

Academy Conversions and Mergers and the TUPE Regulations

Advice for NASUWT Leadership Members

In circumstances where a school or college changes its legal status (such as during an academy conversion) or merges with another school/college or becomes part of a trust or group, staff employed by the original school(s) will be protected by statutory regulations known as the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

This briefing provides information, guidance and advice to support NASUWT leadership members where they are likely to be affected by TUPE.

Where a TUPE transfer is a possibility (for example, where an academy conversion is proposed), members should seek advice immediately from the NASUWT by phone on 03330 145550 or by e-mail at advice@mail.nasuwt.org.uk.

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

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 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 took place and may include those set out in the School Teachers' Pay and Conditions Document (STPCD) and the Conditions of Service for School Teachers in England and Wales (the 'Burgundy Book').

Under TUPE, existing staff become employees of the new employer, and all rights, powers, duties and liabilities connected to the employment relationship then transfer from the old employer to the new employer. Any action taken by the old employer in respect of the employee is treated as having been taken by the new employer.

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' is 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.

Briefing

2. The Application of TUPE

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

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.

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 (such as from a local authority to a governing body, or from one governing body to another). A school will count as an 'economic entity' and therefore 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, like 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 a merger will very likely be classed as a relevant transfer.

- Where teachers are working in a school that is converting to academy status, or merging or joining a MAT, the leadership team should confirm at the earliest possible stage whether this will be treated as a relevant transfer under the TUPE Regulations.
- NASUWT leadership members should seek advice from the NASUWT at the earliest opportunity.

3. Information and Consultation

There is a requirement for 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.

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 any 'measures' being taken in connection with the transfer which will affect the staff, and, if so, what (for example, redundancies, restructures, changes to duties, location moves and changes to working conditions).

School/college leaders will be expected to act on behalf of the employer in ensuring that it meets the requirements regarding negotiation and consultation. At the same time, school/college leaders will be affected directly by the nature and implications of any TUPE transfer and it is important that these contractual and employment conditions are protected, alongside the contractual and employment conditions of all other employees. NASUWT leadership members will therefore need to seek advice from the NASUWT, whilst at the same time continuing to meet the professional and contractual expectations placed on them by their employer.

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.

- Under TUPE, the old and new employer must provide information and consult with employee representatives (such as recognised trade unions) about the nature, implications and potential impact of the transfer on existing staff.
- NASUWT leadership members should seek advice from the NASUWT at the earliest opportunity.

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'.

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.

TUPE CONSULTATION CHECKLIST

The employer will need to:

1. agree a consultation timetable and detail when consultation with unions will take place;
2. discuss the proposed staffing structure and procedures for 'matching' staff to posts;
3. discuss any 'measures' in connection with the transfer, including any criteria to be used in cases of proposals to make staff redundant;
4. discuss the new employer's intentions in relation to terms and conditions, and policies and procedures;
5. establish arrangements for trade union recognition by the new employer;
6. agree mechanisms for consultation and negotiation with recognised unions.

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. An individual's employment will be considered 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' (for example, a change in the numbers or functions of the employees, or a change of location). 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.

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.

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 without first seeking advice from the NASUWT.

Objecting to the transfer

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. If an employee objects, 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.

Any members who indicate that they are thinking of objecting to the transfer should not do so until they have received specific advice from the NASUWT.

Leadership members should seek advice from the NASUWT at the earliest opportunity if they are considering objecting to the transfer.

Pensions

Teachers in pensionable employment at an academy shall automatically remain within the Teachers' Pension Scheme (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, please contact the NASUWT immediately.



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