



**Call for Evidence – Effectiveness of Transfer of Undertakings
(Protection of Employment) Regulations 2006**

This evidence is submitted by Unite the Union. Unite is the UK’s largest trade union with 1.5 million members across the private and public sectors. The union’s members work in a range of industries including manufacturing, financial services, print, media, construction, transport and local government, education, health and not for profit sectors.

Unite officials and workplace reps have extensive experience of representing members during TUPE transfers, both through information and consultation arrangements and by ensuring that members benefit from their TUPE related rights.

Unite has conducted a survey of officers to provide evidence in response to this consultation. Specific case examples are included at the end of this document in the Appendix.

Executive Summary

- While current TUPE provisions are not perfect the 2006 amendments have helped to make the application of TUPE clearer to business and employees
- This has created stability and security for workers, especially in low paying service sector jobs such as contract cleaning and catering.

- This has particularly benefited women, and ethnic minority workers.
- Unite rejects the idea that TUPE is “gold plated” – there are still considerable loopholes in the TUPE regulations that unscrupulous employers regularly exploit to make sure TUPE does not apply.
- To this end Unite believes that amendments to the rules on service provision and harmonisation rules are unnecessary and could have a negative effect on the UK economy.
- Unite believes that TUPE needs to be strengthened and tightening up in insolvency situations and through the definition of “Economic, Technical or Organisational” reasons, as long as this is done to protect workers. The “Protection of Employees” is what the provisions are there for.

The Unite evidence in detail:

1. Introduction

1.1 The aim of creating the Transfer of Undertakings (Protection of Employees) Regulations 2006 (TUPE) Regulations and the Acquired Rights Directive (ARD) (2001/23/EC) was to facilitate restructuring and fair competition for businesses while minimising workplace disputes and protecting workers.

1.2 Unite officer's deal with TUPE on a regular basis throughout the UK economy and their experience of the regulations varies widely depending on the industrial sectors they work with and the behaviour of employers. In the Appendix to this document Unite has included a collection of case studies taken from officers experiences of working with the TUPE 2006 regulations. In some cases the legislation works smoothly and effectively, while in others officers report problems largely down to employers trying to avoid compliance. From this perspective Unite recognises that the

TUPE regulations are not perfect. There continues to be major loopholes in the legislation that unscrupulous employers exploit to avoid compliance.

1.3 Many of the suggestions highlighted in this call for evidence, however, would substantially weaken the legislation rather than improve it. This would do nothing to improve clarity for business or reduce litigation and bureaucracy, if anything they would make the situation worse.

1.4 Whilst clearer guidance in some areas would be welcome, calls for the Regulations to be weakened cannot be justified. There is no evidence that TUPE regulations act as a barrier to businesses or the economy. In fact TUPE Regulations have had a key role to play in the rescuing of businesses, in maintaining employment levels, retaining skilled staff, protecting household incomes and sustaining consumer confidence. Unite does not agree with the CBI and IOD's assertion that TUPE regulations are 'gold-plated', especially when compared to other European comparators.

1.5 Undermining the legislation would lead to a rapid erosion of employment protection for workers and to a downward spiral of pay and conditions for contracted out staff. It is likely that such changes would have a disproportionate effect on low paid women and ethnic minority workers, who tend to work in contracted out service sector jobs. Outsourcing and restructuring can have detrimental impacts on the health and well-being of workers affected. This can have a major impact on the economic productivity of the economy.

2. Clarity and Transparency of 2006 Regulations Overall

Q1. Have the 2006 amendments provided greater clarity and transparency on application of TUPE rules?

2.1 In Unite's experience the TUPE 2006 legislation in general has helped to provide stability and clarity for transferred and outsourced workers about

their rights, while protecting them from exploitation and the undermining of their terms and conditions. They have also reduced litigation on the application of TUPE.

2.2 Unite believes that the 2006 amendments on 'service provision change' have been particularly useful in significantly increasing business certainty and security for transferred staff (see below).

2.3 The legislation provides businesses with a level playing field that allows for competition on quality, innovation and efficiency and not on the basis of lower pay and terms and conditions. It also has reduced workplace disputes by providing workers with greater information and voice during any transfer. To this end UK TUPE regulations, where implemented in the spirit of the legislation, have been of great benefit to the stability of the UK economy.

2.4 Unite's experience is that since 2006, there have been fewer requests for advice and support in relation to the question as to whether or not there has been a business transfer. This demonstrates the considerable advantage of the 2006 amendments in that they provide less room for legal argument.

Q2. Do the 2006 Regulations provide enough transparency around employment rights and obligations being transferred to ensure a smooth transition? If not, how could this be improved?

2.5 While Unite believes that the 2006 Regulations have greatly improved the transparency of the legislation there are several areas where it can still be improved.

2.6 Firstly Unite believes that the law should make sure that there is a full and proper exchange of information between the transferor and the transferee about employment related liabilities prior to any transfer. Lack of

transparency is not in the interest of the contracting businesses or transferred staff.

2.7 Secondly the Regulations should require that information relating to transferred liabilities should also be shared with recognised trade unions, ideally before it is released to transferees. This would enable trade unions to check the accuracy of any information that would reduce the prospect of disputes and Employment Tribunals claims following any transfer.

2.8 Thirdly the current statutory obligations on employee liability information is too short i.e. 14 days before the transfer. Unite believes more time is needed especially when the transferee plans to make changes to terms and conditions after the transfer.

2.9 Fourthly Unite believes that existing information and consultation arrangements (Regulation 13(6)) should be extended to require consultation to take place between recognised unions and the transferee before the transfer takes place. This would enable workers and trade unions to be consulted on the plans of the transferee, for example redundancies, organisational changes, etc. As it stands this is a major gap in TUPE rights and Unite officials report many occasions where members are TUPE transferred over to jobs that in reality don't exist. Unite believes that this should be made clear to workers before the transfer.

Q3. Do employers and commissioners generally comply with the transparency obligations under the 2006 Regulations? If not, are there particular problems around timing and/or accuracy of the information they provide; and are problems particularly noticeable in respect to transfers from the public or private sector?

2.10 Unite's experience of this varies widely between sectors and employers. In the best situations employers go over and above the legislation to make sure that transferred employees have all the information both from the transferor and transferee organisation.

- 2.11 There are some sectors, however, where some employers do their best to avoid compliance with these regulations or do the bare minimum as obliged by law.
- 2.12 The social housing, and voluntary sectors bidding for public sector contracts and funding are particularly bad at this. Organisations in these sectors regularly submit bids for government contracts with the full knowledge that they will not be able to afford to maintain transferred staff terms and conditions. These organisations rely heavily on the lack of clarity in the guidance about Economic, Technical or Organisational reasons.
- 2.13 The same is true for the Hotel sector where housekeeping functions are often outsourced to agencies that then put the contracts out to tender. In these cases workers terms and conditions are regularly used to undercut other organisations making bids. This predominantly hits the mainly female migrant workers who work in the sector.
- 2.14 Unite is particularly worried that, in the current context of Government's public service reform, changes to TUPE regulations will have a disproportionately negative impact on employees transferred out of jobs from the public sector to the private or voluntary sectors.

3. Service Provision Changes

Q4. Does inclusion of service provision changes within the 2006 Regulations provide benefits in terms of increased transparency and reduced burdens on business? If yes what are these benefits? If no, what additional burdens have resulted from their inclusion? Call for Evidence: Effectiveness of current TUPE regulations 7

Q5. Have the 2006 amendments led to less need to take legal advice prior to tendering or bidding for contracts?

Q6. Have the 2006 amendments led to fewer tribunals resulting from service transfers?

Q7. Is the inclusion of service provision changes in principle helpful, but there are alternative models for their inclusion that would lead to improvements? What might these look like?

- 3.1 Unite is strongly against any removal or exemptions from the service provision changes brought into TUPE legislation in 2006. These changes have created much greater certainty about when TUPE applies and therefore reduced the need for costly litigation. It is ironic that at the same time that the Government is looking to improve the clarity of the legislation it is also suggesting removal of these provisions.
- 3.2 The trade union movement welcomed the changes in 2006 as they helped to ensure that contracted out low paid service sector employees, including cleaners and catering staff, would be protected by TUPE (see Appendix).
- 3.3 This has not only helped improve conditions for employees but also helped to prevent unfair competition between contractors on the basis of pay and conditions in some sectors. Unite officials highlight that this has been felt particularly keenly in the low paying cleaning sector where contracts change with short notice and members regularly transfer employers.
- 3.4 If the provisions were removed many low paid service sector workers could lose out on TUPE protections. This would increase job insecurity, lead to a downward spiral in pay and conditions and generate increased inequality. This, in turn, would harm the economy.
- 3.5 Unite is concerned by some creative interpretation of the service provision changes. Firstly, in cases such as *Metropolitan Resources v Churchill Dulwich [2009] IRLR 700*, the EAT suggested that for a service provision change to apply services undertaken by the transferee had to be 'fundamentally and essentially the same'.
- 3.6 Secondly, in cases such as *Clearsprings Management Ltd v Ankers and ors* the EAT suggested that service provision change will not have taken place and TUPE will not apply where services are significantly fragmented. Unions report that on a number of occasions where services

are fragmented following a transfer employees who are dismissed often lose out on redundancy payments.

3.7 Unite is concerned these cases may create opportunities for service providers to restructure and repackage their services in order to avoid TUPE rules. Unite therefore believes that legislation is needed to close these loopholes.

Q8. Should professional services be included in the definition of service provision and be covered by the Regulations?

Q9. Would the exclusion of professional services lead to uncertainty over whether TUPE did or did not apply, requiring businesses to seek further legal advice?

3.8 Unite is against the removal of professional services from the TUPE Regulations. This will have particular implications for any outsourced public services such as those transferred from the NHS and this is likely to undermine the quality of those services. Removal of this would create substantial legal uncertainty and discourage compliance. It is legally difficult to draw distinctions between differing types of professions and other services potentially covering nurses, teachers, allied health professionals, architects and planning officers.

3.9 In Unite's view, all professionals should be entitled to the same level of employment protection as any other employee. The Acquired Rights Directive makes no provision for different treatment or levels of protection for different categories of workers. Any exemption for professional services would therefore be in breach of the directive.

4. Harmonisation of terms and conditions:

Q10. Is lack of provision for post-transfer harmonisation a significant burden? How might the Regulations be adjusted to enable this whilst remaining in line with the Directive?

4.1 Unite does not see the need to review the rules on harmonisation of terms and conditions following a transfer. Current legislation already provides for

harmonisation of terms and conditions, while protecting workers who would lose out.

4.2 Unite believes that any moves to allow harmonisation down of pay and conditions after a transfer would drive a “coach and horses” through TUPE protections. Downward harmonisation is not permitted under the Directive and it is likely that any amendments in this area would conflict with EU law.

4.3 The Acquired Rights Directive was introduced with a view to enabling businesses to restructure in response to market changes but to do so in a way which avoids disputes with workers, the deterioration of terms and conditions and increased insecurity and inequality. Proposals for the harmonisation of terms and conditions are inconsistent with these purposes.

4.4 In practice Unite officials report that where organisations have positive relationships with unions, they have been able to negotiate changes to terms and conditions which workers have been happy to accept. In other less positive cases organisations have often used ETO reasons to justify harmonisations down. Unite continues to question whether this approach is consistent with the Directive.

Q11. Would it be helpful to have a provision limiting the future observance of terms and conditions derived from collective agreements?

4.5 Unite is particularly concerned about the suggestion that the TUPE Regulations should be amended to allow for contracted out staff to lose the right to terms and conditions contained in the collective agreement.

4.6 Article 3 of the Acquired Rights Directive 2001/23/EC provides that “Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or

application of another collective agreement.” The Government has an obligation to promote collective bargaining (see DEMİR AND BAYKARA v. TURKEY 12 November 2008 Grand Chamber European Court of Human Rights (*Application no. 34503/97*)).

4.7 We are concerned that comments in the consultation paper demonstrate that, as part of the Government’s public service agenda, it is attempting to further undermine national agreements such as Agenda for Change in the NHS.

4.8 Unite strongly believes that contracted out employees should be able to continue to rely on contractual terms linking their pay rates to those negotiated by unions and employers in the original workplace. This will help to ensure that contracting out does not lead to the erosion of pay and conditions and the recreation of the two tier workforce.

4.9 Unite believes that any moves to limit the rights of transferred staff to benefit from collectively agreed terms and conditions or from union recognition, will fall foul of EU law.

4.10 Unite Officials report that many transferee organisations are already attempting to undermine these agreements by arguing that they only have to apply national minimum agreements, rather than local supplementary agreements (e.g. in outsourced estates and maintenance functions in Local Authorities and the NHS) and also by rejecting any changes to the agreement that took place after the transferral.

4.11 Until recently the continued applicability of collective agreements had been clear and recognised by law (e.g. *Whent v T Cartledge Ltd [1997] IRLR 153*). Unite understands that this is currently under review in the CJEU in the *Alemo-Heron & Ors v Parkwood Leisure* case. Unite believes that should the courts rule that collective agreements no longer apply then the Government should reinstate these rights.

Q12. Would it be helpful to agree with employees a renegotiation of their contract provided that overall the resulting contract was no less favourable than at the point of transfer? Call for Evidence: Effectiveness of current TUPE regulations 8

4.12 Unite does not believe that any move to an overall package approach to terms and conditions would be helpful in the legislation. Such approach goes against the term by term approach used in EU employment law and would result in complicated legal cases to define the relative value of each different term and condition.

4.13 Unite's experience, reinforced by the approach taken by the ECJ, is that different conditions of employment have different values to different employees. For example people with families may value more flexible working patterns as opposed to overtime. A package approach is likely to lead to more disputes and unfair outcomes for different groups of employees leading to complicated court cases and tribunals, especially in terms of non-monetary benefits.

4.14 Unite further believes that the EFTA court case, *Langeland v Norske Fabricon A/S* [1997] 2 CMLR 966, makes it clear that such a package approach is inconsistent with the Acquired Rights Directive.

5. Insolvency and Liabilities

Q13. Should more be done to clarify the application of TUPE in insolvency situations? If so, would this require changes to the legislation, for example, by setting out which insolvency procedures fall under which provisions, or would more detailed guidance than currently provided be sufficient?

Q14. Have the 2006 amendments meant that transferees (ie businesses taking over the contract) have a greater awareness of potential liabilities, and has this helped to reduce transaction costs and risks? If not, how could this be improved?

Q15. Should liability for pre-transfer obligations be transferred entirely to the transferee as is the case currently in the Regulations ie should the business taking on the contract take on all the liabilities of the business or part of the business they are taking over? Or should both parties be jointly liable, as permitted by the Directive. Call for Evidence: Effectiveness of current TUPE regulations 9

- 5.1 Unite believes that the law in insolvency situations requires improvement. There are currently no incentives for Insolvency Practitioners (IPs) to comply with the law. In practice insolvency practitioners rarely engage with TUPE regulations properly nor do they consult on any collective redundancies that are contemplated.
- 5.2 The 2006 amendments mean that transferees do have a greater awareness of potential liabilities, and greater certainty has this helped to reduce transaction costs and risks.
- 5.3 Unite would support the imposition of a financial penalty on IPs where they have failed to comply with Regulation 7. Changes to liability rules may make it more difficult for transferred employees to enforce their rights.
- 5.4 Trade unions should have a right to receive information about employee liabilities. This information should be shared at an early stage to enable genuine consultation. Measures are needed to ensure that insolvency practitioners observe their duties to inform and consult trade union and workplace reps.

6. Guidance

Q16. Is the provision on 'Economic, Technical or Organisational reason entailing changes in the workforce' sufficiently clear? Would additional guidance be helpful and if so in what form?

- 6.1 The provisions on ETO reasons are critical for employment rights. The test is relevant in determining whether transfer related dismissals are fair and whether it is lawful for employers to vary terms and conditions after a transfer. Unite officers report that in practice this is the main source of abuse in TUPE law as the broadness of this definition leaves the law ripe for abuse.
- 6.2 As already discussed, Unite officers working in the voluntary and hotel sectors regularly report that organisations bid to run public services

knowing full well that the budget they are working to is not affordable with current workers terms and conditions. These organisation undercut better quality organisations to win the contract and then once employees have been TUPE transferred over they use ETO reasons to cut pay and terms. Unite. Similar issues are reported in the IT and Communications sectors.

6.3 Any new guidance must not be used to make this situation worse by encouraging employers to avoid TUPE protections and to undercut the pay and conditions of transferred staff. Guidance should be used to tighten the definitions so that they can not be abused. Unite believes that any further undermining of the situation will make the UK non-compliant with the EU directive.

6.4 In Unite's view the guidance should emphasise that ETO provisions will only justify dismissals or detrimental changes to pay and conditions in very limited circumstances. It is not sufficient that an employer simply wishes to harmonise terms and conditions or to vary working hours. The guidance should clearly state that employers must also demonstrate that the ETO reason involves changes in employees' actual roles and in their job descriptions or a reduction in head count for example through redundancies.

6.5 The guidance should mirror the relevant case law. In particular it should spell out the decision of the Court of Appeal in *Berriman v Delabole Slate Ltd* [1985] ICR 546. This case established that for the ETO defence entailing change in the workforce to apply there must be a change in the job functions or the numbers of workforce as a whole.

6.6 In addition, the guidance needs to clarify the distinction between a dismissal which is 'by reason of a transfer' and one which is 'for a reason connected with the transfer'.

Q17. Are there other areas of TUPE that would benefit from additional guidance/clarification?

6.7 As discussed earlier Unite believes that the duty to consult trade union representatives set out in Regulation 13 should be extended to cover both the transferor organisation and the transferee. To this end the guidance should highlight the benefits of early consultation involving both organisations. This includes increased awareness for the transferee of their future liabilities, increased reassurance for staff affected by transfers and the promotion of good employment relations. The Regulations and accompanying guidance should also stress that it is essential that consultation takes place at an early stage and certainly well in advance of any decisions relating to any measures which will be taken.

7. Implementation of TUPE in other EU Member States

Q18. Do you have experience of the implementation of the Acquired Rights Directive (TUPE) in other EU Member States? If so, are there any problems you have encountered, or conversely are there lessons that the UK could learn, from their implementation of the Directive?

7.1 Unite's understanding is that in many other EU Member States the application of the Acquired Rights Directive provides much better clarity and coverage than it does in the UK.

7.2 The primary reason for this is the existence of sectoral and national collective agreements, in many cases protected by law. This means that employees will automatically continue to receive the same pay and conditions following a transfer as they did before. Employees would also receive the same pay and conditions as existing employees and new recruits in the organisation to which they are transferred.

7.3 The presence of sectoral and national collective agreements dramatically simplify TUPE regulations allowing for fair treatment, the promotion of equality and stability in pay and conditions. They also benefit employers as they create a level playing field, without competition driven by undercutting of pay and employment conditions while helping to facilitate restructuring

by avoiding disputes. The strong economic performance of the German economy should act as an example to the UK.

7.4 Unite believes that strengthening and supporting national agreements where they currently exist would help with this. For example clear rules that stipulate terms and conditions for any outsourced public services under current terms and conditions (e.g. in local government or Agenda for Change).

7.5 Similarly creating legal support for agreements such as in agriculture, the construction and print and media sectors will help provide clarity in those sectors too.

8. TUPE and other areas of employment law

Q19. Have you experienced problems from the interaction of TUPE with other areas of employment law?

8.1 Unite is concerned about the growth of the use of compromise agreements to avoid future claims relating to the failure to inform and consult with trade unions or workplace representatives. These rights pertain to trade union and workplace representatives, not individual employees, therefore it should not be possible for individuals to be coerced to compromise these rights.

Q20. The Government is also calling for evidence on collective redundancy consultation rules. Please identify any issues that you have in terms of how the TUPE Regulations and the rules on collective redundancy consultation fit together. Call for Evidence: Effectiveness of current TUPE regulations 10

8.2 The obligations to inform and consult under TUPE are simple and straightforward. They reflect good practice and are not unduly onerous. The rules are relatively easy to comply with.

8.3 Unite has also responded to the call for evidence regarding Collective Redundancy Consultations. Unite officers report that in the best cases TUPE consultations involve both organisations transferring and receiving

organisations throughout the process. As already set out earlier Unite believes that Regulation 13 needs to be amended to include both transferor and transferee organisations. The extension of these consultation rights will help improve the relationship between union and the transferee organisation before formal redundancy consultation takes place.

9. Other

Q21. Do you have particular concerns around the application of TUPE to different managerial levels of employees within the same organisation? If so, what are these and how would you like to see them addressed, bearing in mind the requirements of the Directive?

9.1 As with professional employees there is no justification for treating managerial staff differently to other employees. Unite believes that any attempt to do this will contravene the Acquired Rights Directive.

Q22. Have developments in case law since 2006 raised issues that mean the 2006 Regulations would benefit from updating?

9.2 In addition to other cases raised earlier, Unite believes that there is currently a lack of clarity in relation to transfers to multiple service providers (*Cf Kimberley Group Housing Ltd v Hanley*).

9.3 This can cause uncertainty for all parties. It would be helpful if the 2006 Regulations could more clearly state the principle established in *Kimberley* and reflecting the list of factors set out for considered by the ECJ in *Botzen v Rotterdamsche Droogdock Maatschappij [2005]*.

9.4 Regulation 13 should also be updated to reflect the decision in *Todd v Strain & Others*. In this case the EAT established two important principle. Firstly it clarified the meaning of the term measures, confirming that purely administrative measure such as the change in the pay date is a measure which must be consulted on. Secondly, it confirmed that the duty to provide information is separate and independent of the duty to consult workplace representatives.

9.5 In *Cable Realisations Ltd v GMB Northern* the EAT concluded that employers may take holidays and closure dates affecting their business into account when assessing the length of time they must allow to fulfil their information and consultation obligations. Regulation 13 and accompanying guidance should be updated to reflect this.

Q23. Are there other areas of the Regulations that would benefit from change/review? Conversely are there areas that it is important to keep?

9.6 Unite believes that the Regulations should be amended to clarify that TUPE provisions apply to share transfers especially in situations where businesses are bought out by private equity firms.

9.7 It is anomalous that certain transactions should attract the protection of TUPE whilst others do not. It is absurd that the devastating consequences of takeovers and mergers for the workers affected (e.g. the Kraft take over of Cadbury's or the take over of Burtons foods) are not covered by the same protections as outsourced jobs. At present there is limited protection for conditions of employment or information and consultation rights for unions to ensure that any changes to contracts of employment are negotiated and agreed.

9.8 In 2007, *Print Factory Ltd v Millam*, the Court of Appeal ruled that TUPE provisions can apply to a share transfer where the purchasing company effectively takes control over the running of the purchased business. This Court of Appeal's decision is likely to have wide ranging implications and as a result TUPE provisions will apply to a substantial proportion of share transfers, including private equity buy-outs. Unite therefore believes that as a minimum the TUPE Regulations should be amended in line with the Court of Appeal decision.

9.9 Similarly Unite further believes that TUPE rules should apply in all circumstances, including to the reorganisation of administrative functions in central and local government.

9.10 The recent decision of the CJEU in the case of *Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca (Case C-108/10)* confirmed that the ARD does apply to some reorganisations between public authorities.

9.11 Unite would therefore support the removal of the Regulation 3(5) exemption for public administrative transfers. Failing this, the Cabinet Office Statement of Practice 2000 should be retained and the Government should exercise its section 38 powers to ensure that TUPE protections apply to all transfers relating to public services.

Q24 Are there any other issues you wish to raise?

9.12 Unite believes that pension provision needs to be improved in TUPE situations. The Pensions Act 2004 requires employers to provide minimum pension entitlements following a transfer, although not pension schemes which mirror the employees' previous entitlements. The introduction of the Fair Deal for pensions in 2004 as part of the Cabinet Office Code on Staff Transfers ensures that public sector staff receive a 'broadly comparable' pension and that previous service would be honoured if they transferred to other parts of the public sector or to the private or voluntary sector. Since 1999 the Local Government Pension Scheme has allowed admitted body status to contractors to ensure their staff preserve pension membership and continuity. The NHS has a similar option which has also worked well. These welcome changes have helped to provide employees with income insecurity and to reduce the risk of needing to rely on means-tested benefits in their retirement. Unite believes that they should be protected and increased.

10. Evidence

10.1 What follows (Appendix) are real accounts of TUPE transfers from Unite officials. Unite would be happy to provide further written or oral evidence on any of the issues covered in this submission.

31/01/2012

This response has been submitted on behalf of Unite the Union by:

Simon Dubbins,

Unite Director of Research

Simon.Dubbins@unitetheunion.org

For further information or clarifications please contact:

James Lazou

Research Officer

James.lazou@unitetheunion.org

020 7611 2504

Unite House,

128 Theobalds Road,

Holborn, London, WC1X 8TN

Cathryn Law

3rd floor Abbey 1

Department for Business, Innovation and Skills

1 Victoria Street

London SW1H 0ET

tupe.callforevidence@bis.gsi.gov.uk

Appendix – Unite experience of TUPE regulations

1. Health service scientific employer

Date: 2011

Region: National

Number of workers involved: Entire workforce 500

What was the reason for the TUPE transfer?

Large health science function has been outsourced into a Government owned company.

At the moment there is only one shareholder, the Government, even though the organisation is run like a private sector organisation.

Did the employer comply with TUPE regs? Yes

Were terms and conditions in the new employer better or worse than those in the old?

Workers are still under the Agenda for Change terms and conditions but there was a reduction on shift allowances due to the transfer. Current staff were also kept in the NHS pension scheme but new starters lost out and have been put into a money purchase scheme (not salary related).

Were terms and conditions harmonised after the transfer? N/A

If staff were transferred out of a national agreement did they keep terms and conditions inline with that national agreement?

Agenda for Change terms and conditions remain and so far there has been no change – this may only be due to the pay freeze from the last two years.

Were any workers dismissed after the transfer? If yes how was this justified?

No

Would it have helped to have been able to negotiate directly with both the current employer and the recipient organisation during the TUPE process?

The Union was able to negotiate with both managements as they were the same management.

Any other comments?

Tupe regs do protect workers collectively.

It is important that there is proper consultation with both parties involves and proper dialogue taking place.

2. Public Health transfer to Local Government

Date of transfer: 2011-2013

Region: National

Number of workers affected: Around 5000 public health workers

Why are they being transferred?

Government reorganisation of the NHS and public health transferring the public health workers out of the NHS and into Local Government.

Consultations: Within the NHS Social Partnership Forum and subgroups there has been a year long discussion involving: all the affected unions, the Department of Health, the Local Government Association and the NHS Employers.

This is due to finish in April 2013 and will produce comprehensive guidance for all Local Authorities on the transfer.

This is being done before any official TUPE regulations are needed.

3. Contract catering and hotels

For migrant workers in these sectors just having the regulation is really important as it provides them with stability and protection despite regular changes of employer.

- i) Contract caterers at a major drink manufacturers head office changed contract. These caterers had originally been in-house employees at a Factory. When this factory was closed the caterers have undergone several TUPE transfers. In all cases organisations have complied with the transfer regulations and terms and conditions as well as union recognition have been retained.

- ii) Food services have been outsourced several times a large investment bank. Unite Officials have been involved several times. In all of these cases Unite has been fully consulted and the new employers have continued terms and conditions as well as union recognition.

- iii) The experience in the Hotel sector is quite different. Many of the largest hotel chains have outsourced their housekeeping functions to agencies. These agencies have then outsourced the workers again. Those secondary contractors have regularly underbid to win the contracts and then used ETO reasons to cut pay and terms and conditions.

4. Facilities management company - cleaning

Date of TUPE: June 2011

Region: Scotland

Number of employees affected: 200+

What was the reason for the TUPE transfer? (e.g. insolvency, outsourcing, sale of business)

The Scottish Government building cleaning contract was outsourced a number of years ago. The Scottish Government have switched preferred contractor.

Did the employer comply with TUPE regs? (If not please explain how)

Initially yes – but then quickly moved to make major changes to working hours and the way they were arranged and also to working practices based on a re-specification of the contract by the government.

Was anything unclear in the regulations while dealing with the TUPE?

No – however, our members were disappointed in the fact that the employer could use an ETO reason to attempt to force changes even early into the contract. This was fought successfully, but it was a turbulent few months.

Were terms and conditions in the new employer better or worse than those in the old?

The new company's terms are less favourable than those that transferred over in the majority of cases. The previous company was not without their problems but they were at least trying to deal with them to eradicate any perceived or otherwise inequality.

Were terms and conditions harmonised after the transfer?

No – Those that transferred over have retained the majority of their terms as were. However, the company are not prepared to make any offer on pay despite Scottish Government highlighting that no worker in the Scottish Government will face a pay freeze if they earn less than £21,500 p.a. and also there was a commitment to pay at least the Scottish Living Wage (which at the time sat at £7.15 p/h).

This had led to a campaign being launched targeting the involvement of the Minister for Procurement and Sustainability (John Swinney) to which we await his response.

If staff were transferred out of a national agreement did they keep terms and conditions inline with that national agreement (e.g. did they receive pay rises inline)?

The Collective Agreement we had with the previous company has been honoured (with the caveat of the problems identified above).

Were any workers dismissed after the transfer? If yes how was this justified? (i.e what were the 'economic, technical or organisational reasons')

Yes – in the supervisory and office grades – reduction from 3 supervisors to 1 and 4 admin to 2. Those that left did so due to them not wishing to remain with the company.

Would it have helped to have been able to negotiate directly with both the current employer and the recipient organisation during the TUPE process? (please describe how)

Definitely YES.

If there could be any improvement to TUPE REGS then certainly, from public to private outsourcing – being able to negotiate with the principle client and the successful bidder would be very useful.

It would be useful to not only agree something with the client prior to the transfer – that is witnessed by the contractor – without having to go through the he said she said hoops of proving the point after the horse has bolted.

5. Service companies

Date of TUPE: End 2012

Region: NEY&H

Number of employees affected: 50

What was the reason for the TUPE transfer? (e.g. insolvency, outsourcing, sale of business)

Outsourcing of operation.

Did the employer comply with TUPE regs? (If not please explain how)

Yes, more or less!

Was anything unclear in the regulations while dealing with the TUPE?

Not more than usual!

Were terms and conditions in the new employer better or worse than those in the old?

Same – minor changes, slightly worse, ie. Vehicle damage policy larger excess.

Were terms and conditions harmonised after the transfer?

No. Company tried but collective grievance put employer off.

If staff were transferred out of a national agreement did they keep terms and conditions inline with that national agreement (e.g. did they receive pay rises inline)? N/A

Were any workers dismissed after the transfer? If yes how was this justified? (i.e. what were the 'economic, technical or organisational reasons') No. But currently in consultation on potential redundancy due to restructure.

Would it have helped to have been able to negotiate directly with both the current employer and the recipient organisation during the TUPE process? (please describe how)

It certainly would as there was lots of ambiguity on the contract once transferred, i.e. unwritten rules and custom and practise. This could have been verified and simplified at the consultation stage.

6. Local authorities

Region: North East, Yorkshire and Humber

What was the reason for the TUPE transfer?

Councils wanted to cut costs by outsourcing - Housing stock maintenance and some building maintenance due to financial problems.

Did the employer comply with TUPE regs?

The receiving company worked well with the Unions and participated with all discussions.

Were terms and conditions in the new employer better or worse than those in the old?

Members transferred from the council across to the company. Maintenance and Craft. Terms and conditions transferred – local agreement of pay have since improved pay in Sheffield.

The company doesn't pay pension contributions on bonus and overtime. BUT members are still in the Local Government Pension scheme because the company has admitted body status.

If staff were transferred out of a national agreement did they keep terms and conditions inline with that national agreement

In general they got a pay rise over and above the red book.

Were any workers dismissed after the transfer? If yes how was this justified?

No

Would it have helped to have been able to negotiate directly with both the current employer and the recipient organisation during the TUPE process? N/A

Any other comments?

The experience of these sorts of TUPE transfers depends on the company receiving the workers. Unite has had different experiences with the various other contractors.

Unite had a bad experience with one contractor that underbid for contracts and then went bust because they couldn't make them pay.

Lastly ETO reasons need to be strengthened – Currently the definition is way too broad! Which is particularly bad if there are planned redundancies.

7. Finance examples

Region: National

8 different TUPE transfers into one company

Number of workers involved: 8000

What was the reason for the TUPE transfer? Outsourcing

Did the employer comply with TUPE regs? yes

Were terms and conditions in the new employer better or worse than those in the old?

Standard terms are notably worse:

- Longer working week
- Less holidays
- inferior redundancy pay
- no bonus arrangements
- Inferior pensions

Were terms and conditions harmonised after the transfer? No

If staff were transferred out of a national agreement did they keep terms and conditions inline with that national agreement No

Were any workers dismissed after the transfer? If yes how was this justified? Various redundancy programmes have taken place including one site closure and the off shoring of work to India

Would it have helped to have been able to negotiate directly with both the current employer and the recipient organisation during the TUPE process? both were involved

Any other comments?

The original plan was to close their very large Reading site down and offshore to India nearly all of the work, we had a big & mainly successful campaign to save the site and jobs. This worked however further down the line (3-4 years later) the company came back under a new CEO and wanted to mass offshore again or find an alternative plan - which was outsourcing. Without the new company and TUPE legislation - would the jobs still be in Reading? I expect not.

Clearly there are problems with the new company and outsourcing generally but without TUPE protection/legislation I believe 1000's of jobs would be lost, there would a melt down in industrial relations and we would see a race the the bottom in terms of pay and T&C's.

8. Engineering companies

Date of TUPE: January 2011

Region: London & Eastern

Number of workers involved: Approx 40

What was the reason for the TUPE transfer? One company going out of business.

Did the employer comply with TUPE regs?

The closing business did mainly comply, but by the time of transfer they had a minimal operation and very poor management and records for their employees.

The receiving company – yes

Was anything unclear in the regulations while dealing with the TUPE?

As always what constitutes ETO was unclear.

Were terms and conditions in the new employer better or worse than those in the old?

In the main comparable with some slighter better terms and conditions with the new company

Were terms and conditions harmonised after the transfer?

Some of the non contractual aspects were brought in line with the new employer.

If staff were transferred out of a national agreement did they keep terms and conditions inline with that national agreement N/A

Were any workers dismissed after the transfer? If yes how was this justified? No.

Would it have helped to have been able to negotiate directly with both the current employer and the recipient organisation during the TUPE process? I was able to negotiate with both parties.

It was immensely helpful for all concerned for there to be negotiations and consultation with both employers.

Any other comments?

TUPE transfers are often a difficult set of negotiations. Members are often reluctant to accept the situation. It is almost impossible to convince the original employer that there is no need for a transfer. The original employer often starts to lose interest as they have no gain going forward and they simply comply with the minimums required, if that.

9. Distribution company

Date of TUPE: Sunday 6 December 2011

Region: East Midlands

Number of workers involved: 13

What was the reason for the TUPE transfer?

Loss of tender of supermarket contract

Did the employer comply with TUPE regs?

The original company did but the new one claimed TUPE did not apply

Was anything unclear in the regulations while dealing with the TUPE?

TUPE Regulations are weak in that it does not allow the union to demand a meeting with the successful bidder other than the measures letter which is of limited help in my experience.

Were terms and conditions in the new employer better or worse than those in the old?

TUPE was rejected by the new company therefore our members had to apply for jobs which did not have the same terms and conditions which were enjoyed previously.

Were terms and conditions harmonised after the transfer? N/A

If staff were transferred out of a national agreement did they keep terms and conditions inline with that national agreement?

N/A

Were any workers dismissed after the transfer? If yes how was this justified? None of our members have had the opportunity to transfer to the new company - This is now subject to potential legal proceedings.

Would it have helped to have been able to negotiate directly with both the current employer and the recipient organisation during the TUPE process?

Yes - as the Union would have been in a much better position to ensure either the current or the recipient organisation maintained their obligations to staff.

Any other comments?

Whilst TUPE Regulation offer some protection. The decision as to whether TUPE applies or not is for the Employment Tribunal and given the length of time it take for the Tribunal hearing our members are left frustrated.

10. NHSTrusts

Date of TUPE: 1st April 2011

Region: North East, Yorkshire and the Humber

Number of workers involved: 400

What was the reason for the TUPE transfer? As a result of the governments Transforming Community Services agenda those NHS staff in 'provider' organisations had to formally divest from it's 'provider' arm to either become a Community Foundation Trust, transfer to an existing Foundation Trust, or become a social enterprise. This organisation transferred, in the main, most of it's provider staff to 2 Foundation Trusts.

Did the employer comply with TUPE regs? Yes

Was anything unclear in the regulations while dealing with the TUPE?

No

Were terms and conditions in the new employer better or worse than those in the old? The same

Were terms and conditions harmonised after the transfer?

as it was

If staff were transferred out of a national agreement did they keep terms and conditions inline with that national agreement (e.g. did they receive pay rises inline)? N/A

Were any workers dismissed after the transfer? If yes how was this justified? Not as a result of the transfer.

Would it have helped to have been able to negotiate directly with both the current employer and the recipient organisation during the TUPE process?

It may have helped. As part of the consultation one organisation had sent details of the jobs it wanted to have upon transfer. This caused consternation as people believed they would automatically face redundancy. Through joint working with other unions, a message was communicated to the transferring Trust through the partnership meeting that this would not be acceptable as it was expected that all staff would transfer. Should they wish to review their services at a later date then that was within their gift. Had these kinds of discussions not taken place it is possible that there could have been a number of job losses.

11. Banking group

Date of TUPE: Numerous

Region: National

Number of workers involved: The two examples here of 250 workers moving to one company and 1,300 to another.

What was the reason for the TUPE transfer? Sale of business, ordered by the European Commission

Did the employer comply with TUPE regs? Yes

Was anything unclear in the regulations while dealing with the TUPE?
No

Were terms and conditions in the new employer better or worse than those in the old? Broadly similar, some benefits were unable to be replicated in the new employer given that the original organisation is a Financial Institution. Good deals struck in both transfers - although issues with pension and no longer being members of Defined Benefit scheme. However the pension terms negotiated were well in excess of the legal minimum and highly competitive.

Were terms and conditions harmonised after the transfer? No, some terms have been retained, some of the new company terms were adopted on transfer as these were superior and some heritage terms have been protected for a set period i.e. 3 years or indefinitely.

If staff were transferred out of a national agreement did they keep terms and conditions inline with that national agreement (e.g. did they receive pay rises inline)? n/a

Were any workers dismissed after the transfer? If yes how was this justified? No, both organisations have grown in size and continue to do so, Unite remains recognised in both.

Would it have helped to have been able to negotiate directly with both the current employer and the recipient organisation during the TUPE process? This happened in both TUPE transfers and all TUPE transfers conducted in the original company.

Any other comments? The two examples above are the two largest to date - however there have been other smaller TUPE transfers. There will be a very large TUPE transfer planned next year covering 5,000 staff, which again is as a result of the European Commission.

Without a doubt in some cases this outsourcing activity has saved jobs which may otherwise have been made redundant.

12. Lift and Escalator Contract on the underground

Date of transfer: March 2011

Background: Prior to March 2011 the lifts and escalators were serviced and maintained by more than one company, across 12 separate contracts. London Underground Ltd [LUL] then decided that the new contract post March 2011 would only be contained within 2 contracts which would be placed out to competitive tender.

Whilst two companies Terms and Conditions are determined through collective bargaining with Unite and the parent company of the third also has a recognition agreement with Unite. Engineers at this latter company [some who were members] were on personal contracts and were at the time not covered by a collective recognition agreement.

Issue: To everyone's amazement the smallest of the tendering Companies won both contracts which meant that all other engineers who were solely employed on LUL work, would be TUPE'd across along with the two separate Recognition Agreements and Collective Bargaining Agreements, which overnight more than doubled the size of their engineer workforce.

Outcome: Using the TUPE regulations Unite was able to enter into a formal dialogue with the new company to outline that our members were covered by these agreements and wanted this to continue. After various meetings [including raising the issue with the parent company] it has been agreed to commence a formal dialogue to reach a new Recognition and Procedural Agreement with full Collective Bargaining for all Engineers, both new and legacy.

The 2006 TUPE Regulations therefore preserved our members Terms and Conditions and also directly saved jobs as any intention of putting any jobs at risk of redundancy would require a formal dialogue with Unite the recognised union, rather than direct with the newly engaged employees.

Conclusion: If the 2006 TUPE Regulations are amended to preclude Recognition and Collective Bargaining Agreements any Company that is successful in winning a Service and Maintenance contract could force personal contracts onto all new employees and in the process effectively de-recognise the Union; and until any statutory recognition process was concluded [which could be several Months after the transfer], workers would be denied their previous statutory right to be represented by a Union of their choice.

13. Education publishing companies

Date of TUPE: 2006

Region: SE Region

Number of employees affected: 600 approx

What was the reason for the TUPE transfer? (e.g. insolvency, outsourcing, sale of business)

Sale of the business

Did the employer comply with TUPE regs? (If not please explain how)

Yes but via the staff council who were unprepared and unaware that they had been elected for that purpose. They had no external expert or independent advice.

Was anything unclear in the regulations while dealing with the TUPE?

Yes the union was unrecognised and argued that as the staff council were unaware of this role in their constitution the company should have called for employee elections and not nominated the staff council.

Were terms and conditions in the new employer better or worse than those in the old?

Very similar – including policies and procedures.

Were terms and conditions harmonised after the transfer?

Yes, through union negotiation as the new company extended the Unite collective agreement to the workforce.

If staff were transferred out of a national agreement did they keep terms and conditions inline with that national agreement (e.g. did they receive pay rises inline)? N/A

Were any workers dismissed after the transfer? If yes how was this justified? (i.e what were the 'economic, technical or organisational reasons') No

Would it have helped to have been able to negotiate directly with both the current employer and the recipient organisation during the TUPE process? (please describe how)

Yes – there was no transparency and had the relationship with Unite not been so good employees would have potentially lost out.

14. Facilities management

Date of TUPE: 2006

Region: London & Eastern

What was the reason for the TUPE transfer? (e.g. insolvency, outsourcing, sale of business)

loss of BBC account

Did the employer comply with TUPE regs? (If not please explain how)

No the first company was not transparent as to what information was passed to the new. Result in constant issues with the new company where they claim they were not told about employees' terms and conditions of employment

Was anything unclear in the regulations while dealing with the TUPE?

No

Were terms and conditions in the new employer better or worse than those in the old? Some better some worse

Were terms and conditions harmonised after the transfer?

A few had certain terms and conditions of employment slightly improved

If staff were transferred out of a national agreement did they keep terms and conditions inline with that national agreement (e.g. did they receive pay rises inline)? N/A

Were any workers dismissed after the transfer? If yes how was this justified? (i.e what were the 'economic, technical or organisational reasons') No.

Would it have helped to have been able to negotiate directly with both the current employer and the recipient organisation during the TUPE process? Yes.

15. IT companies

Date of TUPE: 2007

Region: London & Eastern

Number of employees affected: c. 20

What was the reason for the TUPE transfer? (e.g. insolvency, outsourcing, sale of business) Loss of business

Did the employer comply with TUPE regs? (If not please explain how)

Partially in that they met the union and employees and answered some questions but transferee claimed immediately after transfer no knowledge of various terms and conditions of employment. Union derecognised on transfer as absorbed into larger workforce.

Was anything unclear in the regulations while dealing with the TUPE?

No

Were terms and conditions in the new employer better or worse than those in the old? Worse

Were terms and conditions harmonised after the transfer?

Attempts were made but resisted. However a member had to take legal action through the union to enforce his contractual redundancy rights. Once he was successful job security improved.

If staff were transferred out of a national agreement did they keep terms and conditions inline with that national agreement (e.g. did they receive pay rises inline)? N/A

Were any workers dismissed after the transfer? If yes how was this justified? (i.e what were the 'economic, technical or organisational reasons') Reorganisation with duplication in other parts of main workforce.

Would it have helped to have been able to negotiate directly with both the current employer and the recipient organisation during the TUPE process? (please describe how)

Yes as the receiving company claimed that the information passed over was negligible. This was surprising as much of the information was held by employees and had been discussed with the transferor.

16.IT and Computing companies

Region: London & Eastern

Number of employees affected: 60

What was the reason for the TUPE transfer? (e.g. insolvency, outsourcing, sale of business) Outsourcing

Did the employer comply with TUPE regs? (If not please explain how)
Yes

Was anything unclear in the regulations while dealing with the TUPE?
No

Were terms and conditions in the new employer better or worse than those in the old? Worse

Were terms and conditions harmonised after the transfer? No. But through negotiations changes have occurred.

If staff were transferred out of a national agreement did they keep terms and conditions inline with that national agreement (e.g. did they receive pay rises inline)? N/A

Were any workers dismissed after the transfer? If yes how was this justified? (i.e what were the 'economic, technical or organisational reasons') No but workers have been moved from the account.

Would it have helped to have been able to negotiate directly with both the current employer and the recipient organisation during the TUPE process? (please describe how) Both employers did this.

17. Cleaning companies

Date of transfers: October 2011- December 2011

Region: London

Number of workers involved: 600 see above

What was the reason for the TUPE transfer? Cleaning contracts regularly change at very short notice – especially in the City of London

Did the employer comply with TUPE regs? In Unite's experience the companies always comply with TUPE regulations. This is because of a strong union organisation and good consultation agreements.

Were terms and conditions in the new employer better or worse than those in the old?

Terms and conditions were transferred in all these cases.

Were terms and conditions harmonised after the transfer?

These were the same T&Cs as before. Regular TUPE – Never harmonised down on T&C. In general negotiated in good faith.

If staff were transferred out of a national agreement did they keep terms and conditions inline with that national agreement

N/A

Were any workers dismissed after the transfer? If yes how was this justified? In the ISS case there were some redundancies.

Would it have helped to have been able to negotiate directly with both the current employer and the recipient organisation during the TUPE process? In these cases both employers are usually present.

Any other comments

These members are primarily migrant workers (98%), mostly 78% black, 20 % latinos. TUPE provides them with stability as they regularly change employers but their terms and conditions stay the same.