

NORTH LINCOLNSHIRE COUNCIL

**BUSINESS TRANSFORMATION
CABINET MEMBER**

TUPE PROTOCOL

1. OBJECT AND KEY POINTS IN THIS REPORT

- 1.1 To outline and seek approval for a revised TUPE protocol as part of the council's Human Resources Manual.

2. BACKGROUND INFORMATION

- 2.1 TUPE is an acronym for the Transfer of Undertaking (Protection of Employment) Regulations 2006. This is the main piece of legislation governing employees affected by the transfer of an undertaking, or part of one, to another organisation.
- 2.2 The council has an existing TUPE protocol dating from 2009, introduced largely in response to the academisation agenda in education, for the purpose of supporting the TUPE transfer of employees based in council-maintained schools to academies.
- 2.3 Since then, the council has been party to many TUPE transfers, both into and out of the organisation, involving a variety of different sectors in addition to education.
- 2.4 In recognition of the increased scope and complexity of the TUPE transfers the council is involved in, a revised TUPE protocol has been drafted to guide managers and HR practitioners in the application of TUPE principles for transfers of employees both in and out of the council.

3. OPTIONS FOR CONSIDERATION

- 3.1 Approve the revised TUPE protocol.
- 3.2 Recommend further changes to the draft TUPE protocol.

3.3 Continue to use the existing TUPE protocol.

4. ANALYSIS OF OPTIONS

4.1 Approving the revised TUPE protocol will offer greater support to managers and HR practitioners involved in TUPE transfers and ensure the council's compliance with legislative requirements. It will also ensure appropriate consultation, engagement and protection occurs for those employees which are the subject of a transfer.

4.2 Recommending further changes to the draft protocol or continuing to use the existing TUPE protocol may mean that the legislative requirements of TUPE are not fully incorporated and place the council at risk of legal challenge. It may also mean that transfers involving sectors other than education, and transfers of employees into to the council, are not fully provided for and may leave managers and affected employees without the necessary support and guidance for a smooth transfer to take place.

5. RESOURCE IMPLICATIONS (FINANCIAL, STAFFING, PROPERTY, IT)

5.1 There are no additional resource implications.

6. OUTCOMES OF INTEGRATED IMPACT ASSESSMENT (IF APPLICABLE)

6.1 An integrated impact assessment has considered the diversity implications of these changes and there are no adverse implications.

7. OUTCOMES OF CONSULTATION AND CONFLICTS OF INTEREST DECLARED

7.1 The trade unions have been consulted on this protocol and their feedback has been positive.

8. RECOMMENDATIONS

8.1 That the revised TUPE protocol be approved.

DIRECTOR: BUSINESS DEVELOPMENT

Civic Centre
Ashby Road
SCUNTHORPE
North Lincolnshire
DN16 1AB

Author: Louisa Rae
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1.0 Introduction

- 1.1 TUPE is an acronym for the Transfer of Undertaking (Protection of Employment) Regulations 2006. This is the main piece of legislation governing the transfer of an undertaking, or part of one, to another.
- 1.2 There are two parties to the transfer process:
- Transferor: the current (outgoing) employer;
 - transferee: the new (receiving) employer.
- 1.3 The purpose of TUPE is to protect employees if the business or service in which they are employed changes hands. This includes where services are outsourced, insourced or assigned to a new contractor. Its effect is to move employees and any liabilities from the old employer to the new employer.
- 1.4 Under TUPE, the new employer takes over employees' contracts of employment including:
- All previous terms and conditions;
 - any failures of the old employer to observe employees' rights;
 - holiday entitlement;
 - period of continuous employment;
 - any collective agreements.
- 1.5 Whilst reflecting suggested good practice and legal obligations, this document does not have contractual force or represent a definitive statement of the law. Legal or other specialist advice should be sought as early as possible, particularly to check on any future liability.

Note 1: TUPE transfers can be lengthy and complex in nature. Early planning is strongly advised.

- 1.6 This protocol is intended to be used as operational guidance for managers and HR practitioners on key employment issues to be addressed in a TUPE situation including:
- Consultation requirements;
 - information to be exchanged as part of the process;

- employee rights for those affected by a ‘transfer’;
- the transfer process.

1.7 Where the council is intending to outsource a service which affects employees who are members of the Local Government Pension Scheme (LGPS), an appropriate timescale (at least six months) should be built in to the transfer process in case the new employer intends to acquire Admitted Body Status. Further information and guidance is available in the ‘Pension Obligations for Outsourcing and Employee Transfers’ document, which can be accessed at www.erpf.eastriding.gov.uk/employers.

1.8 In addition to complying with the TUPE Regulations, the council will:

- Encourage the full involvement of employees;
- ensure that employees affected by the change are provided with appropriate advice and assistance to enable them to make informed decisions;
- ensure that the fullest possible consultation and negotiation with trade unions takes place;
- ensure effective communication processes are established and maintained.

2.0 When does TUPE apply?

2.1 The provisions of TUPE apply to a ‘relevant transfer’ which may occur in a wide range of situations. There are two broad categories of transfer. Some transfers will meet both definitions:

- **Business transfers**

There is a transfer of an economic entity that retains its identity. An example of this would be the transfer of staff previously employed by the council in a maintained school to an academy.

- **Service provision changes**

- A service is outsourced;
- a service is contracted in/insourced;

- where a contract comes up for renewal and is awarded again to the same contractor or a new contractor.

3.0 Who does TUPE apply to?

3.1 TUPE applies to those employees who are:

- Employed by the transferor immediately prior to the transfer; and
- assigned to the group of employees who carry out the service activities, which are subject to the relevant transfer, either exclusively or for the majority of their role.

3.2 All affected employees will be transferred at the point of transfer to the new employer (the transferee).

3.3 While each case will be examined on its own merits, generally speaking, employees on a fixed-term or temporary contract will typically not transfer unless they have been employed in the transferring undertaking for one year or more.

4.0 Procedure

4.1 It is the role of the council officer with overall responsibility for the service involved to ensure that the quality of service provision, the interests of customers, and the welfare of employees are maintained throughout the TUPE process.

4.2 The responsible officer, in consultation with HR as appropriate, will:

- Ensure that organisations tendering for a contract are aware of any TUPE implications;
- arrange consultation with employees and trade unions in a timely and meaningful manner;
- ensure all necessary TUPE information is accurate and released at appropriate times;

- 4.3 Whenever a change, which could potentially lead to the transfer of employees to external providers, is being considered by the council/school governing body this will be subject to consultation at the earliest opportunity. Consultation will take place with the relevant trade unions and employees in accordance with the council's Review Protocol F.1.
- 4.4 If any of the affected staff are members of the LGPS, the council will inform the East Riding Pension Fund of the potential outsourcing at the tender stage.
- 4.5 A reasonable period of consultation should be in line with statutory redundancy consultation requirements, i.e. at least 30 days. If the transfer would affect 100 or more employees, the consultation should be at least 45 days.
- 4.6 Affected employees will have a right of appeal against their selection for transfer. Any such appeal will be referred to the relevant Director and the Strategic HR Lead to resolve.
- 4.7 The date of transfer will be such that it allows for sufficient time for meaningful consultation to take place, and for any contractual notice to be given.
- 4.8 Wherever possible the council undertakes to seek redeployment opportunities for those employees who do not wish to transfer, up to the point of transfer. This will be subject to agreement with the new contractor once the contract has been awarded. Employees who wish to seek redeployment will be placed on the redeployment register as Priority 4 in accordance with 1.11 of the council's Redeployment procedure (A.9).
- 4.9 If redeployment has not been successful and the employee still objects to transfer, it is important that discussions are held with the employee and their reasons explored. As long as their reasons are not due to a substantial and detrimental change to working conditions as a result of the transfer, the objection terminates the contract of employment. The employee is considered to have resigned and therefore would not be entitled to a redundancy payment.
- 4.10 A consultation document should be produced in liaison with the transferee/transferor. This should include:
- The fact of the transfer;
 - when the transfer is to take place;

- the reasons for the transfer;
- The legal, economic and social implications of the transfer for the affected employees;
- the employee's rights in a transfer situation;
- if any 'measures' will be taken, what these will be (or if there will be none, that fact)
- the proposed timetable for meetings, decisions and transfer;
- processes for communication and raising concerns.

Note 2: A 'measure' is a term which refers to any 'action, step or arrangement' that the transferee intends to make, which may affect the terms and conditions of employees.

4.11 The consultation document should be reviewed, updated and communicated as necessary throughout the process.

5.0 Disclosure of information and data protection

Stage One – Procurement

5.1 In order that organisations have accurate information upon which to formulate a tender, the council should obtain and disclose information about those employees working within the affected service.

5.2 At Stage One the disclosure of information is not Employee Liability Information (see 5.6 onwards below), nor is it linked to TUPE: it is for procurement purposes only.

5.3 The disclosure of information at this stage must only occur if there is a contractual clause in the tender document requiring its disclosure.

5.4 The council will request any information it considers necessary to enable an assessment as to whether any 'measures' will be taken. This will be clearly stated in the tender document.

5.5 If employee information is requested, the disclosure of any personal information must only occur with the consent of the employee. If consent is

not obtained, this could result in a breach of data protection legislation. 'Personal information' means any information by which an individual may be identified. Alternatively, any personal information should be anonymised to prevent identification.

Stage Two – Employee Liability Information

- 5.6 Regulation 11 of TUPE expressly requires the current employer to provide Employee Liability Information to a transferee (e.g. to a new contractor) at least 28 days before the date of transfer. This is a legal requirement.
- 5.7 The disclosure of Employee Liability Information is permitted under the Data Protection Act as it is information required to be disclosed by law.
- 5.8 The checklist at Appendix 1 gives a list of the information that must be disclosed.
- 5.9 Employee Liability Information is normally disclosed when it has been confirmed the transfer will go ahead, and the transferee named.

Stage Three – The Transfer

- 5.10 Before transferring personnel files to the new employer, the files should be checked for any irrelevant data and any such data should be removed and securely destroyed. For example, records of expired disciplinary warnings and information relating to other employees.

6.0 Pensions

- 6.1 The council has a duty to ensure that any new service contractor complies with the Best Value Staff Transfers (Pensions) Direction 2007 and that transferring staff are either given access to their existing pension scheme or a 'broadly comparable' pension fund.
- 6.2 If the new employer offers its own scheme, the council will require a certificate from the Government's Actuary's Department stating that the benefits are broadly comparable to those which the employees would have received under their existing scheme. Specific guidance on the implications for each scheme can be sought from the council's HR Systems and Pensions Adviser.

- 6.3 All employees transferring into the council will become a member of the relevant pension scheme unless they actively decide to opt out.
- 6.4 Where the council is outsourcing a service, it will inform the relevant pension scheme(s) of the award of any contract including the name of the successful organisation, contract details and the details of any transferring employees. See para. 1.7 for further information relating to the LGPS.

7.0 North Lincolnshire Council as the outgoing organisation

- 7.1 The council will ensure that the new employer will take over the contracts of employment of all the employees who are employed in the undertaking at the time of the transfer, on the same terms and conditions as they were employed by the council.
- 7.2 The council will ensure that employees transferred to a new employer will have access to the same pension scheme, a broadly comparable one, or better than they had access to prior to the transfer.
- 7.3 The council will ensure that the new employer takes over all of the rights, powers, duties and liabilities in respect of employees transferring to it.
- 7.4 The council will ensure that any new employer takes over any of the council's collective agreements, including recognition agreements, applicable to employees transferring.
- 7.5 The council will ensure that any new employer makes information available to employees and trade unions and consults fully on matters related to the transfer.
- 7.6 The council accepts that employees have the right to object to a transfer under TUPE and so will not transfer. In such circumstances, their employment will come to an end at the date of transfer and they will be treated as having resigned from the council, rather than dismissed.
- 7.7 The council will ensure that all information required by a future employer to enable it to continue to pay and manage employees transferred from the council, under TUPE, and carry out the work required, is provided. The council will therefore complete any due diligence questionnaire as requested by the new employer, in addition to the statutory information required by the TUPE regulations.

7.8 The council will supply the new employer with details of any agency workers engaged in the service which is transferring and the type of work they are carrying out.

8.0 North Lincolnshire Council as the receiving organisation

8.1 With assistance from HR as appropriate, a nominated manager will need to liaise with the transferring organisation and attend any consultation meetings as agreed with the transferor.

8.2 The nominated manager will also need to ensure that appropriate information is supplied to the council in a timely manner. This will ensure that the terms and conditions of the staff can be continued after the transfer.

8.3 Appendix 1 should be used as guidance as to the information that legally must be received as part of the transfer and information that it is desirable to receive.

8.4 If the council needs to make changes to any of the existing terms and conditions of the transferring employees, this will be included within the consultation documentation. These changes must be justifiable for economic, technical or organisational reasons.

8.5 The transferee takes over the liability for all statutory rights, claims and liabilities arising from the contract of employment, except any criminal liabilities.

8.6 The council will therefore require that a 'due diligence' questionnaire be completed in relation to employees transferring. If any issues arise from a due diligence exercise, specific warranties may be requested to protect the council as the transferee against any future legal action that may be brought by a transferring employee. Legal advice should be sought in these circumstances.

Pre-employment checks

Right to Work in the UK

8.7 Whilst TUPE and the Immigration, Asylum and Nationality Act 2006 are silent on the subject of the obligations for transferees, guidance from the UK Border Agency gives employers who acquire employees under TUPE a grace period of 28 days to establish their right to work in the UK.

- 8.8 If it is not clear from the due diligence information supplied by the transferor, that an employee is eligible to work in the UK, the council will carry out the check and request that the employee provides appropriate evidence to support this.

Medical checks

- 8.9 As the role that a transferring employee will be undertaking for the council should be fundamentally identical to their role with the outgoing employer, there should be no requirement for the council to undertake a medical clearance.
- 8.10 If the transfer involves a change to working environment that may impact upon an employee's health, the council reserves the right to seek occupational health advice in accordance with the Attendance Management policy.

Disclosure and Barring Service

- 8.11 If employees are transferring into the council to a role which is subject to a check from the Disclosure and Barring Service, evidence of an existing check should be obtained from the outgoing employer.
- 8.12 If there is no evidence available that an appropriate check has been undertaken, or if it has but it was undertaken outside locally agreed re-check timescales, the council will request that the employee undergo a new check.

Transfer Out

NLC Section:

Manager:

HR Lead:

Transferee:

Prior to the Transfer

| Initial Meeting with Transferee | |
|--|-------------|
| Action | Date |
| Arrange meeting with company/organisation director | |
| Send anonymised establishment list of employees prior to the meeting | |
| Discuss proposed date of transfer* | |
| Prepare consultation document | |
| Agree dates for consultation meetings | |
| Agree processes for communications and raising concerns | |
| Discuss any issues of potential liability (tribunal/civil cases) | |
| Discuss any possible commercial opportunities for North Lincolnshire Council | |
| <i>*If the transfer is likely to involve an application for the transferee to have 'Admitted Body Status' with the LGPS, this process may take up to 12 months.</i> | |
| Pension Arrangements | |
| Action | Date |
| Does the transferee have a 'broadly comparable' scheme in place? or If Admitted Body status is required, notify East Riding Pension Fund (ERPF) of potential transfer | |
| Issue ERPF document: ' Pension Obligations for Outsourcing and Employee Transfers ' to transferee | |
| Run pension data report of affected employees and send to payroll for validation | |
| Send validated report (see above) to ERPF for data cleansing of records | |
| Contact Finance Partners via TOPdesk to request instruction to pension actuary | |
| Actuary report with revised contribution rate given to transferee <i>(a fee will be payable to the actuary for this service of approximately £2500-£3000)</i> | |
| Contact Legal Services regarding any continued liability for the council | |
| Legal/Finance to determine if a Risk Share agreement is required and/or a financial bond from the transferee | |

| Consultation | |
|--|------|
| Action | Date |
| Invite trade union representatives to initial consultation meeting | |
| Send trade union representatives a report showing affected staff | |
| Invite affected staff to initial consultation meeting (include any staff absent through sickness, family leave, career break etc.) | |
| Prepare TUPE presentation | |
| Deliver TUPE presentation | |
| Send letter to affected employees confirming the transfer and information sharing requirements | |
| Arrange further consultation meetings as required | |
| Send letter to any employee not wishing to transfer confirming contract end date (by reason of resignation) | |

The Transfer

*Note: The below actions should be completed at least **28 days** prior to the date of transfer.*

| Employee Information | |
|---|------|
| Action | Date |
| Provide Employee Liability Information to transferee (see Appendix 1) | |
| Remove any unnecessary data from personnel files. Securely transfer files to the new employer | |
| Close employee records/post records on HR/payroll database | |
| Pension Arrangements | |
| Action | Date |
| Send a copy of the signed transfer agreement to EPRF | |
| Complete pension scheme leaver documents | |

Transfer In

NLC Section:

Manager:

HR Lead:

Transferor:

Prior to the Transfer

| Meeting with Transferor and Consultation | |
|---|-------------|
| Action | Date |
| Arrange meeting with company/organisation director | |
| Request establishment list of employees prior to the meeting | |
| Confirm proposed date of transfer | |
| Agree dates for consultation meetings | |
| Agree processes for communications and raising concerns | |
| Request full disclosure of due diligence information as part of the transfer | |
| Prepare consultation document | |
| Discuss any issues of potential liability (tribunal/civil cases) | |
| Liaise with legal services regarding any indemnity warranties | |
| Write to employees regarding any 'measures' that will be taken after transfer | |

The Transfer

| Employee Information | |
|---|-------------|
| Action | Date |
| Request all employment liability and due diligence information from transferee (see Appendix 1) <i>This must be obtained no later than one month prior to transfer</i> | |
| Prepare revised organisational structure showing transferring posts | |
| Set transferring posts up on HR database | |
| Set employees up on HR database | |
| Notify payroll of transferring employees | |
| Write to transferring employees to welcome them. Include LGPS information. | |
| Issue new starter information/forms if required | |
| New managers to prepare for the induction process | |
| Validate core employment checks and undertake any outstanding checks (e.g. DBS) | |
| Pension Arrangements | |
| Action | Date |
| Payroll will contractually enrol the transferring employees into the LGPS | |

NLC Section:

Manager:

HR Lead:

Transferring organisation:

This checklist sets out the information which an employer provides/receives under the TUPE regulations. This should be used as a template for any employee reports/information exchanged as part of the transfer.

| EMPLOYEE DETAILS | | | |
|--|---|---|---|
| Employee Liability Information (Mandatory) | ✓ | Due Diligence Information (Desirable) | ✓ |
| Name of employee | | Address of the employee | |
| Date of continuous service | | National Insurance number | |
| Date of birth | | Gender | |
| Job title | | Employment status (employee/worker) | |
| Job description | | Pre-employment checks | |
| Type of contract (e.g. permanent/fixed term) | | | |
| End of contract date if fixed term | | | |
| Place of work | | | |
| Any mobility requirements/clauses | | | |
| Details of terms and conditions of employment required by the written statement of particulars | | | |
| PAY DETAILS | | | |
| Employee Liability Information | ✓ | Due Diligence Information | ✓ |
| Salary/hourly rate of pay | | Pay day/date | |
| Pay interval (e.g. weekly/monthly) | | Pay method | |
| Details of holiday pay | | Proposed salary increases/pay awards | |
| Details of sick pay arrangements | | Salary band details | |
| | | Details of overtime rates, | |
| | | Bonus/commission entitlements | |
| | | Authorised deductions from pay | |
| | | Statutory/contractual maternity, paternity, adoption, parental, shared parental pay | |
| | | Statutory/contractual redundancy pay | |
| | | Travel expenses rules/rates | |

| WORKING TIME | | | |
|---|----------|--|----------|
| Employee Liability Information (Mandatory) | ✓ | Due Diligence Information (Desirable) | ✓ |
| Normal hours of work | | Full time hours of work | |
| Any specific terms relating to hours of work (e.g. shift work, 48-hour opt out) | | Working pattern (days/hours/rota) | |
| Annual leave/bank holiday entitlement | | Flexible working arrangements | |
| Annual leave taken/outstanding | | Employees on/due to take: maternity, adoption, parental, shared parental leave | |
| Annual leave carry over arrangements | | Reasonable adjustments under the Equality Act | |
| | | Employees who have been absent through sickness for over two weeks | |
| | | Holiday year dates (from/to) | |
| BENEFIT ENTITLEMENTS | | | |
| Employee Liability Information | ✓ | Due Diligence Information | ✓ |
| Pension scheme entitlement and membership | | Private healthcare provisions | |
| Employee and employer contributions paid over the past three years | | Early retirement provisions | |
| | | Life insurance cover | |
| | | Company car entitlements/scheme rules | |
| | | Any other discretionary benefits/ payments/salary sacrifice schemes (specify) | |
| | | Employee loans (e.g. travel season tickets) and repayment details | |
| CONTRACTUAL REQUIREMENTS | | | |
| Employee Liability Information | ✓ | Due Diligence Information | ✓ |
| Notice periods (employee and employer) | | Restrictive covenants in place | |
| Collective agreements in place | | Mobility clauses | |
| Details of any requirement to work abroad | | Orally agreed terms and conditions | |
| | | Lay-off provisions | |
| EMPLOYEE RELATIONS | | | |
| Employee Liability Information | ✓ | Due Diligence Information | ✓ |
| Disciplinary action taken in the last two years | | All employment policies including staff handbooks | |
| Grievances raised in the last two years | | Trade union representatives | |
| Legal actions taken in the last two years | | Trade union membership | |
| Tribunal/civil claims which the outgoing employer reasonably believes an employee may bring | | | |