

STAFF TRANSFERS IN THE PUBLIC SECTOR : Guidance 08

Statement of Practice

Cabinet Office, January 2000

Guiding Principles

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

Introduction

1. In order to meet these guiding principles, the Government believes that there must be a clear and consistent policy for the treatment of staff, founded upon the provisions of the Transfer of Undertaking (Protection of Employment) Regulations 1981 (as amended) (TUPE). This Statement of Practice sets out the framework that the Government expects all public sector organisations to work within to achieve this aim (see paragraph 6 for the coverage of this statement).
2. TUPE implements the 1977 European Council Acquired Rights Directive. In broad terms, TUPE protects employees' terms and conditions (except occupational pension arrangements) when the business in which they work is transferred from one employer to another. Employment with the new employer is treated as continuous from the date of the employee's start with the first employer. Terms and conditions cannot be changed where the operative reason for the change is the transfer, although changes for other reasons may be negotiated.
3. The Government takes a positive attitude towards TUPE, regarding it as an important aspect of employment rights legislation with the potential to promote a co-operative, partnership approach towards business restructuring and change in the public sector. It has, however, acknowledged that TUPE is

less than satisfactory in its current form and, following amendments to the Acquired Rights Directive agreed in June 1998, will be shortly consulting on proposals for revising it.

4. The Government's strategy in revising this legislation is based on the principle that it must be made to work effectively for all those whose interests depend upon it. This mirrors the approach that the Government is adopting in deciding policy on employment relations issues generally.
5. In the area of Public Private Partnership and change in the public sector, the consultations that the Government has undertaken and the representations which have been made have shown a strong consensus between private sector employers, the voluntary sector, employee representatives and public sector organisations for the application of TUPE to all general situations where a service or function is contracted out, then retendered, brought back into the public sector, transferred within the public sector, or restructured and organised in a new way in a different part of the public sector. It is accepted that there will be some genuinely exceptional circumstances where TUPE will not apply but attempts to orchestrate a non-TUPE situation in other circumstances should not be tolerated. The policy in this Statement of Practice is therefore based on the following principles:
 - contracting-out exercises with the private sector and voluntary organisations and transfers between different parts of the public sector, will be conducted on the basis that staff will transfer and TUPE should apply, unless there are genuinely exceptional reasons not to do so;
 - this includes second and subsequent round contracts that result in a new contractor and where a function is brought back into a public sector organisation where, in both cases, when the contract was first awarded, staff transferred from the public sector;
 - in circumstances where TUPE does not apply in strict legal terms to certain types of transfer between different parts of the public sector, the principles of TUPE should be followed (where possible using legislation to effect the transfer) and the staff involved should be treated no less favourably than had the Regulations applied; and
 - there should be appropriate arrangements to protect occupational pensions, redundancy and severance terms of staff in all these types of transfer.

Coverage

1. This Statement of Practice sets out a framework to be followed by public sector organisations to implement the Government's policy on the treatment of staff transfers where the public sector is the employer when contracting out or the client in a subsequent retendering situation. It applies directly to central government departments and agencies and to the NHS. The Government expects other public sector organisations to follow this Statement of Practice. Local government is subject to some different considerations, particularly the current restrictions in legislation contained in Parts I and II of the Local Government Act 1988. However, abolition of CCT from January 2000 and proposals to modify Section 17 of the 1988 Act, as part of the introduction of Best Value, will remove, in part, obstacles to local authorities following this Statement of Practice. However, in doing so, they must have regard to the

need to comply with their best value duties. The Personnel and Human Resources panel of the Local Government Association support the principles set out in this Statement of Practice and have encouraged their adoption by individual local authorities.

2. The Statement of Practice covers the following types of situation that may involve transfers of staff:
 - Public Private Partnerships (e.g. following Better Quality Service Reviews). This includes contracting-out; market testing; PFI; privatisation and other outsourcing and contracting exercises (paragraphs 10-16);
 - Second and subsequent generation contracting where, when the contract was first awarded, staff transferred from the public sector (paragraph 12);
 - Reorganisations and transfers from one part of the public sector to another (paragraphs 17-20); and
 - Reorganisations and transfers within the civil service (where TUPE cannot apply because there is no change in employer but TUPE principles should be followed) (paragraphs 21 and 22).
1. This Statement deals only with the policy framework for the treatment of staff involved in such transfers. It does not offer policy advice or guidance on:
 - assessing the options for a particular service or function;
 - project appraisal or procurement (except on the application of TUPE);
 - managing a contracting exercise;
 - how to discharge the obligations when TUPE applies or not; or
 - how to secure appropriate pension provision, redundancy or severance terms.

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

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

Transfers as a result of public private partnership

1. This section of the Statement deals with the policy that should be adopted for the transfer of staff from the public sector to a private sector employer or a voluntary sector body. This will be as a result of a Public Private Partnership where a service or function currently performed by the public sector will in future be carried out by a private sector organisation. This may, for example, be a result of a PFI initiative, strategic contracting out or market testing exercises. All will involve some sort of contracting exercise where the public sector organisation (not necessarily the one in which the staff are employed) is the contracting authority.
2. In such transfers the application of TUPE will always be a matter of law based on the individual circumstances of the particular transfer. However, the policy adopted in defining the terms of the contracting exercise can help ensure that staff should be protected by TUPE and that all parties have a clear understanding that TUPE should apply and will be followed. In such transfers,

therefore, the public sector contracting authority should, except in genuinely exceptional circumstances (see paragraph 14), ensure that:

- at the earliest appropriate stage in the contracting exercise, it states that staff are to transfer and this should normally have the effect of causing TUPE to apply, although legal advice should always be taken to confirm the applicability of TUPE in individual cases;
- at the earliest appropriate stage staff and recognised unions (or, if none, other independent staff representatives) are informed in writing of the intention that staff will transfer (and where possible when the transfer will take place) and that TUPE should apply;
- potential bidders are then invited to tender, drawing their attention in the Invitation to Tender letter to the intention that staff will transfer and TUPE should apply. Potential bidders should be also advised that they can, if they wish, submit bids where staff do not transfer and TUPE does not apply, but that these will only be accepted if they fall within the genuinely exceptional circumstances, i.e. unless the bid falls within one of the exceptions at paragraph 14 it must comply with the condition that staff transfer and TUPE should apply;
- the contracting exercise is then operated on the basis that the intention is that staff will transfer and TUPE should apply. Public sector contracting authorities should however consider all bids received. If a tenderer considers that staff should not transfer, they should be asked to give their reasons for this. Tenderers should be reminded that if they do not consider that staff should transfer and the contract does not fall within the exceptions in paragraph 14, the contracting authority reserves the right not to accept the tender;
- in a very few cases bids made on the basis staff will not transfer and TUPE not apply will fall within the genuinely exceptional circumstances set out in paragraph 14 and cause the authority to accept the bid. The costs of redeploying staff and redundancies costs to the public sector employer must be taken into account when assessing such a bid. In all other cases the bid should not be accepted as it will not conform to the contracting authority's view that staff should transfer and TUPE apply; and
- where there is then a contractual requirement that staff should transfer, the requirements of TUPE should be scrupulously followed by the public sector contracting authority who should also ensure that it is satisfied that bidders' proposals fully meet the requirements of TUPE.

Second and Subsequent Transfers

- This part of the Statement also extends to the retendering of contracts where, when the contract was first awarded, staff transferred from the public sector (irrespective of whether TUPE applied at the time). Where a public contracting authority retenders such a contract then, except in exceptional circumstances (and where the incumbent contractor is successful), staff working on the contract should transfer and TUPE should apply. Views should be sought from the current contractor as to whether, from their point of view, there are any exceptional circumstances why staff should not transfer (by

reference to paragraph 14). The retendering exercise should then be conducted as described earlier in paragraph 11.

Transfer of services or functions back into the public sector

1. There may also be circumstances that require a function contracted out to a private sector contractor or voluntary sector body to be brought back into the public sector on the termination of the contract. If, when the contract was first awarded, staff transferred from the public sector (irrespective of whether TUPE applied at the time), then the public sector organisation should ensure that staff working on the contract transfer (and TUPE should therefore apply) into its organisation unless there are genuinely exceptional reasons not to do so. Views should be sought from the current contractor as to whether, from their point of view, there are any exceptional circumstances why staff should not transfer (by reference to paragraph 14). For transfers into the Civil Service, where TUPE applies, then the recruitment provisions of the Civil Service Order in Council and Civil Service Commissioners Recruitment Code as well as Civil Service Nationality rules are not relevant.

Exceptions

1. There may be a small number of cases where the policy set out in paragraphs 11-13 may not be followed and TUPE may not apply. There must be genuinely exceptional reasons why this should be the case. Circumstances that may qualify for such exceptions are, broadly:
 - where a contract is for the provision of both goods and services, but the provision of services is ancillary in purpose to the provision of the goods; or
 - where the activity for which the public sector organisation is contracting is essentially new or a one-off project; or
 - where services or goods are essentially a commodity bought "off the shelf" and no grouping of staff is specifically and permanently assigned to a common task; or
 - where the features of the service or function subject to the contracting exercise are significantly different from the features of the function previously performed within the public sector, or by an existing contractor, e.g. a function to be delivered electronically and in such a way that it requires radically different skills, experience and equipment.
1. Where a public sector organisation believes such genuinely exceptional circumstances exist then it should be prepared to justify this, and the departure from the Government's policy (paragraphs 11-13), publicly, if challenged. In central government, the agreement of the relevant departmental Ministers may need to be obtained before such an exception is made.
2. In such exceptional cases where staff do not transfer and TUPE does not apply, the public sector organisation should, in the case of first generation contracts, seek to identify as soon as possible with the contractor any staff that will be taken on voluntarily by the contractor; and then, where possible, to redeploy those members of staff remaining within the public sector organisation (the cost of such redeployments and possible resulting redundancy payments must be taken into account when evaluating the bid).

Transfers and reorganisations within the public sector

1. TUPE can apply to the transfers of a function from one part of the public sector to another where there is a change of employer. This, for example, can include:
 - Transfers between local government and Civil Service Departments and Agencies;
 - Transfers between local government and NDPBs;
 - Transfers between local government and the NHS;
 - Transfers between the NHS and Civil Service Departments and Agencies;
 - Transfers between the NHS and NDPBs; and
 - Transfers between NDPBs and Civil Service Departments and Agencies.
1. The application of TUPE will, again, always be a matter of law based on the individual circumstances of the particular transfer. The amended Acquired Rights Directive directly legislates the *Henke* judgment of the European Court of Justice that: an administrative reorganisation of public administrative authorities or the transfer of administrative function is not a transfer and, therefore, as a matter of law, does not fall within the Directive. Recent case law suggests that it excludes from the legislation's application only a relatively limited range of situations involving the transfer of entities pursuing non-economic objectives within the public sector. Nevertheless the issue has still to be tested fully in the tribunals and courts. The *Henke* exception has been thought to apply where: the reason for a transfer is only because there is a change of geographical boundaries and the type of public sector body carrying out the function does not change (e.g. the transfer of administrative staff as a result of changes to police authority boundaries); or where the main function is a judicial, quasi-judicial or quasi-judicial regulatory function (e.g. the creation of the Financial Services Authority) and incapable of being performed other than by a public sector authority. Officeholders who are not workers are also excluded from the scope of the directive.
2. However, transfers at the instigation and under the control of central government will usually be effected through legislation, in particular those involving Officeholders. Provision can then be made for staff to transfer on TUPE terms, irrespective of whether the transfer is excluded from the scope of the Directive implemented by TUPE. Departments must therefore ensure that legislation effecting the transfers of functions between public sector bodies makes provision for staff to transfer and on a basis that follows the principles of TUPE along with appropriate arrangements to protect occupational pension, redundancy and severance terms.
3. Section 38 of the Employment Relations Act also includes a power that can be used to apply the requirements of TUPE specifically to some such transfers, e.g. Transfer of Undertakings (Protection of Employment) (Rent Officer Service) Regulations 1999 (SI 2511/1999). Where, for whatever reason, this power or other legislation is not used there will be no legal requirement or obligation in such cases for staff to transfer to another part of the public sector where the function is to be performed (as to attempt to compel them would, in effect, constitute a unilateral change in their employment contract by imposing