

Academy Conversions and Mergers and the TUPE Regulations

Advice for NASUWT Local Secretaries and Workplace Representatives

This briefing provides information, guidance and advice to support NASUWT Local Secretaries and Workplace Representatives in England where members are likely to be affected by a Transfer of Undertakings (Protection of Employment) Regulations (TUPE) transfer.

This will usually be the case where a decision has been taken to proceed with conversion of a local authority school to an academy. TUPE will also usually apply when a school merges or joins a multi-academy trust (MAT) and to other changes of school status and governance.

This leaflet should be read in conjunction with the information on the Union's policy on academy schools available on the NASUWT website.

Where a TUPE transfer is proposed, the Workplace Representative(s), Local Association Secretary, National Executive Member and Regional Centre staff will all have a role to play in the process.

The NASUWT Workplace Representative should seek advice immediately from the NASUWT by phone: 03330 145550 or e-mail: advice@mail.nasuw.org.uk when an academy conversion is considered in their workplace.

The appendices to this briefing include a checklist which has been designed to assist NASUWT representatives in obtaining the information which will be required as the transfer proceeds.

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1. The Law in Brief

Where an existing school becomes an academy or merges into a multi-academy trust (MAT), there will usually be 'a relevant transfer' under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

The TUPE Regulations may also apply to other situations where there is a change in the identity of the employer (for instance from the local authority to the governing body, or from one governing body to another).

The basic position is that where a school converts to academy status or joins a MAT, TUPE operates to ensure the staff working in the school, who have a contract of employment or a similar working relationship with the employer, automatically transfer. They will remain on their existing terms and conditions. These terms and conditions will include those set out in their contracts of employment before the transfer and may include the School Teachers' Pay and Conditions Document (STPCD) and the Conditions of Service for School Teachers in England and Wales (the 'Burgundy Book') if these terms applied before the transfer.

The employees become employees of the new employer and all rights, powers, duties and liabilities connected to the employment relationship transfer from the old employer to the new employer. Anything done by the old employer in respect of the employee is treated as having been done by the new employer.

The TUPE Regulations were designed to provide for the protection of employees in the event of a change of employer and to safeguard their rights. The language in the TUPE Regulations is complex and the information contained within this leaflet has two objectives:

- to make the concepts of the law more accessible to NASUWT representatives;
- to indicate what NASUWT representatives should be checking and seeking to secure.

The employers involved in a TUPE transfer are technically known as the 'transferor' and 'transferee'. A 'transferor' is simply the old or existing employer and the 'transferee' will be the new or proposed employer.

To avoid technical jargon, in this briefing the terms 'old employer' or 'existing employer' and 'new employer' will be used.

2. The Application of TUPE

TUPE applies where there is a 'relevant transfer'. There are two types of relevant transfer: business transfers and service provision changes.

This briefing will deal in detail with business transfers as these will be much more common in schools.

Most academy conversions or mergers into MATs will be covered by the rules on business transfers.

Service provision changes occur when an activity is contracted out to another provider, or brought back in house. These may be relevant in some cases where, for instance, a school contracts out a particular function, such as special educational needs (SEN) provision. Where this occurs, NASUWT representatives should seek advice immediately from the NASUWT.

A business transfer occurs when there is a transfer of an economic entity which retains its identity. A 'transfer' just means a change of employer (e.g. from a local authority to a governing body or from one governing body to another). A school will count as an 'economic entity' and so TUPE will usually apply to a conversion or merger or where a school joins a MAT, as long as the school retains its identity during the transfer process.

There are a number of factors which are taken into account in deciding whether identity is retained. For example: whether or not the majority of employees are taken over and the degree of similarity between the activities carried on before and after the transfer. One of the most important factors in a school transfer will be whether the pupils transfer. Conversion to academy status or merger will be very likely to be a relevant transfer, except in exceptional circumstances (for instance, if there is fragmentation of the student population).

Box A

Guidance in brief

- Where teachers are working in a school that is converting to academy status, or merging or joining a MAT, the NASUWT representative should confirm at the earliest possible stage with both the old and new employer that this will be treated as a relevant transfer under the TUPE Regulations.
- If any members are being told that the identity of their employer will be changing but that TUPE does not apply to the change, the NASUWT should be informed.

3. Information and Consultation

There is a requirement on employers to inform and, often, to consult 'appropriate representatives of any affected employees' where a TUPE transfer is proposed. Any failure to inform or consult can be the subject of a claim to the Employment Tribunal. Where there is a recognised union, a claim for failure to inform or consult can be made by the union on its members' behalf and an Employment Tribunal can award up to 13 weeks' pay to each affected employee if the Regulations have been breached. Both the old and new employer can be liable to pay compensation for any failure to inform or consult. Claims for failure to inform or consult can be very costly for employers so most HR advisers will err on the side of caution in making sure the employer complies with the requirements.

What information should be given to NASUWT representatives?

The TUPE Regulations require that employee representatives be informed of:

- whether the transfer is to take place, when it is to happen, why it is to happen;
- the legal, economic and social implications of the transfer for the affected employees;
- whether the employer envisages that any 'measures' will be taken in connection with the transfer which will affect the staff, and if so, what.

'Measures' is a very wide term and covers a range of actions taken by employers, including redundancies, restructures, changes to duties, location moves and changes to working conditions.

When and how should the information be provided?

The information must be provided to 'appropriate representatives'. Where there is union recognition, 'appropriate representatives' means the trade union(s). The information should be 'sent by post to the trade union at the address of its head or main office' but it is common for the Local Association Secretary or Workplace Representative to be provided with this information directly. If the information is not sent to the union's main office, this is a breach of the Regulations and could give rise to a claim on behalf of members. Where there is no recognised union, the information must usually be provided to elected employee representatives and the employer is responsible for ensuring that appropriate representatives have been elected.

The Regulations do not set out a specific time at which the information must be provided. They just say that information is to be provided long enough before the transfer for consultation is to take place. The NASUWT would expect this to be at least 90 working days before the transfer.

It is not only the old employer who has to provide information. The transfer may affect the new employer's existing workforce and in that case the new employer would also have to provide information to appropriate representatives. Most employers provide the information to representatives in the form of a 'Measures Letter'. An example of a Measures Letter is contained in Appendix 1.

Box B

Guidance in brief

- On learning of the proposed transfer, the NASUWT representative should straightaway seek assurances that the required information will be provided at the earliest possible stage, and in any case at least 90 days before the transfer.
- If the required information is not provided in good time before the transfer, the Regional Centre should be informed.
- The NASUWT representative should ensure that all information regarding the consultation is provided to the Regional Centre.

When must consultation take place?

The duty to consult arises when 'an employer of an affected employee... envisages that he will take measures in relation to an affected employee'. Both the old employer and the new employer may be under a duty to consult about the effect of the transfer on their respective employees. Although the Regulations do not set out detailed requirements relating to the timing or content of consultation, locally negotiated agreements may require consultation and most employers will engage in a process of consultation with recognised unions to reduce the possibility of legal action.

Box C

Guidance in brief

- In all cases, NASUWT representatives should make it clear that the NASUWT expects that there will be consultation with both the old and new employer over a period of at least 90 working days before the transfer.
- If either employer does not agree to enter into consultation, the Regional Centre should be informed.

What should the consultation involve?

The Regulations say that consultation must be undertaken with a view to seeking agreement to the intended measures. Employee representatives should be given the required information long enough before the transfer to enable consultation to take place.

Box D

Guidance in brief

In all cases, NASUWT representatives should seek to agree a consultation timetable with both employers, detailing when consultation with unions will take place to:

- confirm the proposed staffing structure and procedures for 'matching' staff to posts;
- discuss the new employer's intentions in relation to terms and conditions, and policies and procedures;
- establish that the Union will continue to be recognised by the new employer; and
- set up effective mechanisms for consultation and negotiation with recognised unions and appropriate arrangements for issues such as facility time.

If agreement cannot be reached over any of these issues, the Regional Centre should be informed.

What about redundancies?

If either employer gives an indication that they intend to make any staff redundant then they need to establish fair and transparent selection criteria and give sufficient time to consult about the proposals. There is always a duty to consult with recognised unions when an employer proposes making 20 or more employees redundant at a single workplace. It is now possible for the new employer to consult about collective redundancies before the transfer takes place but the rules are complex and require the agreement of both employers.

Box E

Guidance in brief

- If either employer suggests they are considering making staff redundant, the NASUWT representative should straightaway seek assurances that full information will be provided at the earliest possible stage and the Regional Centre should be informed.

4. Employment Rights Protected by TUPE

The TUPE Regulations provide for retention of continuity of employment and protection from dismissal or changes to contractual terms in the event of a TUPE transfer.

Continuity of employment

The new employer will step into the shoes of the old employer. The NASUWT members' employment will be continuous from the date they started work under the original contract of employment. This is of great importance for rights such as maternity and paternity, unfair dismissal and redundancy.

Protection from dismissal

Any dismissal will be automatically unfair where the sole or principal reason for the dismissal is the transfer. However, the dismissal will not be automatically unfair where the sole or principal reason for the dismissal is an 'economic, technical or organisational reason entailing changes to the workforce'. This is known as an 'ETO reason'. A valid ETO reason must involve a change in the workforce. This requires a change in the numbers or functions of the employees, or a change of location. This means that if the new employer tries to impose harmonised terms and conditions and an employee is dismissed for refusing to accept them, the dismissal may well be automatically unfair unless the reason for the change entailed changes to the workforce.

Since the Government changed the TUPE Regulations in 2014, it has become easier for employers to avoid automatically unfair dismissals. Dismissals which are not because of the transfer, or which are for a valid ETO reason, will not be automatically unfair. However, it is important to remember that even if a dismissal is not automatically unfair, it may still be unfair under the 'ordinary' unfair dismissal rules. So, for instance, if the new employer wants to reduce staff numbers they will need to establish a fair selection procedure. In addition, if the employer is relying on an ETO reason for dismissal, the dismissal will probably amount to redundancy and so the member should qualify for a redundancy payment.

Box F

Guidance in brief

- NASUWT representatives should ensure they are aware of any proposed staff reductions before the transfer.
- Where staff reductions are proposed, the NASUWT representative should immediately inform the Regional Centre. The Regional Centre will assess whether or not any claims for unfair dismissal should be brought in an Employment Tribunal.

Pay and conditions of service

TUPE says that certain changes to terms and conditions are ineffective, even if they have been agreed between employer and employee. Any variation of the contract of employment which disadvantages the employee is void where the sole or principal reason for the change is the transfer. However, variations to the contract where the reason for the change is an ETO reason are permitted.

A desire on the part of the new employer to have all their staff employed on harmonised terms and conditions will not, of itself, be an ETO reason (unless it also involves changes to the workforce). This means that if the new employer tries to change the contracts of transferred staff onto its own terms and conditions, this may be ineffective. If changes are introduced because of the transfer and not for an ETO reason, then members who have transferred may be able to make a claim to the Employment Tribunal.

It is important that, if the new employer seeks to impose a change to terms and conditions, a written objection to the variation is registered promptly by the employees and/or the union. This is the case even if the change is permitted by TUPE. If no objection is registered promptly, the employees may lose the right to challenge the change as it may be deemed to have been accepted by continuing to work.

Box G

Guidance in brief

- NASUWT representatives should check if any changes to members' terms and conditions are to be made at or around the time of the transfer.
- Where changes are suggested to the pay and conditions of service or any other terms of teachers who transfer, the Regional Centre should be contacted immediately for advice.
- Agreement should be sought in writing from the new employer that any proposals affecting the pay and conditions of service of all staff, including new appointees, should be subject to discussion with the NASUWT and other recognised trade unions.

Collective agreements

Terms and conditions, which are derived from local collective agreements which are already in place, such as the Burgundy Book and local authority or school policies and procedures, will in most cases be transferred under the TUPE regulations. Any collective agreements entered into by the old employer before the transfer date, in respect of individual terms and conditions of employment, should be honoured by the new employer to the extent that they applied at the date of transfer.

The NASUWT's position should be that all collective agreements, policies and procedures transfer and if the new employer insists on moving away from local agreements, they would need to negotiate new agreements with recognised trade unions through appropriate joint negotiating structures.

The same principles apply to these changes as to any other changes to terms and conditions. Although the recent changes to the TUPE Regulations included a new power for employers to change terms derived from collective agreements once a year has passed after the transfer, there are huge legal difficulties for employers attempting to use this rule. If an employer suggests that they have the right to change collective agreements after a year has passed from the date of the transfer, the Regional Centre should be contacted immediately for advice.

Box H

Guidance in brief

- The NASUWT representative should seek confirmation in writing from the new employer that collective agreements (including, where applicable, the STPCD and the Burgundy Book), and relevant policies and procedures, will transfer.
- Advice should be sought from the Regional Centre where there is any doubt over the transfer of the agreement(s).

Offers of revised contracts of employment

Where the new employer offers transferred staff a new contract of employment on its own standard terms, members should be advised not to agree to changes to their contracts. Such an offer will be likely to amount to harmonisation, which is not usually a valid ETO reason for making changes to terms and conditions.

Box I

Guidance in brief

- If the new employer proposes that they will offer or impose new contracts of employment, advice should be sought from the Regional Centre.

Objecting to the transfer

In theory, employees who do not wish to become an employee of the new employer have the right to object to the transfer by informing either employer. There is no requirement to give notice but in most circumstances the objection must be made before the transfer takes place. If an employee objects in this way, they will not transfer. Their employment is usually treated as being terminated by operation of law with effect from the transfer date and there is no dismissal. The consequence of this is that there is usually no possibility of a claim for unfair dismissal (because the employee is not dismissed) and there is no entitlement to any statutory or contractual compensation on termination.

The only exception to this is if the employee objects in response to a fundamental breach of contract or where the transfer would involve a substantial change to working conditions to the employee's material detriment. Only if this is the case is the termination treated as a dismissal (although the dismissal will not necessarily be unfair). Because of this, it is a very bad idea to object without getting specific advice first. Any members who indicate that they are thinking of objecting to the transfer should be advised strongly against doing so until they have received specific advice.

Box J

Guidance in brief

- If any member indicates that they are considering objecting to the transfer, they should be immediately advised not to do so and advice should be sought from the Regional Centre.

Pensions

Teachers in pensionable employment at an academy will automatically remain within the Teachers' Pension Scheme (TPS). Pension entitlements do not transfer under the TUPE Regulations; however, teachers in pensionable employment in academies are automatically members of the TPS. If there is any attempt to deviate from this or there is any suggestion that changes will be made to pension arrangements after the transfer, the Regional Centre should be informed immediately.

Box K

Guidance in brief

- NASUWT representatives should seek confirmation in writing from the new employer before the transfer takes place that all teachers in pensionable employment will automatically be entered for membership of the Teachers' Pension Scheme and that there will be no changes made to pension arrangements.
- If the new employer will not provide this confirmation, the Regional Centre should be notified.

Newly appointed teachers

Academies have freedom to determine the pay, conditions of service, policies, procedures and working time arrangements for new employees who have not transferred under the TUPE provisions.

In some academies and MATs, the pay and conditions of employment for newly appointed teachers are the same or similar to those of staff who transferred. In others, pay and conditions of employment can vary considerably. This creates a two-tier workforce which potentially adversely affects staff morale and disadvantages individual members.

The current Government guidance says only that 'new entrants should have fair and reasonable pay, terms and conditions. [The employer] should consult with their recognised trade unions on the terms and conditions to be offered to new entrants'.

Box L

Guidance in brief

- NASUWT representatives should seek agreement that newly appointed staff will be employed on the same terms as existing staff.
- In all cases, the new employer should follow government guidance and consult about the terms to be offered to newly appointed staff. If the new employer will not do so, or seeks to offer less favourable terms to new staff, the Regional Centre should be contacted.

5. Issues for NASUWT

Trade Union Recognition Agreements (TURAs) also transfer when the group of employees who transfer retains a distinct identity. The NASUWT's position is that this is the case where a school becomes an academy, merges with another school or joins a MAT. Therefore, representatives should be seeking confirmation at an early stage that the new employer will continue to recognise the NASUWT after the transfer.

The TURA may include the right for union representatives to take paid time off for union duties and this should also be honoured by the new employer. The right to paid time off may also be part of the representative's individual terms and conditions of employment which would transfer, even if those arrangements are not written down anywhere. Further advice should be obtained if the new employer seeks to argue that they do not have to recognise the NASUWT or seeks to curtail paid time off for union duties and activities.

The NASUWT is a signatory to a useful TUC *model agreement on recognition, facilities and negotiation structures*, which may be helpful in discussions with academies about these issues (www.nasuwt.org.uk/Academies).

Box M

Guidance in brief

- NASUWT representatives should seek confirmation in writing from the new employer that they will continue to recognise the NASUWT for collective bargaining and that NASUWT Representatives will be guaranteed access to premises, staff and adequate facilities to undertake their duties.
- If the new employer will not provide this confirmation, advice should be obtained from the Regional Centre.

Collective disputes

If a solution that is acceptable to members cannot be reached and they remain unhappy about changes to policies, pay, pensions, terms and conditions or anything else that the new employer seeks to introduce, then it will be necessary to canvass members' views on whether they will support further action by the NASUWT, including industrial action.

Box N

Guidance in brief

- NASUWT representatives should contact the NASUWT for advice and guidance to be given if agreement is not possible.

6. Advice and Further Information

**For advice and support, contact the NASUWT by phone 03330 145550,
e-mail: advice@mail.nasuwt.org.uk
or website: www.nasuwt.org.uk.**

Appendix 1

Example of Measures Letter giving Information about a Transfer

Dear [Names]

Transfer of [The School] to [New Employer]

Following our previous discussions, I am writing to confirm that the [Old Employer] is proposing to transfer [The School] to [New Employer]. This transfer would affect employees of the following description: [Description of Affected Employees] (“the affected employees”).

We believe that the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) will apply to the proposed transfer. As you may know, under regulation 13 of TUPE, the employer of employees affected by a proposed transfer must provide certain information to appropriate representatives of those employees. In addition, in some circumstances, there is an obligation to consult with those representatives.

You are a representative of the NASUWT, which [Old Employer] recognises in respect of employees employed at [The School]. [Old Employer] is therefore providing you with the following relevant information:

[Old Employer] is proposing to transfer [The School] to [New Employer].

It is currently planned that the transfer will take place on [or about] [Date].

[Old Employer] is proposing to transfer [The School] to [New Employer] because [Reasons for the transfer].

The proposed transfer would affect [number and description of affected employees] who are currently employed in [The School]. They would transfer to [New Employer] under TUPE on their current terms of employment [except for those terms relating to their occupational pension scheme (see below)]. Their period of continuous employment would be preserved.

[Details of any legal implications for the old employer’s affected employees]

Affected employees have the right under TUPE to object to their transfer to [New Employer]. The legal effect of objecting would be that their employment with [Old Employer] would automatically terminate by operation of law with effect from the date of the transfer (and they would not automatically transfer to [New Employer]) and there would be no entitlement to either statutory or contractual compensation.

There will be [no OR the following] economic implications of the proposed transfer: [Details of any economic implications].

There will be [no OR the following] social implications of the proposed transfer: [Details of any social implications].

[New Employer AND/OR Old Employer] [envisages taking the measures specified below OR does not envisage taking any measures] in relation to its affected employees in connection with the transfer: [Details of any Measures including any proposed measures in relation to pensions].

There are currently [Number] agency workers working temporarily for and under the supervision and direction of [Old Employer] at [The School]. The parts of the undertaking in which those agency workers are working, and the types of work they are carrying out, are as follows: [Details].

[Names] and I need to meet with all of the appropriate representatives to discuss the proposed transfer and to consult with you about the measures which it is envisaged will be taken in relation to affected employees in connection with the transfer. The aim of this consultation will be to seek your agreement to those measures. I have arranged a meeting with all of the representatives for [details of meeting], at which we will explain the proposals to you in more detail and consider any representations that you wish to make on the proposed measures. We will arrange a further meeting at which we will reply on behalf of [Old Employer] to all of the representations and, if it rejects any of those representations, state its reasons.

Please let me know if you have any queries. [I would be happy to meet with you to discuss the proposed transfer.]

Yours sincerely

Appendix 2

NASUWT Representatives' Checklist

This checklist is designed to assist in identifying the information which will be required during the process of a TUPE transfer, either from a local authority to academy status, or when an existing academy merges with another school, or joins a multi-academy trust (MAT) or national academy chain.

At all stages of the process, local representatives are encouraged to provide information to the Regional Centre and to seek advice from the Local Association Secretary, the National Executive Member and the Regional Centre. In particular, advice should be sought where issues arise which might affect the job security or working conditions of members, or where the future position of the union in respect of members at the school is called into doubt.

Name of School

Existing Employer (Transferor)

Name of Representative

1. Preliminary Stages

As soon as information becomes available which suggests that a school will be converting to academy status, merging or joining a MAT or that any other change in the identity of the employer is to take place, the following information should be confirmed with the present employer:

Proposed Employer (Transferee)

Proposed Date of Transfer

Will the change be treated as a relevant transfer under the TUPE Regulations? Yes No

If not, why not?

The proposed employer should also be contacted and asked the same questions

Will the proposed employer confirm that this is a TUPE transfer? Yes No

If not, why not?

- If the identity of the employer will be changing but either employer will not confirm that TUPE will apply, the representative should obtain advice from the Local Association Secretary, the National Executive Member or the Regional Centre.

See Box A of the Guidance in brief

2. Information from the Existing Employer

Once it is confirmed that a transfer is proposed, the NASUWT representative should seek assurances from both employers that the information required by the Regulations will be provided at least 90 days before the transfer and that there will be consultation with both employers.

Does the existing employer confirm that the information will be provided 90 days before the proposed transfer date? Yes No

Has the existing employer provided information? Yes No

When was the information received?

Has the following information been provided by the existing employer? Yes No

The fact that the transfer is to take place

The proposed date of the transfer

The reasons for the transfer

The legal, economic and social implications for affected employees

The measures the existing employer intends taking (or that no measures will be taken)

The measures the existing employer envisages the new employer will take (or that no measures are envisaged)

The number, locations and roles of agency workers working for the existing employer

- **If the information is not provided in good time before the transfer, the representative should obtain advice from the Regional Centre.**
- **If any of this information is not provided, the representative should obtain advice from the Regional Centre and provide a copy of the information which has been received.**

See Box B of the Guidance in brief

3. Information from the New Employer

The new employer may also be obliged to provide information. This is required if they have an existing workforce who will be affected by the transfer.

Has the new employer also provided information? Yes No

If so, on what date was information received?

Has all the following information been provided by the new employer? Yes No

The fact that the transfer is to take place

The proposed date of the transfer

The reasons for the transfer

- | | | |
|---|--------------------------|--------------------------|
| The legal, economic and social implications for affected employees | <input type="checkbox"/> | <input type="checkbox"/> |
| The measures the new employer intends taking
(or that no measures will be taken) | <input type="checkbox"/> | <input type="checkbox"/> |
| The number, locations and roles of agency workers working for the new employer | <input type="checkbox"/> | <input type="checkbox"/> |

- **If it appears the new employer might be obliged to provide information and any of this information is not received, the representative should obtain advice from the Regional Centre and provide a copy of the information which has been received.**

See Box B of the Guidance in brief

4. Preparing for Consultation

Once the information is received, it will be necessary to agree a consultation timetable with both employers detailing when consultation with the NASUWT and other recognised unions will take place. The timetable should provide for a series of meetings so that the views of members can be obtained and their concerns raised with the employers at further meetings.

Have both employers agreed to consultation? Yes No

Agreed dates of meetings with employers

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Steps should also be taken to set an agenda for the meetings. Does the agenda cover all the following matters?

- | | Yes | No |
|---|--------------------------|--------------------------|
| Staff numbers | <input type="checkbox"/> | <input type="checkbox"/> |
| The measures specified in the information provided by the employer(s) | <input type="checkbox"/> | <input type="checkbox"/> |
| The proposed staffing structure | <input type="checkbox"/> | <input type="checkbox"/> |
| Procedures for matching staff to posts | <input type="checkbox"/> | <input type="checkbox"/> |
| Terms and conditions (including pay and pensions) | <input type="checkbox"/> | <input type="checkbox"/> |
| The status of policies and procedures and collective agreements | <input type="checkbox"/> | <input type="checkbox"/> |
| Union recognition | <input type="checkbox"/> | <input type="checkbox"/> |
| Facilities and time off for union representatives | <input type="checkbox"/> | <input type="checkbox"/> |
| Mechanisms for consultation and negotiation | <input type="checkbox"/> | <input type="checkbox"/> |

- **If either employer does not agree to consultation or an appropriate timetable and agenda cannot be agreed, the representative should obtain advice from the Regional Centre.**

See Boxes C and D of the Guidance in brief

Does the information received from the employers or the members (or any other source) suggest that either employer is considering reducing staff numbers?

Yes No

Has any information been received from members (or any other source) which suggests that either employer is considering changes to working conditions such as:

Moving away from the School Teachers' Pay and Conditions Document (if applicable)?

Yes No

Ceasing to adopt future School Teachers' Pay and Conditions Documents?

Yes No

Not retaining Burgundy Book terms (if applicable)?

Yes No

Changes to redundancy payments?

Yes No

Changes to sick pay?

Yes No

Changes to maternity pay?

Yes No

- **If the answer to any of these questions is yes, the representative should obtain advice from the Regional Centre.**

See Boxes F and G of the Guidance in brief

5. During the Consultation

The consultation should be conducted by the employers with a view to seeking agreement. The employers should consider the views of union representatives and reply with reasons. Representatives should be given accommodation and facilities to consult with members. The representative should keep a written record of all consultation meetings which take place, including the following information:

The date

The names of attendees

The format for the meeting

The matters discussed at the meeting

What benefit will accrue from the academy conversion/change of employer?

Details of any proposed changes which will affect members

Details of any proposed changes which will affect the NASUWT

The manner in which the meeting was conducted by management

Whether management appeared to be seeking agreement

Any representations made by the NASUWT, other unions or staff

The management response to these representations

If the representations were rejected, the reasons for rejection

Whether NASUWT representatives were given an opportunity to consult with members

Whether NASUWT representatives were provided with time and facilities to do this

Details of any consultation with parents, pupils or the community

The date and arrangements for the next meeting(s)

A record should also be kept of any information (whether in documents, e-mails, letters etc or information given verbally) outside of consultation meetings.

A request should be made to see a fully costed business plan for the new academy arrangements. Does it include provisions for the additional resources and costs associated with:

- Personnel functions?
- Legal functions?
- IT costs and maintenance?
- Health and safety obligations?
- SEN provision?
- Public liability and other insurance?
- Complaints by parents?
- Equality Act 2010 duties?

Has an equality impact assessment of the change to school status been conducted? Yes No

- **If the consultation is not conducted with a view to seeking agreement, or the employers do not reply with reasons to representations, or accommodation and facilities are not provided for consultation with members, the representative should obtain advice from the Regional Centre.**

See Box D of the Guidance in brief

6. Terms and Conditions

In the course of the consultation process, representatives should check if any changes to members' terms and conditions are to be made at or around the time of the transfer. This will include checking whether there is an intention to move away from or make changes to collectively agreed terms (including, where applicable, changing Burgundy Book and STPCD terms).

Does the new employer suggest they will be retaining:

- The School Teachers' Pay and Conditions Document (if applicable)? Yes No
 - Future School Teachers' Pay and Conditions Documents? Yes No
 - Burgundy Book terms (if applicable)? Yes No
 - The same redundancy payments? Yes No
 - The same sick pay arrangements? Yes No
 - The same maternity pay arrangements? Yes No
 - The same school day? Yes No
 - The same holidays? Yes No
- Does the new employer confirm:
- There will be no changes to collective agreements? Yes No
 - There will be no changes to other terms and conditions? Yes No
 - There will be no changes to pension arrangements for existing staff? Yes No

That new staff will be offered the same terms as existing staff? Yes No

That new staff will have the same pension arrangements as existing staff? Yes No

Please provide brief details of any proposed changes

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Agreement should be sought from the new employer in writing that changes to pay and conditions (including changes to collective agreements, or the terms offered to new appointees) will not be implemented without prior discussion within joint negotiating structures involving the NASUWT and other recognised trade unions.

Does the employer agree that any changes should be subject to discussion within joint negotiating structures? Yes No

- **If there are any proposals affecting the pay and conditions of service of staff, including issuing new contracts of employment, changing collective agreements, changing pension arrangements or offering different terms to new appointees, the representative should obtain advice from the Regional Centre.**

See Boxes G, H, I and L of the Guidance in brief

7. Union Recognition

During the consultation process, representatives should seek confirmation in writing from the new employer that they will continue to recognise the NASUWT for collective bargaining to the same extent as occurred before the transfer. The new employer should also be asked to confirm in writing that the previous arrangements of time off and other facilities for NASUWT representatives will continue.

Does the new employer confirm that recognition of the NASUWT will be unchanged? Yes No

Does the new employer confirm that there will be no changes to time off and other facilities for representatives? Yes No

Does the new employer agree to adopt the TUC Model Agreement for Academies on recognition, facilities and negotiation structures? Yes No

Brief details of any proposed changes

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- **If the new employer will not provide this confirmation, the representative should obtain advice from the Regional Centre.**

See Box M of the Guidance in brief

Appendix 3

TUPE Glossary

The law concerning transfers of employment is full of confusing terminology. These are some definitions of key terms:

Appropriate Representatives

Employers must inform and often consult Appropriate Representatives. Where an employer recognises a trade union or unions, this means the recognised union(s). Where there is no recognised union, this means either existing employee representatives or new ones specially elected for the purpose.

Acquired Rights Directive

EU Council Directive No. 2001/23. This is the piece of EU legislation which requires member states of the EU to introduce laws to protect employees when there is a **Transfer of Undertakings**. The UK law which was introduced to comply with this requirement is known as **TUPE**.

Automatically Unfair Dismissal

Dismissal because of a transfer (where there is no valid **ETO Reason**) is always unfair. However, there is still a minimum qualifying period of two years' continuous service in order to claim.

Business Transfer

A type of **Relevant Transfer** which takes place when there is 'the transfer of an **Economic Entity** (see below) which retains its identity'.

Collective Agreement

An agreement between an employer and a trade union covering matters like: terms and conditions; discipline, dismissal and suspension, allocation of work; union membership, facilities and recognition and/or the machinery of collective bargaining. The Burgundy Book is a Collective Agreement.

Economic Entity

Defined as 'an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'. A school will count as an **Economic Entity**.

Economic, Technical or Organisational Reason

Also called an **ETO reason**. This could include profitability or financial performance, regulatory requirements, differences in the **Transferor** and **Transferee's** organisational processes or the **Transferee's** organisational structure. To be a valid **ETO reason**, the reason must entail changes in the workforce (i.e. changes to numbers of employees, their roles or their location).

ETO Reason

An **Economic, Technical or Organisational Reason**.

Facilities Agreement

A type of **Collective Agreement** which covers the facilities to be provided to union representatives, such as time off for union duties, activities and training, equipment, office space etc.

Harmonisation

This is where the **Transferee** changes the terms and conditions of transferred employees to align them with the terms of existing staff. This is usually not permitted by **TUPE** because a desire to have all staff on the same terms is typically not a valid **ETO Reason**. Most employers will avoid using this term.

Legal, Economic and Social Implications

The legal implications of a transfer include the impact on employees' legal rights, the economic

implications include changes to pay or benefits, and the social implications include changes in working conditions or work location.

Measures

This has a very broad meaning and covers *any* 'action, step or arrangement' taken in connection with the transfer including restructures, changes to job roles or working conditions, relocation or redundancies.

Measures Letter

This is a letter sent to **Appropriate Representatives** before the transfer setting out information about the transfer, including information about the **Measures** which it is envisaged will be taken.

Objecting to the Transfer

Where an employee tells either the **Transferor** or the **Transferee** that they do not wish to transfer. This may lead to the employee's employment ending with no legal rights and no redundancy pay. This is therefore usually a very bad idea.

Protective Award

A term often used to describe an Employment Tribunal award of up to 13 weeks' pay to employees for an employer's failure to inform and consult prior to a transfer. The term 'Protective Award' does not actually appear in **TUPE**.

Relevant Transfer

A **Business Transfer** or a **Service Provision Change** to which **TUPE** applies.

Service Provision Change

A type of **Relevant Transfer** which occurs when activities are contracted out, contracted in or recontracted and the activities stay fundamentally the same afterwards as they were before.

Trade Union Recognition Agreement – A type of **Collective Agreement** whereby an employer agrees to recognise a union for the purposes of negotiating employee terms and conditions etc.

Transfer Date – The date a **Relevant Transfer** takes place for the purposes of **TUPE**.

Transfer of a Business – See **Business Transfer** above.

Transfer of Undertakings – A **Relevant Transfer** under **TUPE**.

This occurs when a business is sold, or the responsibility for providing a service moves from one organisation or legal body to another (for instance an academy conversion).

Transferee

The new employer. The employer after the transfer has taken place.

Transferor

The old employer. The employer before the transfer has taken place.

TUPE

The Transfer of Undertakings (Protection of Employment) Regulations 2006.

TURA

A Trade Union Recognition Agreement.

Appendix 4

Notes and Further Reading

The following documents are referred to in the briefing note and can be accessed online:

The Transfer of Undertakings (Protection of Employment) Regulations 2006

www.legislation.gov.uk/uksi/2006/246/contents/made. These are the original regulations and care should be taken as they were amended in 2014 by The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014.

The School Teachers' Pay and Conditions Document www.nasuwat.org.uk/STPCD.

The Conditions of Service for School Teachers in England and Wales www.nasuwat.org.uk.

Details of the Teachers' Pensions Scheme www.teacherspensions.co.uk.

The Cabinet Office Statement on Principles of Good Employment Practice

www.gov.uk/government/publications/principles-of-good-employment-practice.

The TUC Model Agreement for Academies www.nasuwat.org.uk/Academies.

NASUWT

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