

## Introduction

This topic outlines the business manager's guide to employee relations in relation to the following -

- [Time Off for Trade Union Duties \(TOFTUDS\)](#)
- [The Corporate Dispute Resolution Panel](#)
- [Transfer of Undertakings Protection of Employment Regulations \(TUPE\)](#)

Advice on management's responsibilities to consult with the Council's trade unions is contained within other topics of the Business Managers Handbook; notably, [Reorganisation - Redeployment & Redundancy Procedure](#), [Variations to Contracts of Employment](#)

## Time Off For Trade Union Duties (TOFTUDs)

### Management Guidelines

1. When an organisation recognises trade unions, officials of these unions automatically gain the right in law to reasonable paid time off to carry out certain duties. In November 1998, Southwark Council and its recognised non-teaching trade unions reached a collective agreement on TOFTUD. Technical advice on these matters and on TOFTUD in general is available from HR. This practice note sets out the key principles of the agreement and advises on how to apply these principles. **The full text of the agreement is available from HR.**
2. The agreement is a practical document which recognises certain key positions of the parties, as follows:
  - The Council recognises the Trade Unions' responsibility to represent and raise issues that are in the interests of their members.
  - The Trade Unions recognise the Council's mission statement.
  - The Council supports collective bargaining. TOFTUD is a legal right and the agreement and the ACAS Code of Practice provide the minimum framework against which issues would be assessed.
3. The agreement replaces all previous agreements and arrangements relating to time off for trade union duties and activities for trade unions in the Council.

### Coverage and Key Principles of the Agreement

1. The Trade Unions party to the agreement are those covered by the Green Book & Craft workers Agreement. These are: UNISON, GMB/APEX, TGWU\*, UCATT, MSF\*\* and EPIU\*\*. The teaching and youth worker Trade Unions are excluded from the agreement although the principles of seeking and approving TOFTUD equally apply and the procedures outlined are commended for application.

\*Renamed UNITE

\*\*Subsequent to this Agreement joined with UNITE

2. The key principles of the agreement are:
  - **Managers and trade union officials should seek to operate the agreement in a spirit of good faith.** In this regard, the agreement states: *"It is the spirit and intention of this agreement to maintain and further the best possible industrial relations between the trade unions and the council in order to advance both the work of the authority and the interests of its employees."* This means that managers should seek to support reasonable requests for time off, balancing this aim with the primary duty to maintain service delivery. Trade union officials should seek to give reasonable notice of time off requests, providing the appropriate documentation.

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- **The importance of administration.** It is essential that managers and trade union officials fulfil their obligations in terms of the paperwork required to record levels of time off.
- **Release for shop stewards will normally be for trade union work within their employing department.** This is in accordance with the stated value of local resolution of industrial relations issues. Where there is a need for a particular expertise, however, managers may occasionally grant shop stewards time off for trade union duties outside the employing department. Please note that the agreement provides for pre-determined release for a number of defined trade union officials.

## Defining the Main Terms

### Definition of a recognised trade union

1. For the purposes of the agreement, recognised Trade Unions are those constituent unions identified above. Should other Trade Unions seek recognition locally they should be referred to HR.

### Definition of a trade union official

2. Section 179 of the Trade Union and Labour Relations (Consolidation) Act 1992 states that: " 'Official' ... means any person who is an officer of the union or of a branch... is a person elected or appointed in accordance with the rules of the union to be a representative of its members or of some of them".
3. Trade unions have a responsibility to inform the employer of elected officials. Under the terms of the Agreement, the Branch Secretary or Regional Officer of each trade union will notify the HR Director of all properly appointed Trade Union Officials; "self-notification" is not acceptable. The HR Director will inform Chief Officers and departmental HR practitioners of all new trade union officials.
4. A properly elected trade union official may hold the elective position for up to five years without re-election. Specific periods of appointment will be set out in the individual trade union's rulebook. HR will monitor and advise on the appointment dates of officials.

## Statutory Rights to Time Off

1. Employees who are officials of an independent trade union recognised by their employer are to be permitted reasonable time off during working hours to carry out certain trade union duties.

## Trade Union Duties

1. In general terms, trade union duties are functions carried out by officials that are directly concerned with employment issues. Typically, these will include contractual rights, health and safety in the workplace, disciplinary and capability issues and other employment policies. Trade union duties also encompass discussions with the employer in connection with trade union facilities and consultation machinery.

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2. Trade union officials should be allowed reasonable time off with pay to carry out their duties. An official may also seek reasonable time off in order to prepare for meetings connected with her or his duties and to inform members of progress made in consultations.
3. The agreement lists a number of duties that qualify for paid time off. These are:
  - Attendance at meetings called by authorised members of the Council, by business unit managers or by the HR Director or nominee.
  - Attendance at disciplinary hearings and interviews arranged by management.
  - Meetings with management to seek to resolve disputes within departments, and meetings related to management proposals affecting the section or department for which the official is a member e.g. Departmental Local Committees.
  - Meetings with management to discuss termination of employment or functions related to or connected with termination of employment e.g. collective redundancies and business transfer arrangements.
  - Attendance at meetings called by management to consider Employee Complaints.
  - Attendance at inquiry / investigatory meetings arranged by management.
  - Attendance at interviews with employees of the authority relating to discipline, grievance, conditions of employment, disciplinary appeals.

### **Payment for Time off for Trade Union Duties**

1. Time off for trade union duties will be paid and funded from business unit budgets. Officials will receive the contractual pay they would have earned had they worked during their time off. Officials noted as receiving pre-determined release under the agreement will have their pay refunded from corporate budgets.

### **Trade Union Activities**

1. Typically, trade union activities are activities concerned with the internal business, decision-making and administration of the trade union; this will be without pay, and will normally include trade union branch meetings.
2. Time off with pay will be granted to staff (TU members) as follows where there has been prior permission of Management:
  - Attending workplace meetings to discuss and vote on the outcome of negotiations with the employer;
  - Meeting full-time officials to discuss issues relevant to the workplace; and
  - Voting in union elections e.g. Branch Annual General Meeting
3. There is no right to time off, however, for trade union activities related to industrial action.

### Time Off for Meetings

1. **Branch meetings** during working hours, must be notified to the HR Director in advance of the intended date, venue and time of such meetings, who will notify managers to release staff. The Council will only allow paid release for the **Annual General Meeting** (AGM). Time off for other Branch meetings if permitted are unpaid.
2. **Mass/ Workplace Meetings** of members of individual Trade Unions are occasionally requested. The decision is one for the Chief Officer (if Council-wide, the H R Director) considering notice, reason, venue request, service impact etc.

### Time off for training

1. The training must be:
  - Relevant to the carrying out of the official's trade union duties
  - Concerned with trade union duties; and
  - Approved by the TUC or by the independent trade union of which the employee is an official.
2. Reasonable paid time off will also be granted for newly appointed Trade Union Officials to receive their initial training in basic representational skills. The Council will not meet the travelling and subsistence expenses incurred.
3. The Council will also consider paid release for a Branch Officer who is directly running a training course that has a significant industrial relations content relating to the Council's business.

### Trade Union Conferences

1. Time off to attend trade union conferences will be allowed with pay for accredited delegates, funded from the central TOFTUD budget. Unpaid leave will be granted to official observers at trade union conferences.

### Rules for Requesting Time Off

1. Requests for time off should not unreasonably be refused. Service delivery requirements will be an important factor in a manager's decision on granting time off. The manager will also take account of:
  - The purpose of the time off
  - The length of time-off requested
  - The occasions on which time-off is required
  - The length of notice provided; and
  - Any information/documentation that may assist in supporting requests for time-off e.g. agendas of meetings, role of the official at an ET.

2. All requests for time off must be made to the official's line manager on the pre-authorisation forms. Unless there are exceptional circumstances, advance notice of the request must be given. The process is:

- Obtain from convenors, shop stewards and safety representatives a completed pre-authorisation release form for every request for time off.
- If the manager is granting the request, s/he signs and retains the form.
- Once completed the manager & Trade Union Official should agree the time actually taken and enter this on the pro forma, which is countersigned.
- The manager forwards the completed form to the relevant staffing section for local monitoring and dispatch to HR.

Business Managers must determine what are the appropriate levels of authority for granting time off, and exercising the responsibilities of the line manager.

3. In the case of requests for time off for training normally, at least four weeks notice should apply. In the case of official delegates to trade union conferences, the agreement is that the trade unions will notify management of the delegates as soon as they are known.

#### **Pre-determined release**

1. The Agreement includes provisions for pre-determined release for some trade union officials.
2. The Council will allocate 1 full time release for Branch Secretary per Trade Union with 1000 plus members; GMB & UNISON for 1999/2000. Part-time release of 3 days per week will be granted to Branch Secretaries of Trade Unions with less than 1000 members, TGWU\* and UCATT, supplemented by approved ad hoc release.

\*Renamed UNITE

3. In addition to the above, the Council will recognise 1 day per week pre-determined release for each 200 members above the first 1000 members. Branch Secretaries will be responsible for advising the HR Director of the allocation of this release, which will be notified, to Chief Officers.

#### **Health & Safety Representatives**

1. The rules for this group of representatives are contained in the Health and Safety at Work Act 1974. A key qualifying rule for this group of representatives, in addition to being employees engaged at the work place, must have worked for the employer for at least the previous year or have had two years' experience in similar employment, so far as is reasonably practicable. Under the agreement, the Trade Unions will notify the HR Director in writing of the appointed Health & Safety Representatives.

2. The Council will allow a safety representative to take such time off with pay during the employee's working hours as shall be necessary for the purpose of:
  - Performing their functions under the Health and Safety at Work legislation;
  - Undergoing such training in aspects of those functions as may be reasonable in all the circumstances.

### **Process for Resolving Disagreement**

1. It is fundamental to the agreement that any dispute in relation to time off work for trade union duties or activities is resolved through local line management wherever possible. Where there is a dispute relating to the application of the Agreement, the point of referral shall be the HR Director who will liaise as necessary with the Regional Officer of the constituent trade union. It is incumbent on all parties to act as quickly as possible to resolve such disputes. In particular, managers should ensure that the dispute process is used in order to reduce the likelihood of applications to the employment tribunal.

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## **The Corporate Dispute Resolution Panel**

The Corporate Dispute Resolution Panel will consider matters where a failure to agree remains after full consideration at a Departmental Local Committee. The Panel will not deal with matters relating to individual employees. It will be resolution focused

### **Constitution of the Corporate Dispute Resolution Panel ('the panel')**

#### **The parties**

1. The parties to the panel are Southwark Council and the recognised non-teaching trade unions: UNISON, GMB, UCATT (and the allied construction unions) and UNITE.

#### **Aim**

2. The panel aims to support good industrial relations by recognising the parties' common interest in managing change by consensus. As part of the parties' pursuit of a partnership approach, the panel will, therefore, seek agreement on issues that remain unresolved after full consideration at Departmental Local Committees (DLCs).

#### **Key Principles**

3. The parties support the common goal of resolving areas of disagreement at business unit or departmental level wherever possible.
4. Although the parties will not always agree, both sides recognise the other's need to listen to and represent their respective constituencies.
5. Where possible, in pursuing agreement, the parties will have regard to solutions which promote quality of working life and a flexible and well-trained organisation.
6. The parties also recognise the value that constructive industrial relations add to the organisation and express confidence that the panel will be able to resolve most of the issues referred to it.

#### **Scope**

7. The panel will seek to resolve any matter which a Departmental Local Committee has registered as a "failure-to-agree". This means that the panel will not deal with individual matters connected with the disciplinary, capability, employee complaints, sickness management, or matters relating to individual employees arising from the application of reorganisation procedures.



## Membership

8. The panel will comprise two people:

One Chief Officer<sup>1</sup> or nominee  
The HR Director

<sup>1</sup> *Where the Chief Officer has previously been personally involved in the issue and/or it is a cross departmental matter the Chief Officer may be replaced. This will be a management decision.*

7. Where necessary the panel will be supported by a HR officer who will advise on matters of process and also record the panel's decisions.
8. The panellists will vary according to the matters for resolution. In this way, the parties intend to ensure that, as far as possible, panel members have not had prior direct involvement in the dispute in question.

## Timescales and Process

9. When a DLC registers a formal failure-to-agree, the Chair of the DLC and a lead officer nominated by the trade unions will meet to prepare jointly a statement about the dispute. Wherever possible, this statement should be sent to the HR Director within 10 working days of the registration of the failure-to-agree. To facilitate resolution the statement should aim to cover the following -
- A statement setting out the subject of the dispute
  - The notes of consultations prior to the failure to agree
  - A short summary of the two sides' positions and their bases
10. On receipt of the joint paperwork, the HR Director will arrange a meeting of the Corporate Dispute Resolution Panel, where possible, within 10 working days. This meeting will form the first part of the dispute resolution process and will be attended by:
- The panellists and, where applicable, the HR advisor
  - For management, the Chair of the DLC at which the dispute was registered, or nominee
  - For each trade union involved in the dispute a branch secretary or nominated deputy.
  - The management and trade union representatives may each side bring with them a colleague for technical support and note taking, if required

11. The meeting of the panel is likely to take the form of presentations from the two sides, followed by clarifying questions from panel members. The panel's responsibility, however, is to seek a resolution of the dispute. And to this end, it may adopt whatever approach it considers most constructive in the light of the particular dispute - within the following parameters:
- Before making any directive recommendation in the dispute, the panel should first explore the possibilities for conciliation between the two sides. In doing this, the panel may engage the services of an independent adviser.
  - In hearing representations from the two sides and informing them of its decision, the panel must act with equity. This means that all representations should be made in open forum and in the presence of both sides and the entire panel. The panel should also ensure that it confirms any decisions it makes about the process and outcomes to both sides at the same time.
  - The parties recognise that there may be occasions where it is not possible for the panel to reach an agreement on an issue. Where this happens, the panel will prepare a joint letter that sets out the reasons for this. In the case of a failure to resolve the dispute, the matter can either return for discussion at the DLC or move to the provincial machinery.
  - The panel is required to carry out whatever investigation is necessary to achieve a reasonable resolution of the dispute. This may mean that it is unable to conclude matters at a single meeting. The remaining paragraphs in this section outline the possible results of the panel's first meeting on any dispute:
12. The HR Director will arrange for the decisions of the Panel to be confirmed in writing to Chief Officer, relevant Branch Secretaries and the Chair of the DLC within 3 working days of the meeting. This may include the need for further investigation before a final decision is made, confirmation of a resolution, notification of further actions required, or acknowledgement that agreement could not be reached and therefore clarification of the ongoing position.

### **Monitoring**

13. HR will record and monitor the outcomes of the panel's meetings to inform corporate industrial relations discussions.

### **Authority**

14. The panel has the authority to resolve all matters that lie within the delegated authority of officers of the council. Southwark Council and the trade unions agree to be bound by decisions of the panel.

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## Managing the TUPE Regulations

### 1. Introduction

This guidance sets out the Council's expectations of Business Managers and others who have a responsibility for managing business transfers and applying the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended). Normally referred to as TUPE. The Regulations apply to organisations of all sizes and protect employees' rights when the business they work for transfers to a new employer; when a business is sold, activities are outsourced, or brought back in-house.

[Appendix 1](#) to this guidance lists a glossary of terms that may be helpful for those unfamiliar with TUPE situations.

### 2. A Summary of the Impact of TUPE

Where the TUPE Regulations apply, they will have the following effects.

- 2.1 Employees working in the undertaking (for the transferor) immediately before the transfer will automatically become employed by the transferee. If an employee objects i.e. chooses not to transfer, the transfer operates so as to terminate their contract of employment and because the contract ends by the operation of the law, neither notice nor redundancy applies.
- 2.2 For transfers that take place on or after on or after 31 January 2014 (and where the date of any notice of termination given by the employee or employer is 31 January 2014 or later) such dismissals will be automatically unfair where the sole or principal reason for the dismissal is the transfer. The dismissal will not be automatically unfair where the sole or principal reason for the dismissal is an economic, technical or organisational (ETO) reason entailing a change in the workforce.
- 2.3 Employee's employment contracts are transferred to the transferee and all contractual terms and conditions of employment are preserved.
- 2.4 An attempt by the transferee to vary the terms and conditions of transferring staff (e.g. by seeking to harmonise the terms and conditions of incoming employee's with those of its existing workforce) may be ineffective, even if the employees or trade union representatives consent to the variation. The TUPE regulations provide that the transferee cannot vary the terms and conditions of employment of the transferring employees, where the principal reason is the transfer itself. However, where the reason for the variation is not the transfer, or the reason is connected to the transfer, but is a genuine ETO reason entailing changes in the workforce, such variations may be fair if they also follow a fair legal process. 'Entailing changes in the workforce', means a change in the numbers of people employed or a change in functions performed by employees.

Note – the regulations also provide that, as a result of the transfer, where there is a substantial change in working conditions to the material detriment of transferring staff, the employee can treat their contract of employment as being terminated and claim unfair dismissal.

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- 2.5 The transferee will have to take over any collective agreements made by or on behalf of the transferring employees, in force immediately before the transfer. For transfers taking place on or after 31 January 2014, the (amended) Regulations –
- Provide that transferred employees are only entitled to the terms of a collective agreement as they stand at the time of the transfer (the ‘static’ approach), and not to changes to the terms agreed after the transfer through a collective mechanism of which the new employer is not a party (the ‘dynamic’ approach).
  - Allow renegotiation of terms derived from collective agreements one year after transfer provided that the overall change is no less favourable to the employee. It should be noted, however, that any such change would still need to be agreed by employees, either on a collective or individual basis. There is no legal definition of “no less favourable”.
- 2.6 An employee’s length of service and accrued rights will be unaffected by the transfer and continuity of service is preserved i.e. there is no break in service. Further information on continuity of service is located in the [Contracts of Employment](#) policy.
- 2.7 Occupational pension rights earned up to the time of the transfer are protected, but under TUPE, certain occupational pension entitlements will not transfer. However, local authorities are required to follow the principles set out in the Cabinet Office annex “A Fair Deal for Staff Pensions” This means that staff transferring from a local authority must have access to either the local government pension scheme or a broadly comparable pension scheme.
- 2.8 The transferee will assume most of the employment liabilities of the transferor relating to the employment contracts of the employees who transfer. This is not restricted to just contractual obligations, but also includes outstanding liabilities arising out of the employment relationship with the transferring employees prior to the transfer e.g. claims for personal injury, acts of discrimination committed by the transferor. Liabilities for outstanding criminal acts or omissions committed by the transferor are exempted from the transfer.
- 2.9 For transfers that take place on or after 1<sup>st</sup> May 2014 the deadline by which the transferor must provide the transferee with details of transferring employees and their terms and conditions (i.e. the employee liability information) will be increased to later than 28 days before the transfer. Details of what information must be provided is given at [Appendix 2](#)
- 2.10 Under TUPE, the recognition agreement with the trade union(s) that represent some or all of the transferring employees will transfer to the transferee, provided that these employees maintain an identity distinct from the remainder of the transferees business.
- 2.11 Representatives (e.g. recognised trade unions) of affected staff have a right (i) to be informed about the transfer (ii) to be consulted about any measures concerning affected employees, proposed by the transferor and transferee.

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- 2.12 For transfers that occur after 31<sup>st</sup> January 2014 the (amended) Regulations to permit pre-TUPE transfer consultation with transferring employees by the transferee on collective redundancies to count for the purposes of those consultation duties under TULR(C)A. However, such consultation will only be allowed if the transferee employer elects for it by way of a written notice to the transferor employer, and the transferor then agrees to it. If pre-transfer consultation takes place, the current transferor employer “may provide information or other assistance to the transferee” to help them meet the consultation requirements, although it does not have to.

### **3. TUPE & Pensions**

- 3.1 The transferee will be required to offer new staff working on the local authority contract, alongside staff transferred from the local authority, one of the following pension provision arrangements:
- Membership of the local government pension scheme, where the employer has admitted body status within the scheme and makes the requisite contributions.
  - Membership of a good quality pension scheme, either being a contracted out, final salary based defined benefits scheme, or a defined contribution scheme. For defined contribution schemes the employer must match employee contributions up to 6%, although either could pay more if they wished.
  - A stakeholder pension scheme, under which the employer will match employee contribution up to 6%, although either could pay more if they wished.
- 3.2 If there is a retender of the contract to which the Code applies, where any transferring employee previously had a right under the Code to one of these pension options, the new service provider is required to offer one of these pension options.

### **4. TUPE & Contract Arrangements**

(FOR FURTHER INFORMATION ON THE IMPACT OF TUPE AS PART OF THE CONTRAT LETTING PROCESS [CLICK HERE](#))

Key principles adopted by the Council in operating TUPE are as follows.

- 4.1.1 The Council acts in the expectation that all externalisation of Council services will be covered by the TUPE Regulations, the only exception being where specific legal advice has been obtained to the contrary.
- 4.1.2 Bidders for Council contracts are required to take their own advice on whether TUPE applies and the implications of TUPE.
- 4.1.3. The TUPE Regulations apply equally to public or private sector undertakings.

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- 4.1.4 The Council conducts consultation in good time with affected staff and their trade union representatives in order to promote understanding of what the transfer involves, to deal as soon as possible with any concerns that arise and to ensure that the delivery of service is not compromised in the run-up to a transfer.
- 4.1.5 Managers and staff dealing with the transfer process have clear and appropriate roles.
- 4.1.6 The method of identifying staff for transfer is clear, objective and principled.

## **4.2.Tender Process and TUPE Requirements**

- 4.2.1 There are a number of stages to tendering which set the scene for TUPE activity as outlined below.

- Decision to invite tenders for a service.
- Pre qualification.
- Invitation to tender / negotiate.
- Tender evaluation.
- Award of contract.
- Commencement of contract.

## **4.3. Decision to invite tenders**

- 4.3.1 Once the decision is made to invite tenders for a particular service, the Lead Contract Officer should identify a HR Practitioner to provide HR support throughout the tender process.
- 4.3.2 The Lead Contract Officer / HR Practitioner should arrange to meet the recognised trade unions in advance of issuing any procurement notice. At the meeting, the Lead Contract Officer should provide an account of the overall approach and likely timetable for the procurement. This will include, flagging milestones in the process, establishing regular meetings throughout and setting out an agreed process for informing the trade unions and staff currently working in the contract area.
- 4.3.3 The HR Practitioner will support service managers in dealing with transfer issues as they relate to the workforce, notably:
- To confirm the decision to tender the service;
  - To explain that TUPE may apply and the potential consequences for the staff concerned;
  - To clarify that redundancy and redeployment do not apply, i.e. staff affected by a transfer of the particular undertaking are not redundant at the point of transfer and therefore do not have access to severance payments or the Council's redeployment pool.

- 4.3.4 Where requested, the HR Practitioner can support management in determining which employees are identified as working in the undertaking. Only staff who work predominantly (more than 50% of the time) in or for the undertaking should be identified. Wherever possible, this will be done by reference to work sheets that support the assessment of working time on the relevant contract area.

Those working in the undertaking will also include any operational, administrative or support staff whose post would otherwise become redundant upon the transfer of the undertaking. This can occur where the transfer gives rise to a reduction in the requirement for work of a particular kind and applies whether or not the staff are employed within the particular service area.

- 4.3.5 Any agency staff used in the contract area should be identified, giving indicative staff numbers, hours per week and cost.
- 4.3.6 The Lead Contract Officer will obtain details of the costs and structures of the transferring workforce. The HR Practitioner may contribute to the drafting of the tender documentation and determining the prospective liabilities in relation to TUPE.

#### **4.4. Pre Qualification**

- 4.4.1 At the pre qualification stage, those bidders that have offered an expression of interest are provided with a pre qualification questionnaire (PQQ), which will measure organisational fitness and provides that workforce matters that assess suitability in relation to certain criteria - legal, financial / economic standing and technical ability, can come into consideration at this stage.

- 4.2.2 The PQQ could incorporate the following matters as they relate to the criteria.

- Experience and track record of providing similar services and referees that can be called upon to confirm said performance. There is information in the current application form / PQQ for the Approved List in respect to references. The same form is also used for OJEU and publicly advertised contracts. However, Strategic Procurement advises departments to cover this detail in a supplementary questionnaire specific to the service.
- Accreditation, documentation and procedures including health and safety and HR procedures, staffing details, details of staff involved in the provision of the service, TUPE track record, etc. This information is requested in the current application form, and TUPE is covered by a specific service questionnaire.
- Criminal convictions, grave misconduct and breaches of employment protections e.g. health and safety, discrimination. This information is requested in the application form.

- 4.2.3 The Lead Contract Officer must seek appropriate advice on the content of workforce related questions to determine if they are suitable, relevant and practical. Consult with Strategic Procurement, Legal and the HR Practitioner.

## 4.3 Invitation to Tender / Negotiate Documentation

### 4.3.1 Trade Unions

Subject to commercial sensitivity, the Lead Contract Officer will provide the recognised trade unions with, details of the bidders, a copy of the tender specification and any other relevant information.

### 4.3.2 Contractual Documentation

In addition to workforce details and consultation periods, the contractual documentation should include the following: (For those involved in contract letting also refer to legal advice on pages; [Workforce Issues](#), [TUPE](#), [Pensions](#))

- **TUPE:** the Council considers that the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended), will apply; although the applicability of TUPE depends ultimately on a consideration of any proposals submitted by the bidder and the Council will evaluate bids accordingly.
- **Legislative Compliance:** the transferee will comply with all relevant statutes and regulations e.g. Equality Act, Health and Safety at Work Act, etc.
- **Pension:** bidders should be invited to seek Admitted Body Status to the Local Government Pension Scheme or be required to include in their tender, a pensions package which is broadly comparable with the Council's pension scheme and certified as such by the Government Actuary Department (GAD). The Council's preferred option is for bidders to seek Admitted Body Status.
- **Flexibility:** TUPE provides for the transfer of staff working in the undertaking at the point of transfer. This can mean that employee details may have changed by the time of the transfer / contract commencement. The contractual documentation should contain a clause to reflect this.
- **Information:** An obligation on the transferee to provide information to the transferor on workforce matters during the course of the contract.

### 4.3.3 Response Document

This refers to the information that bidders will provide in their tender and will include evidence of their approach to workforce matters that are relevant to the delivery / performance of the contract. Bidders should be required to indicate in their tenders, details of any 'measures' proposed in relation to transferring staff. This should include any proposals for redundancies in the event of a transfer, any proposals for revised working arrangements and any other proposals in relation to the affected employees.

The workforce matters detailed below could be included in the response document and maybe added to or amended according to the particular service area.

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*Workforce matters:*

- Approach to TUPE;
- Pension arrangements;
- Health and safety practises;
- Skills gap analysis;
- Transition plans for TUPE staff;
- HR practises;
- Industrial relations practises;
- Training and development;
- Equal opportunities practice.

#### **4.3.4 Pensions**

The Council will provide bidders with a Pension Advice Book. This document outlines the costs associated with admitted body status to the Local Government Pension Scheme. The Personnel Practitioner is to send the TUPE list to the Pensions Manager who will request the actuary to draw up the Pension Advice Book for the contract. When this has been prepared, it is to be included in the tender documentation or sent to the bidders.

#### **4.3.5 Roles and Responsibilities**

The Lead Contract Officer should act as contact point for queries from bidders. The Council should not give bidders any advice on the operation of the TUPE regulations other than that they should take their own advice on the application and effect of TUPE.

#### **4.3.6 Tender Evaluation**

- a) Only workforce matters provided for in the Invitation to Tender / negotiate should be considered in the evaluation, matters addressed at the pre qualification stage should not be readdressed, unless there has been any change in the information given during that period.
- b) **Trade Unions**

It is often not clear what tender information is relevant and can be provided to the trade unions. Generally, the trade unions should only be provided with tender information that is relevant to the employment of its members. There may be information which is confidential to the bidder and the evaluation process (for example because it is commercially sensitive), and which cannot be given to the recognised trade unions, whose obligation will usually be to disclose information to their members.

In order to deal with such issues, the Lead Contract Officer may wish to consider,

- Agreeing with the bidder, information which may be disclosed (so that there is no argument about whether confidentiality has been breached); or
- Inviting the bidder to meet directly with union representatives; or
- Suggesting to union representatives that they make submissions to bidders about the matters trade unions would wish to see considered.

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The Lead Contract Officer must consult with the HR Practitioner, before any tender information is passed to the recognised trade unions.

- c) The recognised trade unions may be invited to provide written comments on the bidders (e.g. as to their suitability). Comments should be supported by evidence.

#### **4.4 Award of Contract**

4.4.1 To allow for meaningful discussion to take place, sufficient time must be built in between the identification of the preferred bidder or contract award and the commencement date. The TUPE Regulations does not specify a consultation period, but states that certain details are to be provided to employee representatives "long enough before a relevant transfer". To ensure effective consultation, it is advised to establish a consultation period of up to three months between the identification of the preferred bidder or award of the contract and the commencement date; depending on the complexity of the matter. TUPE issues are often complex and contentious, involving numerous parties, therefore maximum time should be allowed to achieve clarity and, where possible, agreement.

4.4.2 At this point, the Lead Contract Officer will know whether or not there is to be a transfer. Where there is to be a transfer, there are three key activities that need to be undertaken:

1. Provision of information to the transferee
2. Consultation with the trade unions;
3. Consultation with staff.

4.4.3 In order to co-ordinate the delivery of information, the Lead Contract Officer will need to meet representatives of the transferee immediately following the identification of the preferred bidder or award of the contract and at intervals thereafter. It may be, for example, that the transferee proposes further measures in relation to the transferring staff, wishes to discuss the practical operation of the transfer (including any staff who object to transferring) or has queries about the pay and conditions of transferring staff. This process may be assisted by the attendance of trade union representatives.

#### **4.4.4 Information to the Transferee**

Under the TUPE Regulations, the transferor is required to provide the transferee with particular information about the staff that will TUPE transfer. This is listed in [Appendix 2](#). Under the TUPE Regulations, the time for supplying all this information to the transferee is 28 days prior to the transfer date.<sup>1</sup>

<sup>1</sup> For transfers from 1<sup>st</sup> May 2014; prior to that date 14 days prior to the transfer.

#### 4.4.5 Consultation with Trade Unions

- a) The regulations provide that both the transferor and transferee are to inform and consult the representatives of those employees affected by the transfer. In the council, the representatives will include all recognised trade unions. Those 'affected' will include those employees that transfer and will also include (i) employees of the transferor that don't transfer, but whose jobs are affected by the transfer or the measures (ii) employees of the transferee who will be colleagues of those transferring and whose jobs are affected by the transfer or the measures.
- b) Both the transferor and transferee will be jointly and severally liable for claims related to a failure to inform and consult. Therefore it is important to ensure that both employers meet their consultation obligations.
- c) The employer of affected employees (transferor and transferee) will write to the recognised trade unions of the affected employees to provide the following information:
  - The fact that a transfer is to happen;
  - The reasons for and the date of the transfer;
  - The legal, economic and social implications for the affected employees;
  - Any measures the employer envisages he will take in relation to the affected employees or confirmation that there are no measures;
  - If the council is the transferor, any measures the transferor envisages the transferee to take in relation to the affected employees or confirmation that there are no measures.
- d) It should be noted that there is no requirement to **consult** on all these matters. Regulations requires that the employer of affected employees (transferor and transferee) consult only on measures proposed in relation to the affected employees with a view to seeking agreement on the proposed measures. The transferor and transferee only need to consult on measures it intends to implement i.e. not the measures the other party intends to implement.

This consultation must involve:

- Meaningful consultation i.e. with a view to reaching agreement;
  - Consideration of all representations made by the trade unions;
  - Replying to those representations, giving reasons if rejecting them.
- e) Trade Union representatives must be allowed reasonable access to affected employees, particularly those transferring, to discuss issues related to the transfer.

- f) TUPE requires the transferee to 'give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him...' i.e. the requirement to provide recognised trade unions with details of any measures envisaged by the transferee. A complaint that a transferor has failed to perform this duty may be presented to an employment tribunal. The transferor can make a defence in relation to such a complaint by seeking to establish that it was not reasonably practicable to perform the duty, as the transferee did not provide the information in question at the requisite time. It should be noted, however, that such a defence will only be admissible where the transferor gives notice to the transferee of the intention to rely on this fact.

The clear advice, therefore, is that the Lead Contract Officer should write to the transferee at an early stage (giving notice of the Council's likely defence in any proceedings before a tribunal), wherever there are difficulties in obtaining appropriate information.

- g) For transfers that occur after 31<sup>st</sup> January 2014 the (amended) Regulations to permit pre-TUPE transfer consultation with transferring employees by the transferee on collective redundancies to count for the purposes of those consultation duties under TULR(C)A. This is described further in 2.14 above.

## **5. Consultation with Staff**

- 5.1 Whilst the TUPE Regulations specify the role of the trade unions, it is essential that the staff affected must be similarly informed about the impact of the transfer and their personal position. This can be achieved by regular one-to-one meetings or by holding group meetings with the opportunity of personal meetings if required.

Following the trade union consultation and prior to transfer, all transferring staff are to be notified in writing of the following:

- The reason for and date of the transfer;
- Confirmation that TUPE will apply and that terms and conditions will be preserved following the transfer;
- Pension details;
- Payroll arrangements;
- Any other relevant employment related matters.

- 5.2 It is also important that if requested, staff are given the opportunity to scrutinise their personal records, as these will be transferred to the successful contractor.

## **6. Commencement of contract**

- 6.1 At this point the transfer takes place. Although the employer should be informed, it is only now that the Council knows for certain which staff, if any, object to be transferred and have effectively resigned.

- 6.2 The roles of the transferor with regard to personnel issues are as follows:

- Review the personnel files before transferring over to ensure that any information deemed inappropriate is removed. There may be confidentiality issues that must be considered e.g. safeguarding disciplinary case information. In this instance, consult with the Personnel Practitioner.
- Provide the transferee with the individual pay and service details and contracts of employment of staff to be transferred. This will include personal records of staff.
- Remove transferring staff from the Council's payroll.

## **7. Reverse (Incoming) UPE**

There will be occasions when the Council will in-source services & our responsibilities shift to the role of transferee. The Lead Contract Officer will need to work with HR, Strategic Procurement and Legal on such occasions to ensure TUPE requirements and duties are fulfilled.

## **8.0 Other Practical Considerations**

### **8.1 Liabilities**

Under the TUPE Regulations, with respect to the transferring employees, the transferee will take on liabilities apart from the liability for certain occupational pension entitlements (although with local authority contracts, bidders must seek admitted body status or provide a broadly comparable pension scheme, refer to section 7.4.2). The liabilities include unpaid wages, compensation for industrial injuries and employment tribunal awards. Bidders should reflect these liabilities in the contract price submitted with their tender. Note – where a transferor is not required to hold insurance under the Employer Liability (Compulsory Insurance) Act 1969, both the transferor and transferee can be jointly liable for personal injuries or diseases to transferring employees that occurred during employment with the transferor. As public sector bodies are not required to hold this insurance, the council could be liable for this pre transfer liability, where previously this liability had transferred. Therefore, it may need to be considered in contract negotiations, particularly in an indemnity agreement (see below).

Sometimes bidders will seek indemnities from the Council for the 'pre-transfer' liabilities, and this may result in a more cost effective option for the Council. The Lead Contract Officer should not however agree any indemnity without advice from Legal.

### **8.2 Collective agreements**

The transferee will have to take over any collective agreements made by or on behalf of the transferring employees, in force immediately before the transfer. For transfers taking place on or after 31 January 2014, the (amended) Regulations –

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- Provide that transferred employees are only entitled to the terms of a collective agreement as they stand at the time of the transfer (the 'static' approach), and not to changes to the terms agreed after the transfer through a collective mechanism of which the new employer is not a party (the 'dynamic' approach).
- Allow renegotiation of terms derived from collective agreements one year after transfer provided that the overall change is no less favourable to the employee. It should be noted, however, that any such change would still need to be agreed by employees, either on a collective or individual basis. There is no legal definition of "no less favourable".

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## TUPE Appendix 1 - Glossary of Terms

The guidance contains a number of technical terms. The definitions of the main terms are:

**Transfer:** Under the TUPE regulations, a 'relevant' transfer occurs when (i) a business, undertaking, or part of an undertaking is transferred from one employer to another as a going concern and there is a transfer of an economic entity which retains its identity ('business transfer') or (ii) there is a change to service provision through outsourcing, retendering or in-sourcing involving an organised grouping of employees, whose principal purpose is carrying out these activities on behalf of the client ('service provision change'). These two categories are not mutually exclusive e.g. outsourcing is also a business transfer.

**Economic Entity:** This refers to an organised grouping of resources that pursues an economic activity. The economic entity must retain its identity for there to be a 'relevant transfer'. An example of an exception could be the transfer of a staffed canteen service, which results in the delivery of food solely by vending machines.

**Undertaking:** For the purposes of this document, this refers to council services and is an organised grouping of resources or employees.

**Transferor:** The transferor is the organisation or person passing over the responsibility for or ownership of the undertaking (also known as the outgoing employer or the 'old employer')

**Transferee:** The transferee is the organisation or person receiving the undertaking in question, e.g. the winning contractor in a tendering process (also known as the incoming employer or the 'new employer')

**ETO reason:** ETO stands for economic, organisational or technical. Its significance is that it can provide fair and legal justification for the dismissal or changes to terms and conditions of transferring employees. There is no statutory definition of these terms, but guidance has suggested that, (i) an 'economic' reason may relate to profitability or market performance (ii) a 'technical' reason may relate to the equipment or production processes used (iii) an 'organisational' reason may relate to the management or organisational structure. The ETO reason must 'entail changes in the workforce'. This means that changes to workforce numbers or job functions must be the objective of the plan, not just a possible consequence of it.

**Consultation:** consultation means jointly examining and discussing issues that are of concern both to management and employees. It involves seeking mutually acceptable solutions through a genuine exchange of views and information. Consultation should also take place long enough before a transfer for the dialogue to be meaningful. At the Council, consultation will take place between managers and representatives of the recognised trade unions

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**Affected employees:** this term is relevant to trade union consultation and 'affected employees' includes those employees that transfer, and also (i) employees of the transferor that don't transfer but whose jobs are affected by the transfer or the measures (ii) employees of the transferee who will be colleagues of those transferring and whose jobs are affected by the transfer or the measures.

**Measures:** under TUPE, the transferor and transferee have a duty to consult the trade unions about any 'measures' proposed in connection with the transfer. There is no strict definition of 'measures', but it is likely to include actions undertaken by the employer that will impact the affected staff e.g. reorganisation, move to shift working, requirement to use new equipment, etc.

**Collective agreement:** a collective agreement is an agreement between an employer and one or more trade unions on issues like, pay and conditions of employment, disciplinary and other procedures and trade union facilities.

**Actuary:** an actuary is a qualified statistician and member of a professional actuarial body. Actuaries are commonly employed in the field of insurance and calculate liability risks for policy premiums, pension funds and other financial products.

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## **TUPE - Appendix 2**

### **Disclosure of 'employee liability information' to the new employer**

#### **Note**

- (1) Until after the contract award, any personal information that will identify staff must be omitted e.g. name, home address.
- (2) Up until the transfer date, ensure to provide the successful bidder with up to date information and advise of any changes.
- (3) Where sensitive personal information will be passed to the successful bidder e.g. sickness records, ensure to advise the transferring employees.

The transferor employer must provide the new employer with a specified set of information which will assist them to understand the rights, duties and obligations in relation to those employees who will be transferred. This should help the new employer to prepare for the arrival of the transferred employees. The employees also gain because their new employer is made aware of his inherited obligations towards them. The information in question is:

- The identity of the employees who will transfer.
- The age of those employees.
- Information contained in the 'statements of employment particulars' for those employees.
- Information relating to any collective agreements which apply to those employees.
- Instances of any disciplinary action within the preceding two years taken by the transferor in respect of those employees in circumstances where the Acas Code of Practice on discipline and grievance applies.
- Instances of any grievances raised by those employees within the preceding two years in circumstances where the Acas Code of Practice on discipline and grievance applies; and
- Instances of any legal actions taken by those employees against the transferor in the previous two years, and instances of potential legal actions which may be brought by those employees where the transferor has reasonable grounds to believe such actions might occur.

If any of the specified information changes between the time when it is initially provided to the new employer and the completion of the transfer, then the transferor is required to give the new employer written notification of those changes.

The information must be provided in writing or in other forms which are accessible to the new employer. Therefore it may be possible for the transferor to send the information as computer data files as long as the new employer can access that information, or provide access to the transferor's data storage. Likewise, in cases where a very small number of employees are transferring and small amounts of information may be involved, it might be acceptable to provide the information by telephone. However, it would be a good practice for the transferor to consult the new employer first to discuss the methods which they can use.

The specified information may be given in several instalments, but all the information must be given. The information may also be provided via a third party. For example, where a client is re-assigning a contract from an existing contractor to a new contractor, that client organisation may act as the third party in passing the information to the new contractor.

This information must be given a certain period before the completion of the transfer. However, if special circumstances make it not reasonably Employment practicable to comply with that deadline, then the information must be supplied as soon as is reasonably practicable.

The deadline as amended by the 2014 Regulations is not less than 28 days before the relevant transfer. This applies to cases where the transfer takes place on or after 1 May 2014. (Prior to 1<sup>st</sup> May 2014 the deadline is not less than 14 days before the relevant transfer).

The transferor and transferee and any client on whose behalf the transferor may be providing services, may consider whether earlier disclosure of some information should be made.

It will often be helpful if the transferor provides the necessary employment liability information at an early stage to the transferee. This may not necessarily be all of the information which will ultimately be required and it may need to be on an anonymised basis, or in a way which complies with other appropriate data protection safeguards (see the [Information Commissioner's](#) guidance)

Some such information can be useful at any tender stage to inform bids for the contract. Businesses contracting for the provision of services may wish to consider entering into contractual provisions to facilitate the disclosure of appropriate information for the purposes of a re-tender.

Provision of some information at an earlier stage by the transferor may also assist the transferee in its consideration of whether there could be any measures (which will be relevant to the performance of the information and consultation obligations), and it may assist in practical preparations for the transfer.

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## TUPE - Appendix 3

### Questions and Answers

*Q. Can only one employee TUPE transfer?*

A. Yes. If the employee has been identified as working predominantly (more than 50% of the time) in or for the undertaking that will transfer.

*Q. If I tender for a provider to organise an event and the following year I use another provider to organise this event, as there was an 'organised grouping of people' that originally organised the event, does this group have to TUPE transfer to the new provider?*

A. No. Under the TUPE regulations, one-off events and contracts of a short-term duration are excluded, as they would not meet the definition of a 'relevant transfer'.

*Q. Who transfers?*

A. The TUPE Regulations provide for people working in the undertaking at the time of the transfer to move to the new employer. Plainly, however, it will invite disaster simply to wait until the day of the transfer and identify the employees at this point. The use of worksheets is a helpfully objective way of identifying staff employed in the undertaking. Before making their final decision, managers may wish to consult the trade unions over the amount of time to be covered by the worksheets to be used in any identification exercise. As stated above, no employee can be forced to transfer but s/he should be given clear advice on the consequences for them if they choose not to transfer.

It is recommended that wholesale alterations to the workforce are not made in the period leading up to a transfer (although staff may be successful in applying for vacancies elsewhere in the Council during the run-up period).

*Q. Do employees that are seconded to the undertaking that transfers have a right to transfer?*

A. No. They should return to their business unit before the transfer date. In addition, any employees that are seconded from the undertaking that transfers will have a right to transfer and therefore need to be included on the TUPE list and suitably advised of the transfer.

*Q. What about agency staff?*

A. The issue of agency staff might arise during a transfer. The advice on this matter is that a casual worker cannot be regarded as an employee with the right of transfer due to their contractual arrangement. The transferee may wish to retain an agency worker so that they continue working after the transfer; however this would have to be agreed between the transferee, individual and the agency. The transferor should ensure that agency staff and the agencies are informed of the transfer.

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*Q. What about fixed term contract staff?*

A. Where an employee has been identified for TUPE transfer and they are on a fixed term contract, if their contract extends beyond the transfer date they will have a right to transfer. If the contract expires before the transfer date, the contract will end and they will not transfer. Note – the expiration of the contract should not be for a reason connected with the transfer.

The transferee may wish to retain a fixed term contract employee whose contract expires, so that they continue working after the transfer. After the expiration of the contract, this will be a matter for the employee and transferee.

*Q. Do the TUPE Regulations guarantee the conditions of employment of the staff who transfer for the life of the contract?*

A. Terms and conditions are only protected at the point of transfer. The principal reason for any changes cannot be the transfer, but if the reason for the change is not the transfer or if connected to the transfer, is an ETO reason entailing changes to the workforce, then changes to terms and conditions could be deemed lawful. Generally, this refers to a situation where there is a knock on affect of the transfer that impact the business from an economic, technical or organisational perspective. Note - The courts have interpreted that 'harmonisation' of terms and conditions is achieved by reason of the transfer and is not an ETO reason entailing changes in the workforce.

*Q. Is there a certain period of time to wait so that the reason for changes to terms and conditions is not connected at all to the transfer?*

A. The longer the time period, the less likely that a link can be established with the transfer, although there is no guarantee that a link could not be established.

*Q. How long after a transfer are the jobs of transferring staff guaranteed?*

A, TUPE does not provide any guarantee of job security. Through a fair and legal reorganisation process, the transferee could potentially dismiss transferred staff on the grounds of redundancy. Dismissals on the grounds of redundancy will be for an ETO reason entailing changes in the workforce.

*Q. How do I organise the Pension Advice Book?*

A. The Personnel Practitioner should submit the TUPE list to the Pensions Manager who will arrange with the actuary to produce the Pensions Advice Book. This documentation will be provided to bidders to enable them to prepare their bid. After contract award, a finalised TUPE list is to be sent to the Pensions Manager who will arrange for the actuary to prepare a final Pension Advice Book and this will be provided to the successful bidder.

*Q. Can an employee leave their Southwark pension if the new provider offered a comparable pension scheme?*

A. Occupational pension rights up to the time of the transfer are protected. This means, that if the successful tenderer offered a 'broadly comparable' pension scheme, the employee could either (a) retain deferred benefits within the LGPS rather than transfer them to the new scheme or (b) take a cash equivalent transfer value to the new scheme.

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