly to the employees. It would be good practice for the employer to encourage employees to stand for election and maybe give them a second chance to do so if initial elections don't produce sufficient candidates.

From 31 July 2014, micro businesses (those with fewer than 10 employees overall) are not required to elect representatives to inform and consult where there are no existing recognised trade unions or elected employee representatives. However, they must still inform and consult directly with each individual employee regarding the transfer. Where a micro business recognises a trade union or has appropriate representatives in place, they must consult with the trade union or representatives about the transfer.

Acas has specialist advisers who can help with the election of representatives. For further information call the Acas customer services team on 0300 123 1150.

The role of the representative

During consultation, representatives should listen to what employers have to say, ask questions and challenge views and assumptions about any proposals concerning employees.

Consultation must be meaningful so employers must:

- allow representatives access to the affected workforce
- provide training for representatives, facilities for meetings and time to meet up with the affected employees

- seriously consider what the representatives have to say and take account where appropriate
- undertake consultation with a view to seeking agreement.

Employers are entitled to reject proposals made by representatives although if they do so, the representatives must be told why.

Representatives should accurately reflect what has been said by the employer back to the employees and seek their views and concerns about the transfer. They should then accurately report this information back to the employer where they can discuss the best way forward.

Sometimes to allow a free exchange of views, an employer may release information to the representatives which is commercially sensitive on the basis that it must be kept **confidential**. It is the responsibility of the employer to clearly identify when information is to be treated as confidential. Representatives should keep commercially sensitive information to themselves where required and not disclose it to any third parties without express authority. Failure to do so could result in disciplinary action being taken against them.

Representatives have rights and protections which allow them to carry out their roles including the right not

to suffer a detriment for being a representative, or performing their duties. Similarly, the dismissal of an elected representative will be automatically unfair if it is because of their status or activities as a representative.

Failure to inform or consult

Incoming and outgoing employers must comply with the information and consultation requirements as they can be liable for a failure to consult if employees or representatives challenge this at a tribunal. However, time constraints may make this difficult, particularly when the outgoing employer has no elected representatives in place and has to arrange an election to inform/consult.

Failure to inform/consult can impact employment relations:

- An employer who does not inform/consult with employees runs the risk of the transfer not being as successful as it should be. If employees are not kept informed they may become concerned about the impact of the transfer on their job security and unsettled because they cannot plan for their future.
- Transferring employees may have never heard of the incoming employer and don't know what kind of organisation they are. This

uncertainty may cause resentment leading to a drop in morale and loss of focus on work.

Failure to inform/consult can have legal consequences:

- If the complaint was about failure to elect representatives the employer would need to show they had complied with election requirements. If they can show they have arranged an election as soon as practically possible and allowed reasonable time to consult afterwards they will be deemed to have complied.
- If the complaint was about the outgoing employer not providing the incoming employer with information about the transfer or any measures despite being asked, the incoming employer can be added to any proceedings.

Failure to inform/consult can be expensive for employers:

- Either or both employers can be liable for compensation of up to 13 weeks gross uncapped pay for **EACH** employee affected by the transfer based on the seriousness of breach. The award is 13 weeks in total, it is not 13 weeks per employer so if both employers are found liable they share the amount between them. This applies even if only one employee or their representative brings a claim.

Other considerations

TUPE and the public sector

When contracting out public sector services, the contracting public body will usually follow the principles set out in COSOP (The Cabinet Office Statement of Practice on Staff Transfers in the Public Sector). COSOP is similar to TUPE and protects the rights of public sector staff involved in transfers and ensures continuity of employment and terms and conditions and includes:

- transfers from the public to a private or voluntary sector body
- second and subsequent generation contracting where, when the contract was first awarded, staff transferred from the public sector
- transfers within the public sector
- transfers within the civil service.

For further advice on COSOP see the civil service website www.civilservice.gov.uk/about/resources/employment-practice/codes-of-practice

Organisations contracted to carry out public functions on behalf of a public authority (such as local authorities, central government departments and schools) are covered by the public

sector equality duty. This means that when tendering for or delivering public services employers must comply with the duty. They must eliminate unlawful discrimination, harassment and victimisation, advance equality of opportunity at work, and foster good relations between different groups. Further information can be found on the Equality and Human Rights Commission website.

<http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/>

TUPE and pensions

In a transfer situation, an incoming employer must assess the transferring employees on the date of transfer and auto-enrol them for pension purposes if they are eligible. For further details on workplace pensions and auto-enrolment see the pension regulator's website. www.thepensionsregulator.gov.uk/

Although occupational pensions do not transfer under TUPE, some limited rights e.g. early retirement rights on redundancy may transfer. In addition if the transferred employees were members of an occupational pension scheme, the incoming employer must offer them an arrangement which is either:

- if it is a defined benefit (DB) scheme, most commonly a pension scheme which meets the requirements in the 'reference scheme test' (the minimum benefit standard required for contracted-out defined benefit schemes); or a salary or career average
- if it is a defined contribution (DC) or money purchase scheme, an arrangement under which the employer's contributions match the employee's contributions up to a maximum of 6% of basic pay; or match the old employer's contributions (where it had been under an obligation to make them) provided that these had been solely for the purposes of producing money purchase benefits.

Where the outgoing employer has made a contractual promise to an employee to pay a certain percentage of salary each year into a personal pension plan or a group personal pension plan, this will not amount to an occupational pension scheme run by the employer. As a result the promise will transfer across to the incoming employer under TUPE.

For further details on occupational pensions go to www.pensionsadvisoryservice.org.uk

Under the government's Fair Deal policy, some employees are entitled to remain in their public sector pension scheme on a transfer from public to private sectors, and on subsequent transfers.

On a TUPE transfer advice from a pensions lawyer is to be recommended as this is a complex area.

TUPE and insolvency

The TUPE regulations make special provisions for businesses subject to insolvency proceedings.

If an employer cannot pay its debts and becomes insolvent, an insolvency practitioner (IP) will be appointed to deal with the insolvency. Whether employees transfer to a buyer or how they get monies owed to them will depend upon the type of insolvency proceedings.

1. In some cases, the full TUPE provisions will apply. The insolvency will take place under the supervision of an IP but the aim is to help the business to be sold as a going-concern. In these circumstances TUPE will apply and the employees will transfer to the new employer with their terms and conditions intact. Administration is the best example of this.

Where TUPE applies following this kind of insolvency, the incoming employer will not be liable for some of the insolvent employer's unpaid debts owed to employees (up to a prescribed amount). These are recovered by employees from the National Insurance Fund but the incoming employer will be liable for employment contracts going forward. Where TUPE applies following insolvency, employers are able to agree certain permitted variations to employment contracts via appropriate employee representatives. This only applies where the purpose is to

safeguard employment opportunities by ensuring the survival of the company.

2. In other insolvency cases TUPE may not apply because the business has gone into insolvent liquidation rather than being sold as a going concern. Liquidation is where the business closes down and assets are sold to pay those who are owed money. This could also apply where an individual employer becomes bankrupt. In these circumstances employees will not transfer. They are instead made redundant and core debts owed to them are paid from the National Insurance Fund. Employees should make claims for monies owed through the IP.

An incoming employer taking on staff under insolvency circumstances can find an overview of employee rights at www.gov.uk/your-rights-if-your-employer-is-insolvent/overview

TUPE and international employment

Employees of a UK-based employer who are working outside the UK may have protection under TUPE and where the purpose of a transfer is to move a business or service provision overseas, TUPE can still apply.

In business transfers where the employer has a presence in the UK

but the employee spends most of their working week outside the UK, they are likely to have protection under TUPE.

In service provision changes there has to be an organised grouping of employees in the UK for TUPE to apply.

For example

- 1) Ahmed and the rest of the team work on a project in the UK, apart from George, who is based in France. TUPE is likely to apply here in the UK.
- 2) Ahmed, George and the rest of the team work on a project based in France. TUPE is unlikely to apply because there is no organised grouping of employees in the UK.

The rules concerning international law and determining which country has jurisdiction are complex. For example, the TUPE rules on business transfers are derived from the European Union whilst the rules on Service Provision Changes are specific to UK law. Even if the UK TUPE rules don't apply, other nations may have their own rules and regulations to adhere to. It's essential to seek specialist legal advice where transfers cross international jurisdictions.

Appendix 1: TUPE glossary

Affected employees	Any employee of the incoming or outgoing employer affected by the transfer. This could include those who transfer, those who remain behind with the outgoing employer or those already working for the incoming employer.
Automatic unfair dismissal	A dismissal will be automatically unfair under TUPE if challenged at a tribunal where the sole or principal reason for the dismissal is the transfer itself and it is not an ETO reason.
Bargaining unit	A group (or groups) of workers covered by a recognition agreement or a statutory recognition award for the purpose of negotiating employment terms and conditions.
Business transfer	A type of relevant transfer, some or all of a business is bought or sold by way of the transfer of an economic entity which retains its identity.
Client	The individual or business that wishes to have services provided that are subject to a transfer.
Collective agreement	An agreement between an employer and trade union(s) covering matters such as terms, conditions and pay. The terms of collective agreements can be incorporated into individual employment contracts.
Consult/consultation	The process by which management and employees or their representatives jointly examine and discuss issues of mutual concern. Collective consultation must be conducted with a view to reaching agreement.
Continuity of employment	An employee's continuous period of employment. Whilst some TUPE-related rights have no required length of continuity (such as consultation), others (such as redundancy pay) do.

Contract of employment	Any oral or written agreement between an employee and their employer determining the terms and conditions of employment.
Contractual implied terms	Contractual terms which are so obvious they don't need to be written down, such as the need to turn up to work on time, follow the employer's lawful instructions or which have been implied by custom and practice.
Contractual express terms	Contractual terms which are specifically written down in the terms and conditions and agreed by the parties. These are usually found in individual contracts of employment, written statements of employment particulars, collective agreements or employee handbooks.
Due diligence	The investigation of a business by a potential buyer to determine the costs, liabilities, benefits, and risks associated with acquiring the business.
Economic entity	An organisation or business that has financial activity, which means most businesses will fit this description.
Economic, technical or organisational (ETO) Reason	To make changes to employee terms and conditions after a transfer where the sole or principal reason for the change is the transfer, there must be an 'economic, technical or organisational reason entailing changes to the workforce' for any changes to be valid.
Employer liability information (ELI)	Information which the outgoing employer must provide about transferring employees to the incoming employer.
Employee	For TUPE purposes, this is any individual with a contract of employment or a contract of apprenticeship but does not include anyone who provides services under a contract for services (commonly known as workers) or those who are self employed.

Fragmented/ fragmentation	When a transfer or number of transfers result in such a significant splitting up of the original service that TUPE does not apply.
Incoming employer	This refers to the employer who will be taking over the business or service after the transfer takes place.
Inform/information	The employer must provide certain information to employees and their representatives. In TUPE situations, this includes that the transfer is to take place, approximately when and any potential implications for the employees.
In-sourcing	A type of service provision change where the client brings the work/service currently contracted out, in-house.
Measures	Plans for changes to employment arrangements which an incoming employer may wish to make after the transfer, such as a change to a pay date.
Micro business	For TUPE purposes, this is defined as any employer with fewer than 10 employees in total.
New employer	The employer who will be taking over the business or service after the transfer takes place.
Old employer	The employer who will be handing over the business or service after the transfer takes place.
Organised grouping of employees	The legal definition that transferring employees need to meet for TUPE rights under the service provision change to apply to them. The group has to be deliberately organised by the employer to provide a service for a particular client.
Outgoing employer	The employer who will be handing over the business or service after the transfer takes place.
Outsourcing	A type of service provision change where the client agrees contracts or tenders for work/services originally carried out 'in-house'.

Re-tendering	Where a service provision comes to an end and the client wishes to continue the service with either the same or a new provider.
Recognition agreement	An agreement which sets out how an employer collectively bargains with any recognised trade union(s).
Redundancy	A type of dismissal that can be used in TUPE situations where an employer needs to reduce their workforce because a job becomes unnecessary, or there is a need to reduce the number of employees.
Relevant transfer	A catch-all term referring to all situations where the TUPE regulations apply.
Second generation transfer	A type of service provision change where an existing service provision arrangement comes to an end and the service passes on to a new service provider.
Service provision change	A type of relevant transfer where an employer arranges for new work to be provided by an employer (tendering), moves in-house work to be carried out by an employer (outsourcing), brings outsourced work in-house (in-sourcing) or arranges for an existing contract for the outsourced work to be renewed, by the same or a new employer (re-tendering).
Tendering	Where a service provision comes to an end and the client wishes to continue the service with either the same or a new provider.
Transferor	The employer who will be handing over the business or service after the transfer takes place.
Transferee	The employer who will be taking over the business or service after the transfer takes place.

Appendix 2: TUPE process plan template

Planning for a transfer is essential to ensure a smooth transition and success, and this sample process plan has been developed for an **Incoming employer who is considering bidding for a service provision transfer**.

The plan can easily be adapted for use in other transfer situations and should be used as a starting point only. Employers should still seek legal advice to ensure their actions are legally compliant.

Key details and contact information

[INSERT KEY DETAILS RELEVANT TO THE TRANSFER FOR EXAMPLE DEADLINES AND CONTACT DETAILS FOR CLIENT/ OUTGOING EMPLOYER]

Stage 1: Before committing to the transfer

Things to consider/act on

Notes

Request and analyse all information from the client about the service to determine all associated costs and liabilities, seek additional information where required.

Identify all risks and opportunities relating to the transfer. Consider any benefits it could bring, and what it might achieve for the company and affected employees.

Consider whether any measures may be required to make the service work efficiently and factor this in.

Key details and contact information

Consider whether there could be a risk of redundancies after the transfer and factor this in.	
Decide whether TUPE will apply to the transfer.	
Determine whether any assets or equipment will transfer.	
Determine whether a change in location might be required.	
Determine whether equipment will need to be sourced and put in place for transferring employees.	
Develop a timeframe over which the transfer is to be conducted.	
Inform any recognised trade union or elected representatives about the possibility of a transfer.	
Where there are no existing representatives, make preparations for employee elections and training of new representatives.	
Consider how the TUPE transfer process might be managed if the bid is successful.	
Calculate all running costs and liabilities and submit a bid for the contract based on the information provided if it is feasible to do so.	
Consider setting aside a contingency fund for unexpected additional expenditure.	

Key details and contact information

[INSERT ANY EXTRA ACTION POINTS, CONSIDERATIONS, DEVELOPMENTS]

Stage 2 – Prepare for the transfer

Things to consider/act on	Notes
Request and analyse employee liability information and due diligence, verify all liabilities.	
Obtain warranties and indemnities that the information provided by the outgoing employer is correct if appropriate.	
Inform/consult with existing affected employees about the transfer, include those who may be on long-term sick leave/maternity/paternity etc.	
Hold elections to appoint employee representatives where there are none, and provide training for newly elected representatives in their new role.	
Consider the employment relations arrangements after the transfer, if representatives are in place consult with them about how good relationships can be maintained after the transfer.	
Identify and agree which employees are to transfer.	
Microbusinesses must inform/consult directly with affected employees where there are no trade union representatives or elected representatives in place.	

Key details and contact information

Inform the outgoing employer about any measures which are being considered in respect of the affected employees who will be transferring.	
Seek permission from the outgoing employer to inform/consult with any recognised trade union or elected representatives about the transfer.	
Seek permission to visit the outgoing employer organisation and speak individually with transferring employees about the transfer and their current terms and conditions.	
Where possible, check that the information received from the transferring employees tallies with information received under employee liability and due diligence information. Check and resolve any discrepancies with the outgoing employer.	
Consider how to deal with any terms and conditions of the transferring employees which cannot be continued after the transfer, ensuring that the result is at least as favourable as the original arrangement.	
Determine whether there will be sufficient work after the transfer for all affected employees. If a potential risk of redundancy is identified, consider ways to minimise the impact of this.	
Prepare for potential post-transfer redundancies if they are required, and seek permission to begin pre-transfer consultation if this is appropriate.	

Key details and contact information

Prepare payroll and HR systems for the transferring employees.

Check pension requirements and seek advice where appropriate, and/or set up new pension provisions.

Prepare an induction package for the transferring employees.

Organise communication messages, question and answer sheets, FAQs etc for existing employees and transferring employees for the day of the transfer.

Organise mentors to be available to help the new employees settle in and answer questions. Provide them with a full briefing about their role.

Identify any initial training needs for the new employees and organise training where required.

Ensure that all working areas and equipment is ready and working for the day of the transfer. Check for any requirements for reasonable adjustments that might need to be made for any of the transferring employees.

Inform customers about the transfer and any impact this may have on the services they receive.

[INSERT ANY EXTRA ACTION POINTS, CONSIDERATIONS, DEVELOPMENTS]

Key details and contact information

Stage 3 – The transfer

Things to consider/act on	Notes
Check that all expected employees have arrived for work and are welcomed into the new company.	
Liaise with the outgoing employer about any who have not turned up and contact them to find out their intentions.	
Welcome and introduce the new employees into the organisation.	
Engage with all affected employees by holding meetings/talking to them to find out if there are any issues.	
Check once more with the transferring employees that their terms and conditions match those which transferred across with them and resolve any discrepancies at an early stage.	
Begin the induction process and ensure that mentors are available to answer questions.	
Provide training for any new equipment which has been provided, and check that new employees have all they require to carry out their work.	
[INSERT ANY EXTRA ACTION POINTS, CONSIDERATIONS, DEVELOPMENTS]	

Key details and contact information

Stage 4 – After the transfer

Things to consider/act on	Notes
Continue to consult with representatives and affected employees where potential redundancies are proposed.	
Continue to consult with representatives and affected employees where measures are proposed.	
Make selections for any necessary redundancies by following a fair and correct procedure.	
Where there are no measures or redundancies proposed, continue to engage with affected employees to ensure that morale is preserved and they are successfully integrated into the organisation.	
Liaise with customers to ensure that service levels are being maintained.	
[INSERT ANY EXTRA ACTION POINTS, CONSIDERATIONS, DEVELOPMENTS]	

Appendix 3: Sample Employee Liability Information and Due Diligence document

The table sets out the employee liability information which an employer must provide/receive under the TUPE regulations. The table also sets out the additional information that might be sought/provided as part of a due diligence process.

Employers can use and adapt the table to suit their own needs, but must ensure that all information under ELI is sought/provided as a minimum.

Employee Liability information which must be supplied/received under TUPE	Additional Due Diligence information which may be sought/provided
Employee details	
Name of the employee.	Address of the employee.
Date when employment began, or the date on which their period of continuous employment began.	National insurance number.
Date of birth.	Gender.
Job title and job description.	Employment status, employee or worker.
Type of contract, permanent, fixed-term etc. Where the contract is not permanent details of when it is due to end.	

Employee Liability information which must be supplied/received under TUPE	Additional Due Diligence information which may be sought/provided
Place of work and details of any mobility requirements or clauses.	
Details of terms and conditions of employment as required by the written statement of employment particulars http://www.acas.org.uk/writtenstatement	
Pay entitlements	
Salary or hourly rate of pay.	Pay day or date and method of payment.
Pay intervals, weekly, monthly etc.	Details of proposed salary increases and details of any salary bands.
Details of holiday pay including entitlement to accrued holiday pay on termination of employment.	Details of overtime rates, and whether they are contractual or voluntary.
Details of sick pay arrangements, SSP or contractual.	Entitlements to any other bonuses or commissions.
	Authorised deductions from pay.
	Details of any statutory/contractual maternity, paternity, adoption and parental pay entitlements.
	Details of any statutory/contractual redundancy pay entitlements.
	Details of any travel expenses rules and rates.

Employee Liability information which must be supplied/received under TUPE	Additional Due Diligence information which may be sought/provided
Working time	
Normal hours of work.	Details of employees' taking/due to take maternity, paternity, adoption, parental leave and any proposed return to work date.
Details of any terms relating to hours of work such as shift work or the 48-hour week opt-out.	Details of job-share or other flexible working arrangements.
Annual holiday entitlement including details of any public holiday entitlements.	Details of any reasonable adjustments that have been accommodated.
Number of days leave taken, amount outstanding or carried over and any carry over agreements.	Details of employees who have been on sick leave for more than two weeks.
Benefit entitlements	
Pension scheme entitlement and membership.	Details of any private healthcare provisions.
Details of employee and employer pension contributions over the past three years and details of when contributions are paid.	Details of any early retirement provisions.
	Details of any life insurance cover.
	Details of company car entitlements and associated scheme rules and policies.
	Other discretionary payments such as gym membership, childcare vouchers, long service awards etc.

Employee Liability information which must be supplied/received under TUPE	Additional Due Diligence information which may be sought/provided
	Details of any employee loans and details of repayment agreements, such as travel season tickets.
Contractual requirements	
The length of notice the employee must receive and give to terminate their contract of employment.	Any variation clauses and details of changes to terms and conditions over the past two years.
Details of any collective agreements which affect the terms and conditions of affected employees.	Details of trade union facilities provided and names of representatives and details of any current or anticipated disputes with trade unions.
<p>Details of any requirements to work outside the UK including:</p> <ul style="list-style-type: none"> ● how long they will be working abroad ● the currency they will be paid in ● any additional payments or benefits for working abroad ● any terms relating to their return to the UK. 	<p>Details of any restrictive covenants.</p> <p>Details of any mobility clauses.</p> <p>Details of any orally agreed terms and conditions.</p> <p>Details of any lay-off provisions.</p>
Additional requirements	
Instances of any disciplinary action taken within the previous two years.	Copies of all policies/staff handbooks including redundancy, equality, disciplinary and grievance and recruitment procedures.
Instances of any grievances raised within the previous two years.	

Employee Liability information which must be supplied/received under TUPE	Additional Due Diligence information which may be sought/provided
<p>Instances of any legal actions taken within the previous two years.</p> <p>Instances of any claims that the outgoing employer has reasonable grounds to believe that an employee may bring against the incoming employer arising out of that employee's employment with the outgoing employer.</p>	

Appendix 4: Important changes to making employment tribunal claims

Previously, an employee could go straight to the tribunal service, but this has changed. From 6 April 2014, if an employee is considering making an Employment Tribunal claim against their employer, they should notify Acas that they intend to submit a claim.

Details of how and where to do this are given below.

Acas will, in most circumstances, offer to assist in settling differences between employee and employer. Employers intending to make a counter-claim against an employee must follow a similar procedure.

The process for agreeing settlement is called Early Conciliation. It is handled by experienced Acas conciliators and support officers and is:

- free of charge
- impartial and non-judgmental
- confidential

- independent of the Employment Tribunal service
- offered in addition to existing conciliation services.

Early Conciliation focuses on resolving matters on terms that employee and employer agree.

Early Conciliation may not resolve matters in every claim. When this is the case Acas will issue a certificate that is now required for a claim to be submitted to an Employment Tribunal.

Remember, when a claim is lodged with a tribunal, Acas will continue to offer conciliation to both sides until the tribunal makes a judgment and, if the claim is successful, a remedy decision (usually financial compensation) has been made.

To find out more about Early Conciliation, go to www.acas.org.uk/earlyconciliation

Information in this booklet has been revised up to the date of the last reprint – see date below. For more up-to-date information go to the Acas website www.acas.org.uk.

Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

Acas aims to improve organisations and working life through better employment relations. We provide up-to-date information, independent advice, high quality training and we work with employers and employees to solve problems and improve performance.

We are an independent, publicly-funded organisation and many of our services are free.

August 2016

Acas' offices:

- **National**
London
- **East Midlands**
Nottingham
- **East of England**
Bury St Edmunds, Suffolk
- **London**
- **North East**
Newcastle upon Tyne
- **North West**
Manchester
- **North West**
Liverpool
- **South East**
Fleet, Hampshire
- **South West**
Bristol
- **West Midlands**
Birmingham
- **Yorkshire and Humber**
Leeds
- **Scotland**
Glasgow
- **Wales**
Cardiff

Helpline **0300 123 1100**

18001 0300 123 1100
Acas Helpline Text Relay

To view a full list of Acas publications
go to **www.acas.org.uk/publications**

0300 123 1150
Acas Customer Services Team who
can provide details of services and
training in your area or visit
www.acas.org.uk/training

0300 123 1100
for questions on managing
equality in the workplace

