

Make Work Pay: Call for evidence on Transfer of Undertakings (Protection of Employment) Regulations

Submission by the Trades Union Congress

Introduction

The TUC is the voice of Britain at work. We represent more than 5.5 million working people in 47 unions across the economy. We campaign for more and better jobs and a better working life for everyone, and we support trade unions to grow and thrive.

Trade union officials and workplace reps have extensive experience of representing members during TUPE transfers, both through information and consultation arrangements and by ensuring that members benefit from their TUPE-related rights.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 provide important protections for many workers when their employer is sold or changes, generally following transfer of a public contract to a different provider.

They also ensure that workplace representatives are informed about the potential implications of proposed transfers and that negotiations take place on any envisaged measures relating from the transfer.

However, the TUC believes that the regulations, as they currently stand, fail to protect workers' key rights, as they transfer to another employer. Firstly, there are low levels of compliance with the existing regulations. It is common for employers to tell unions that the regulations do not apply to a particular transfer, with the onus then falling on unions to challenge the decision in tribunal, which is not always feasible. Secondly, the regulations are inadequate. They do not effectively protect key terms and conditions during a transfer. And they give employers too much scope to vary terms and conditions or dismiss workers after transfer.

The TUC believes the following key reforms need to be made to improve the effectiveness of the TUPE regulations:

1. Greater protection for the terms and conditions that are derived from collective agreements, including dynamic interpretation of collective agreements for transferred workers
2. More safeguards to protect the transfer of union recognition and ensure that transferred workers can continue to benefit from having a recognised union post transfer
3. Occupational pension provision should also transfer
4. Regulations should be amended to remove the ability to make variations where the sole or principal reason is an economic, technical or organisational reason entitling changes in the workforce (regulation 4(5)(a)).
5. Regulations should be amended to remove the facility for dismissals potentially to be fair where the sole or principal reason is an economic, technical or organisational reason entailing changes in the workforce (regulations 7(1)(a) and (3)(b))
6. Information and consultation obligations with unions need to be enhanced

7. Greater clarity about what constitutes a service provision change. There needs to be reconsideration of the definition of the circumstances in which a service provision change occurs
8. Extension of the regulations to cover all workers
9. The issues caused by permitting a worker to transfer to multiple transferees must be addressed
10. TUPE provisions should apply to share transfers
11. TUPE should be amended to provide that an employee who treats their employment as terminated by reason of a substantial change in their working conditions to their material detriment is able to claim for wrongful dismissal (regulations 4 (7), (8) and (9))
12. Appropriate statutory information provided under regulation 11 should be shared with the relevant recognised unions
13. Workers should be informed of their right to object to the transfer
14. Regulations should be strengthened to include anti avoidance measures to prevent the use of sham transfers to undermine the intention of TUPE
15. Variations should be permitted which are favourable to the employee
16. Resolution of the issues in Nicholls / Bicknell to clarify that public sector procurement operations are capable of amounting to 'economic entities', that TUPE applies in the situations of those two cases, and that competition law is not an appropriate yardstick (regulation 3(2) and (5))
17. Wider HR and employment policies should transfer in addition to collective agreements.

Q1. To what extent do you agree or disagree that the current TUPE regulations strike the right balance between supporting employer needs and protecting employees' employment rights? Please explain your answer. • strongly agree • agree • neutral • disagree • strongly disagree • other

Other.

The current regulations do not adequately protect terms and conditions when a transfer of employment takes place.

The framing of this consultation question is unhelpful. It's important to remember the original intention behind this legislation, which was to "to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded".¹ References to "strike the right balance" and "supporting employer needs" risk undermining the principal purpose of this legislation which is to safeguard workers' rights during a transfer.

¹ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, Recital 3, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001L0023>

Q2. To what extent do you agree or disagree that the current TUPE regulations sufficiently protect employees' employment rights when a transfer takes place? Please explain your answer. • strongly agree • agree • neutral • disagree • strongly disagree • other

Disagree. Please see the list of suggested reforms above.

The TUC believes that the TUPE regulations need significant reform to improve their effectiveness in safeguarding workers during a transfer process. We have set out those key reforms above. Throughout this consultation document we have outlined significant areas where we think TUPE regulations are not adequately protecting employment rights.

Q3. To what extent do you agree or disagree that the current TUPE consultation requirements are sufficient to ensure employees are informed and consulted with when a transfer takes place? Please explain your answer. • strongly agree • agree • neutral • disagree • strongly disagree • other

Strongly disagree.

Our affiliates' experience in workplaces is that many employers are unwilling to work effectively with trade unions to ensure the most effective outcome for workers and employers.

Once a contract is awarded under TUPE, both the transferor and transferee must provide trade union reps (or employee representatives where a union is not recognised) with specified information and an outline of any "measures" that are to be taken which could affect the employees. In addition to providing information, the legislation places a statutory obligation on the employer to consult with trade union or elected reps over the consequences of the transfer.

However, there are currently significant shortcomings. In reality, some employers choose to bypass the need to elect representatives, by informing and consulting with the employees directly, in contravention of their obligations. This weakens the worker voice because individual employees may not feel equipped to engage with the information supplied and may worry about the consequences if they push back on proposed changes.

In other cases, the consultation is not undertaken in good faith, with employers failing to supply key information or neglecting to properly consider proposals made by staff unions. We therefore urge the Department for Business and Trade to consider how to strengthen and more robustly enforce employers' consultation and information obligations.

The TUC believes that a number of reforms need to be introduced in this area:

- There should be consultation obligations with recognised unions where TUPE applicability is in doubt, for example where the employer informs the unions that TUPE doesn't apply. Specifically, if the employer says TUPE doesn't apply, then there

should be a legal obligation to consult with the union to explain why and hear union counter views.

- Provide that consultation should continue after the transfer, reversing the decision in *Amicus v City Building Glasgow LLP*. The Employment Appeal Tribunal in Scotland has held that a transferee's information and consultation obligations under TUPE cease at the date of transfer. However, it would be reasonable to expect a transferee to continue consultation post transfer where changes to working practices were expected, for example.
- Consistent with the transferee's ability to conduct pre-transfer collective redundancy consultation, require the transferee to consult the appropriate representative of the transferor's affected employees about the measures it envisages it will take in relation to the transferring employees in connection with the transfer (regulation 13(6)). Currently, the transferee only has to consult with the representatives of its own affected employees. Regulation 13 should be amended to ensure there is always a duty to consult about measures affecting both transferor and transferee, before and after the transfer.
- There is no specific timescale set out in the regulations, and in practice information is often provided only shortly before the transfer. This is in contrast to the position regarding collective redundancies where the law does set out specific minimum periods. Given that a TUPE transfer can have momentous effects on the employees, Reg 13(2) should be amended to specify minimum timescales.
- The sanction for an employer failing to consult in a TUPE process should be aligned with the maximum protective award for non-compliance with collective redundancy obligations, which has increased from 90 days' pay to 180 days' pay per affected employee.
- Ensure the 'special circumstances' consultation exemption does not include circumstances dictated by the transactional timetable, reversing the decision in *UNISON v Somerset County Council* (regulation 13(9)). In this case the employer was able to avoid consultation obligations because of the urgent nature of negotiations between the transferor and transferee and concerns the deal could be lost if they consulted with unions.
- Confirm that information to be provided about 'measures' includes information about pensions (regulation 13(2)).
- Provide that information should be supplied in writing (regulation 13(5));
- Small business exemption for information and consultation where there are no elected ('appropriate') representatives should be removed. This was originally introduced in 2014, and then extended with effect from 1 January 2024. Regulation 13A provides that where:
 - (i) there are not appropriate representatives already in place; and

- (ii) there haven't been invitations for elections by the employer,

the employer can comply with its information and consultation obligations 'as if each affected employee was an appropriate representative' (ie it can inform and consult with each affected employee directly) if one or both of the below are satisfied:

- (i) the employer employs fewer than 50 employees; or
- (ii) the transfer involves fewer than 10 employees.

The extent of the current exemption is beyond that permitted by the Acquired Rights Directive.

This exemption should be removed altogether. Employees of small businesses still face the same potentially huge consequences of transfer as those of bigger employers. We note that, in reality, many transfers are of small groups of workers doing specific roles, such as cleaning, and therefore the impact of this provision is significant.

Q4. To what extent do you agree or disagree that collective agreements are sufficiently protected under a TUPE transfer? Please explain your answer. • strongly agree • agree • neutral • disagree • strongly disagree • other

Strongly disagree.

- Union members should benefit from dynamic interpretation of collective agreements post transfer. Transferred workers should continue to benefit from the collective agreements negotiated by their unions and benefit from future enhancements to those agreements. This would reverse the 'static' approach to incorporation of collective agreements from the *Alemo-Herron* case. The effect of the *Alemo-Herron* case is to deny transferred workers the benefits of evolving collective agreements.
- The regulations should be amended to remove the ability to make variations to terms and conditions derived from collective agreements after one year (regulation 4(5B)). The status quo encourages employers to wait out the 12-month period to then cut conditions, rather than engaging properly with trade unions.
- Unions report that even though a collective agreement transfers, the collective bargaining machinery that underpins the agreement and makes it effective, doesn't always transfer, which effectively undermines the collective agreement. NASUWT reports, for example, that arrangements to provide trade union facilities do not transfer unless they are part of a collective agreement which transfers. Including it in the collective agreement is uncommon. It is vital that facility time is protected, as union reps need the time and space to effectively represent their members.

Wider HR and employment policies should transfer in addition to collective agreements

NASUWT, an education union, highlights a key issue that often arises during a TUPE process: wider transferor workplace policies that are not collective agreements, do not always transfer on a TUPE transfer.

This is significant because such policies may be more favourable to the workers involved.

During a TUPE process NASUWT advocates that all policies should transfer but this is frequently disputed by employers, or they declare a measure to replace transferor policies with transferee policies (other than where this would clearly lead to financial loss for TUPE-transferred staff).

An example of this is during the process of academisation where a school transfers from local authority control to an academy trust. Often the new employer cites the need to 'harmonise policies' and, as such, members are transferred from their existing policies – that are often enhanced – to inferior ones. NASUWT provides an example of the text used in a 'measures letter' below:

"Policies and Procedures

As a measure following transfer, all non-contractual policies and procedures currently in operation at the school will be replaced by the Trust's policies and procedures with effect from the transfer date.

The Trust believes that the implementation of a common suite of policies across all schools within the Trust provides consistency, clarity and fairness for all employees.

The replacement of existing non-contractual policies with the Trust's policies constitutes a measure for the purposes of TUPE.

Employees and their representatives will be informed of the principal differences between the current policies and the Trust's policies as part of the information and consultation process.

The adoption of the Trust's policies will not alter employees' contractual terms and conditions of employment."

The reality can be that the transferee does not gather the details of the policies from the transferor in enough time for meaningful consultation and members are left with no choice but to accept working on the new policies from day one with their new employer.

It would be a notable improvement if the TUPE regulations were to state that all HR/employment policies and procedures transfer (whether they are collective agreements or not) and can only be varied post-transfer by collective agreement with the unions and only if any changes to the policies are not detrimental to transferred workers.

Q5. To what extent do you agree or disagree that employee pension rights are sufficiently protected under a TUPE transfer? Please explain your answer. • strongly agree • agree • neutral • disagree • strongly disagree • other

Strongly disagree.

Pensions are among the most valuable benefits that workers receive, and any changes can have a huge impact on their future lifestyle.

The exemption of occupational pension rights from TUPE means that workers often have a vital benefit cut. The TUC's primary recommendation in relation to pension provision is that occupational pension provision should also transfer. Pension rights should fall within scope of regulation 4.

Our experience of TUPE is that it fails to protect pensions for those transferred. We don't believe that the [Transfer of Employment \(Pension Protection\) Regulations 2005](#) provide adequate protection for transferred workers' pensions. A scheme matching employee contributions to a maximum 6 per cent is not a reasonable alternative arrangement.

A worker transferring from a defined benefit arrangement, for example, faces the loss of certainty that such a scheme provides. On top of that it is extremely likely that a higher contribution rate than 6 per cent would be required to have a reasonable chance of matching the income from a public service scheme.

In practice, workers who are outsourced, often experience multiple TUPE transfers during the course of their employment and so frequently change pension providers. This leaves them with numerous, scattered pensions that are difficult to manage and are an administrative burden.

There is a related issue around inadequate consultation around pension provision. A tribunal decision² held that pension changes were not 'measures' for the purpose of the information obligations. This was on the basis that pension rights do not automatically transfer (NATTKE v Rank Leisure COIT). However, workers should still be consulted about what pension provision the new transferee is intending to put in place.

The TUC understands that guidance entitled The Cabinet Office Guidance on 'Staff Transfers in the Public Sector (COSOP)', stipulates that now when public sector workers are contracted out there should be appropriate arrangements put in place to protect their pensions. The 'Fair Deal for staff pensions: staff transfers from central government', an annex of COSOP states, that instead of providing for 'broadly comparable' pension arrangements after a transfer, transferees are required to secure access to relevant public sector pension schemes so that employees can retain membership of them. This guidance applies to central government, the NHS and any other parts of the public sector under the control of Ministers. While this is not a legal right enshrined in the TUPE regulations, it is an important safeguard for contracted-out public sector workers. It also means that there is a significant discrepancy in how transferred workers in the public and private sector are being treated in relation to pension protections. The TUC believes that workers in both the private and public sector should have the terms and conditions of their pensions protected in the event of a transfer.

² NATTKE v Rank Leisure COIT

Furthermore, the exclusion of pensions from TUPE provisions incentivises perverse employer behaviour where corporate restructuring is undertaken with the primary purpose of cutting employees' pension entitlements.³

UCU, which represents members in further and higher education, has highlighted an extremely concerning practice:

"An employer recently set up a wholly owned subsidiary company with the sole intent of removing its obligation to employees of an excellent but expensive (for the employer) pension. By using TUPE they can specifically exclude the pension entitlement and offer a far inferior pension arrangement. The subsidiary is wholly owned by the original employer, and control remains to all real intents and purposes with the original employer. Senior managers remain employed by the original employer and remain on the superior pension arrangements. Employees have no choice around rejection of the change to their pension entitlement – all other terms and conditions remain the same and therefore should they refuse to agree the change of pension, they will be considered to have voluntarily resigned and TUPE legalisation gives them no assistance because pension arrangements are excluded from TUPE protection. We would argue this is a sham transfer because nothing at all changes – same staff, same roles, same premises, same aims and objectives for organisation, same customers. There is no property transfer, only transferred employees and the only change to terms and conditions is the pension."

Q6. To what extent do you believe that it is clear when a 'relevant transfer' has taken place and TUPE regulations apply? Please explain your answer. • completely clear: no improvement required • mostly clear: it could be improved • neutral • mostly unclear: it should be improved • completely unclear: it must be improved • other

Service provision changes

There needs to be reconsideration of the definition of the circumstances in which a service provision change occurs. Currently there is excessive focus on the precise differences between services before and after the transfer which overlooks the purpose of the legislation in protecting workers. Unions believe that the activities should not have to be 'fundamentally the same' after the transfer; fragmentation should not be fatal to there being a Service Provision Change; a diminution in the level of service provided should not matter; the client may not need to be the same; and it should not matter whether the 'organised grouping of employees' is deliberately organised to carry out the activities.

The legal factors that need to be considered when determining whether a transfer has taken place, make it too easy for employers to justify why TUPE doesn't apply to many transfers. The factors which need to be considered under each legal test are not codified in legislation. For example, the legal factors that need to be considered when

³ See, for example, Solent University UCU website, "MERCER CONSULTING AND SOUTHAMPTON SOLENT UNIVERSITY CAMPUS", <https://solent.web.ucu.org.uk/2026/05/>

deciding whether a transfer is “fundamentally the same” are part derived from case law. Difficulties have arisen because employers seek to argue that the activities to be performed by the transferee are not ‘fundamentally the same’ as those carried out by the transferor. This creates uncertainty and a lack of confidence for workers when challenging a decision that TUPE does not apply.

Greater clarity is needed and the TUC’s recommendation is that the factors, which currently determine whether a service provision change has taken place, should be codified in the legislation. For example, the regulations should provide a statutory definition of what “fundamentally the same” means. Consideration should also be given to statutory sector-specific guidance on service provision changes.

In addition to these statutory clarifications, the government should then take further steps to improve clarity and accountability. The government should legislate for:

- a requirement on employers to set out and evidence their reasoning on TUPE applicability
- earlier engagement with recognised unions where applicability is in doubt.

Unions report that a major issue with the operation of the current TUPE regime is that many employers simply deny that a relevant transfer has taken place.

A recent example from the National Education Union highlights the problems many unions face. A local authority determined that TUPE did not apply when a nursery service was taken over by a private provider. This was despite the service continuing and some staff transferring. No clear reasoning for this conclusion was provided.

Share transfers

The TUC believes that the regulations should be amended to make clear that TUPE provisions apply to share transfers, including situations where businesses are bought out by private equity firms. This would improve transparency and ensure that TUPE rules apply consistently to all business transfers. In our view it is anomalous that certain transactions should attract the protection of TUPE whilst others do not. Takeovers and mergers are not merely transactions whose impact is limited to the corporate structure. They can have in considerable, and on occasion devastating, consequences for the workers affected where they result in significant restructuring or a detrimental impact on industrial relations. However, there is limited protection for conditions of employment or information and consultation rights for unions to ensure that any changes to contracts of employment or working practices are negotiated and agreed.

Furthermore, there is uncertainty around this area in existing case law. The law should be amended to provide clarity. An employment tribunal held that, in the acquisition of shares in a printing company, the purchaser ‘did far more than a simple shareholder would have done following a simple sale, or in our experience, a parent company of a subsidiary would have done in similar circumstances’. Decisive for the tribunal was that the buyer handled a ‘significant element of the management of the company’. This included making key decisions about the company’s workload, attempting to bring

about contractual changes and ultimately making the decision to put the company into administration. The employment tribunal reached the conclusion that there had been a TUPE transfer, which was confirmed by the Court of Appeal.

Regulations should be updated to reflect, and underpin, the positive developments in the case law.

Q7. If you have previously been involved in a TUPE process, in your view, what aspects of the process worked well? Please explain your answer.

N/A

Q8. If you have previously been involved in a TUPE process, did you encounter any issues with the process? • yes • no • other (please specify)

Unions report that employers struggle to apply the legal tests correctly, particularly in service provision change scenarios.

The National Education Union reports that concepts such as “organised grouping” and “assignment” can be difficult to apply in settings like education, where roles are often blended and staff work across functions. This creates space for inconsistent decision-making, particularly where services are reconfigured or labelled in ways (e.g. “partnerships”) that obscure whether a service provision change has in fact occurred.

The TUC believes that a series of measures could be implemented to improve TUPE process:

- clearer statutory or Acas guidance on service provision changes, (with sector-specific examples)
- Require employers to:
 - document whether TUPE applies
 - explain how legal tests are satisfied
 - and identify affected employees.
- Introduce a requirement to consult with recognised unions at the “pre-decision” stage, particularly where TUPE applicability is uncertain.
- Introduce mechanisms to resolve disputes before transfer, such as:
 - ACAS advisory opinions; or
 - expedited tribunal determination on TUPE applicability.
- Update guidance to reflect:
 - multi-role jobs;
 - flexible deployment;
- Provide clearer guidance on:

- how TUPE interacts with redundancy and new fire and rehire provisions;
- when redundancy is appropriate;
- sequencing of decisions.
- Introduce standard templates for:
 - TUPE information letters;
 - workforce mapping;
 - consultation documents.

Q9. At which stage of the transfer process did you encounter these issues? Please select all that apply. • after the transfer was complete • dealing with complications resulting from employees disagreeing with the transfer or raising a disagreement with your employer about the transfer • employee liability information • employees' redundancies • employees' terms and conditions after the transfer • employer insolvency • informing and consulting the employees or being informed and consulted regarding the transfer • planning the transfer • throughout the process • transferring the employees to a new business or being transferred to a new business • other (please specify)

Please see above where we have addressed the issues that unions and worker face in relation to the TUPE process.

Q10. Which, if any, of these issues did you face during a TUPE process? Please select all that apply. Please explain your answer. • insufficient guidance or clarity on the process • issues with trade union recognition and collective agreements • lack of clarity about employees' employment rights in continued employment • lack of clarity on identifying a 'relevant transfer' • lack of clarity on transferring employees' terms and conditions • lack of consultation for employees and their representatives • lack of enforcement regulation if the process is not followed • loopholes in the existing process • practicalities are too complicated • rules not followed or discrepancies in following rules • the cost to businesses is too high • other

Union recognition should transfer automatically in all situations. Workers should not lose the benefits negotiated by their recognised union. Currently, trade union recognition only transfers to the new employer if the transferring employees keep a separate identity within the new employer's organisation. This weakens the collective voice of workers at a time when they are particularly vulnerable.

TUPE should provide additional protection for recognition applications at the time of the transfer. When the 2006 regulations were introduced, it was said that further regulations were to be made to ensure that declarations of the CAC and outstanding applications were preserved so as to apply as against the transferee. Those regulations have not been introduced. In the absence of those regulations, the CAC has found in

one case that it was not permissible to allow an application for statutory recognition made initially against the transferor to continue after the transfer against the transferee.

Unions report that there is consistent non-compliance with regulation 6, which provides for the transfer of a collective agreement with the affected employees.

Unions report that if the transferee is hostile to trade unions it often refuses to recognise the union of the transferred workers, despite this being a clear breach of the regulations. Lack of awareness of the regulations is also a problem, with unions pointing out that even in the public sector, where transfers are commonplace and organisations have large human resources teams, awareness of the TUPE regulations is low. This can result in non-compliance with key provisions, such as the transfer of union recognition, falling by wayside.

The National Union of Journalists highlighted a couple of recent instances where recognition has failed to transfer.

One example concerns a local democracy reporting service which carries out re-tendering of journalist contracts roughly every three or so years, where journalists transfer between regional news organisations. Union recognition did not transfer from one outlet to another. NUJ points out that it is common that union recognition is not transferring as it should.

NUJ has also identified a common issue where the transferee indicated it had no knowledge of any recognition agreement and failed to carry out the required due diligence to check on relevant collective agreements and existing union recognition.

RMT has highlighted the issue that employers often seek to exploit regulation 6 (2) (b) and derecognise unions at the point of transfer.

RMT is alarmed that GB Railfreight has used the TUPE process to pursue de-recognition of a trade union on at least three occasions, most recently after being awarded the Imerys contract for china clay freight transport.

This common practice is widely condemned by unions who note that doing this is damaging to industrial relations because blocking the recognised union can remove mechanisms for resolving disputes so industrial conflict escalates and can affect productivity.

Therefore, regulation 6 needs to be strengthened to prevent derecognition at the point of transfer. There should be a specific focus on regulation 6 (2) (b) and a review into how this is being potentially misused by employers to derecognise unions at the point of transfer. If necessary, this section should be revoked.

Q11. To what extent do you agree or disagree that the TUPE process can be challenging for employers to navigate? Please explain your answer. • strongly agree • agree • neutral • disagree • strongly disagree • other

N/A

Q12. In your view, how do you think the TUPE process could be made more efficient for employers?

Making the reforms that unions suggest would assist good employers. Those that want to respect employees' terms and conditions and maintain positive industrial relations would no longer be at risk of being undercut by those primarily interested in profiting from cutting workers' pay and conditions.

Q13. In your view, how do you think the TUPE process could be strengthened to provide greater protections for employees' employment rights?

Please refer to our overview of recommendations above.

Q14. In the process of undergoing TUPE, what support, if any, did you use? • employment organisation • employee representatives • legal representatives • trade union 14 • government • other – please specify

N/A

Q15. How helpful do you believe the guidance (GOV.UK and Acas) currently available on TUPE is? Please explain your answer. • very helpful: no improvement required • somehow helpful: it could be improved • neutral • somehow unhelpful: it should be improved • very unhelpful: it must be improved • other

Please see above for our recommendations relating to the need for new, comprehensive statutory guidance which include sector specific examples.

Q16. To what extent do you agree or disagree that the current circumstances that an employer can change the contractual terms and conditions of an employee (e.g. ETO reasons), strikes the right balance between supporting employer needs and protecting employees' employment rights? Please explain your answer. • strongly agree • agree • neutral 15 • disagree • strongly disagree • other

Strongly disagree.

The permissibility to vary an employee's terms and conditions, or make a dismissal for economic, technical or organisational reasons provides a significant loophole for employers to evade TUPE protections. Unions report that many employers routinely cite ETO reasons for contract changes and that, rather than essential changes, these are simply to bolster the bottom line of the business involved. We therefore believe that it should not be permissible to vary terms or make dismissals related to a TUPE transfer. We urge the government to also consider the impact of the new fire and rehire measures when considering how effective this aspect of the TUPE regime is in protecting workers' pay, conditions, and jobs.

Unions report that ETO variations and dismissals consistently and significantly undermine worker protections derived from the TUPE regulations.

It is apparent that many employers view ETO variations as an easy way to water down key terms and conditions post-transfer, with unions reporting that employers remark how easy it is to circumvent TUPE protections by using ETO variations/dismissals.

The TUC strongly believes that the regulations should be amended to remove the ability to make variations where the sole or principal reason is an economic, technical or organisational reason entitling changes in the workforce (regulation 4(5)(a)). The TUC also strongly believes that the regulations should be amended to remove the facility for dismissals potentially to be fair where the sole or principal reason is an economic, technical or organisational reason entailing changes in the workforce (regulations 7(1)(a) and (3)(b)).

UNISON has highlighted the following case as an example of where ETO dismissals undermine TUPE regulations.

Meter U v Ackroyd & Ors UKEAT/0206/11/CEA

The respondent provided meter reading services across the UK to suppliers of electricity whether by direct contract with suppliers or by sub-contracts. Since 1999, it had carried on this business by means of franchises with independent franchise limited companies, typically owned by individual meter readers. The respondent did not employ meter readers. The contracts of employment of meter readers transferred to the respondent by operation of TUPE and the respondent undertook consultations with the transferring employees. The franchise model was explained and the employees were offered the opportunity of forming franchise companies. The employees that did not take up the opportunity were dismissed by reason of redundancy. The two employment tribunals hearing the cases ruled that the dismissal of employee meter readers transferred to the respondent under TUPE was not for an economic, technical or organisational reason entailing changes in the workforce. The claimants had therefore been unfairly dismissed. The respondent appealed.

*The EAT upheld the appeal. 'Workforce' in Regulation 7(2) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 does not include corporate franchisees. Subject to determination in one of the cases of whether the franchise agreements were a sham, no other conclusion could be reached other than that the **dismissals in both cases were for an economic, technical or organisational reason entailing changes in the workforce and were by reason of redundancy**. TUPE regulations clearly failed to safeguard these workers employment contracts.*

UNISON flags that in health and other sectors there is growing use of measures like service reviews being used. A service review enables the new organisation (transferee) to use the service review as a means of saying it doesn't need as many staff, leading to redundancies.

Unions report that the lack of a statutory definition (or clear guidance) for an ETO variation causes uncertainty and give employers great leeway to make variations.

Variations should be permitted which are favourable to the employee

Recently the government committed to bring around 2,000 facilities workers back in-house.⁴ The workers affected include cleaners, caterers and security staff who keep government buildings running every day – but who are currently employed by private companies that are contracted by the government. These are among some of the lowest-paid workers in the labour market. It's vital that these members can benefit from improved terms and conditions and upwards harmonisation with other public sector workers as a result of insourcing.

It was always the case that these workers could benefit from better terms after they transfer, because *Regent Security Services Ltd v Power* [2007] EWCA Civ 1188 says that contractual variations which are beneficial to the employees are not void under Reg 4(4).

However, this was thrown into doubt by *Ferguson v Astrea Asset Management Ltd* [2020] IRLR 577 which says, applying the amended 2006 TUPE Regs, that 'the words "any purported variation" in regulation 4(4) should be interpreted to cover all types of variation and not just those which are adverse to the employee'. This was followed by the EAT in *Anne v Great Ormond Street Hospital* [2026].

The regulations should be amended to permit changes beneficial to the employee to stand.

Q17. In your view, to what extent do you agree or disagree with the reasons, as outlined above, for being able to vary employment contracts (ETOs)? Please explain your answer. • strongly agree • agree • neutral • disagree • strongly disagree • other

Strongly disagree.

The TUC strongly believes that the regulations should be amended to remove the ability to make variations where the sole or principal reason is an economic, technical or organisational reason entitling changes in the workforce (regulation 4(5)(a)).

The TUC also strongly believes that the regulations should be amended to remove the facility for dismissals potentially to be fair where the sole or principal reason is an economic, technical or organisational reason entailing changes in the workforce (regulations 7(1)(a) and (3)(b)).

Q18. To what extent do you agree or disagree that the circumstances where employers can change the contract terms and conditions of an employee (for example using ETO exemptions), following a transfer, are sufficiently clear and

⁴ "Ambition to end era of 'outsourcing by default' as government looks to bring cleaners and security staff in-house", 18 June 2026, government press release, <https://www.gov.uk/government/news/ambition-to-end-era-of-outsourcing-by-default-as-government-looks-to-bring-cleaners-and-security-staff-in-house>

specific? Please explain your answer. • strongly agree • agree • neutral • disagree • strongly disagree • other

Strongly disagree. We are particularly concerned that the changes brought in in 2014 make it even less clear as to when ETO reasons can apply.

Q19. If answered strongly disagree, disagree, or other to question 18, what further guidance/clarifications do you think will be most beneficial and why? Please explain your answer.

The TUC strongly believes that the regulations should be amended to remove the ability to make variations where the sole or principal reason is an economic, technical or organisational reason entitling changes in the workforce (regulation 4(5)(a)).

The TUC also strongly believes that the regulations should be amended to remove the facility for dismissals potentially to be fair where the sole or principal reason is an economic, technical or organisational reason entailing changes in the workforce (regulations 7(1)(a) and (3)(b)).

However, if this course of action is not taken, the TUC believes that there should be a statutory definition of an ETO variation. This should be accompanied by a statutory code of practice with clear examples.

Q20. To what extent do you agree or disagree that the overall cost of TUPE-protected transfers is too high for businesses? Please explain your answer. • strongly agree • agree • neutral • disagree • strongly disagree • other

Strongly disagree.

Workers bear significant costs relating to outsourcing. TUPE regulations are vital protections that help to mitigate the impacts.

There is extensive evidence that contracting out leads to job losses, a serious erosion of pay and conditions of employment and increased inequality, particularly for women and Black and ethnic minority workers who tend to work in outsourced sectors. Restructuring also has a detrimental impact on the health and well-being of both the outsourced and remaining workers. This in turn impacts on staff turnover, motivation and productivity. There is also evidence that outsourcing exercises can lead to competition based on pay and conditions. This can lead to a "race to the bottom", with often those in low paid and insecure employment paying the price for restructuring.

Providing workers with a voice during restructuring processes helps to increase employee confidence, reduces the prospects of disputes over restructuring exercises and secures a higher level of buy-in from the workforce. The regulations also help to create a level playing field for businesses. By ensuring that employers cannot compete in tendering exercises on the basis of lower pay and conditions, the regulations therefore help to promote competition based on quality of service, innovation and efficiency.

Q21. Please provide information on the types of costs that businesses need to consider during a TUPE-protected transfer and where in the process these costs occur.

N/A.

Q22. If you have been through a transfer process, please provide an estimate of the total cost of the transfer for your business.

N/A

Q23. In your view, have the TUPE regulations resulted in any unintended consequences for individuals with a protected characteristic under the Equality Act 2010 or different socioeconomic background? Please explain your answer. Protected characteristics under the Act are disability, gender reassignment, age, pregnancy and maternity, race, marriage and civil partnership, sex, sexual orientation and religion or belief. • yes • no • do not know • other

We note, in particular, the equalities impact assessment contained in the 2024 consultation paper⁵ concludes that excluding workers from the scope of TUPE could have a particular impact on older, Black and minority ethnic workers and disabled workers. The government's priority should be ensuring that employment protections are effective and clear. It is therefore vital that this matter is considered as part of a broader assessment of employment status

From the 2024 equalities impact assessment:

"Equalities impacts

Although we do not have data on the demographics of workers undergoing a TUPE transfer nor for the limb (b) worker population, we know that SPCs are most likely to occur in labour intensive services such as cleaning, catering, building maintenance and security. Employees in these industries are more likely than employees overall to be:

- *aged 50 years and over*
- *male*
- *disabled, as classified by the Equality Act 2010*
- *from an ethnic minority*
- *affiliated with, or belong to a religion*

⁵ <https://www.gov.uk/government/consultations/smarter-regulation-employment-law-reform/consultation-on-clarifications-to-the-transfer-of-undertakings-protection-of-employment-regulations-2006-tupe-and-abolishing-the-legal-framework-f#annex-initial-impact-assessment-of-proposals> - Consultation on clarifications to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and abolishing the legal framework for European Works Councils, 16 May 2024

As a result, it's possible that the proposal could disproportionately impact these protected groups as they are overrepresented in the sectors in which SPCs happen most frequently."

Q24. Is there anything else you would like to share your reflections on, that was not covered by the previous questions?

Below we identify some issues which we did not address in any of the questions.

Misuse of TUPE to avoid employers' legal obligations - regulations should be strengthened to include anti avoidance measures to prevent the use of sham transfers to undermine the intention of TUPE

NASUWT reports that TUPE is being misused by employers to dismiss their workforce at no/little cost and hire a new workforce on inferior terms and conditions. NASUWT highlights the recent situation at an independent school as an example of this practice.

It is potentially possible for an employer to transfer employees into a shell company but not transfer any of the tangible assets. An independent school, for instance, is "an organised grouping of wage-earners who are specifically and permanently assigned to a common task" and so the employees can potentially transfer to the shell company without any of the other assets that make a school functional (buildings, name, equipment etc) also transferring.

The transferee shell company can then go into liquidation and since that shell company has no assets, the cost of the redundancy, notice pay and any unpaid wages then fall on the National Insurance fund. The transferor, who still owns all the tangible and non-tangible assets, can then reopen the school without the encumbrance of any of the employees and recruit a new workforce on whatever terms they wish, and the taxpayer picks up the cost of the original workforce losing their jobs.

The TUC believes this loophole should be closed, possibly by tightening the definition of a 'relevant transfer' to preclude transferring staff but no assets, or to maintain liability on the transferor, or the directors of the transferee/transferor in certain defined circumstances.

As also explained above, UCU, which represents members in further and higher education, has highlighted an extremely concerning practice:

"An employer recently set up a wholly owned subsidiary company with the sole intent of removing its obligation to employees of an excellent but expensive (for the employer) pension. By using TUPE they can specifically exclude the pension entitlement and offer a far inferior pension arrangement. The subsidiary is wholly owned by the original employer, and control remains to all real intents and purposes with the original employer. Senior managers remain employed by the original employer and remain on the superior pension arrangements. Employees have no choice around rejection of the change to their pension entitlement – all other terms and conditions remain the same and therefore should they refuse to agree the change of pension, they will be considered to have voluntarily resigned and TUPE legalisation gives them no assistance because pension arrangements are excluded from TUPE protection. We would argue this is a sham transfer

because nothing at all changes – same staff, same roles, same premises, same aims and objectives for organisation, same customers. There is no property transfer, only transferred employees and the only change to terms and conditions is the pension.”

Uncertainty over which workers transfer and benefit from continuity of employment

We also have concerns that some workers miss out from TUPE protections, when the transferor doesn't assign certain workers to the “organised grouping”.

Case law has created uncertainty around whether workers who are withdrawn or on long-term sick leave will transfer:

- A care worker who was contractually designated to care for a service user was withdrawn at the request of the local authority.⁶ The contract to provide the care was then re-awarded. The Employment Appeal Tribunal held that the terms of the employee's contract were not determinative and that she was not assigned to the contract to provide the care.
- The Employment Appeal Tribunal⁷ upheld an employment tribunal decision that an employee on long term sickness was somehow separated from the relevant business unit, and therefore not assigned to the part of the undertaking to be transferred. The Employment Appeal Tribunal appears to have added a further requirement of anticipated ongoing participation in the business unit. This is unwarranted.
- Education unions report that concepts such as “organised grouping” and “assignment” can be difficult to apply in settings like education, where roles are often blended and staff work across functions. This creates space for inconsistent decision-making, particularly where services are reconfigured or labelled in ways (e.g. “partnerships”) that obscure whether a service provision change has in fact occurred.

Share options not transferring

The Court of Appeal has held that rights under a share option scheme did not transfer because the rules of the scheme did not form part of the contract of employment.⁸

However, benefits from a profit share scheme have been held to transfer.⁹ Where a profit-related pay scheme was based on the transferor's profits, the transferee was required to introduce a scheme of ‘substantial equivalence’.

⁶ Robert Sage (t/a Prestige Nursing Care Ltd) v O'Connell [2014] IRLR 428.

⁷ BT Managed Services v Edwards [2015] IRLR 994; the case settled before it was heard in the Court of Appeal.

⁸ Chapman and Elkin v CPS Computer Group [1987] IRLR 462, but see also Micklefield v SAC Technology [1990] IRLR 218 and Levitt and Biotrace International plc [1999] IRLR 375.

⁹ Unicorn Consultancy Services v Westbrook [2000] IRLR 80.

These sorts of inconsistency should be resolved by strengthening and clarifying the existing regulations.

Addressing the issues caused by permitting a worker to transfer to multiple transferees

In 2020, the Court of Justice of the European Union in *ISS Facility Services NV v Govaerts and Atalian NV* ruled that a full-time employment contract can be split between multiple employers when a business transfers to multiple transferees. The TUC is concerned that splitting roles between multiple transferees can cause problems for workers. For instance, a worker could find that they are expected in locations many miles apart. Transferees could all insist that a worker work on the same day, or all seek, for example, 30-hour contracts. We are concerned about the burden seeking to resolve such issues places and could continue to place on an already overstretched tribunal system. The effect is to weaken worker protections by giving employers additional grounds on which to dismiss them. We therefore propose that, at the very least, there should be stronger guidance, produced in consultation with trade unions, on how transfers to multiple transferees are conducted. This should encompass how a split of employees or liabilities is to be determined in terms of functions, time spent and, situations where such a division is not possible or will have an adverse impact on the employee's working conditions. This should be accompanied by strengthened rights to consultation for trade unions when the TUPE regulations are engaged.

Sharing statutory information with unions

Appropriate statutory information provided under regulation 11 should be shared with the relevant recognised unions. This would be helpful to ensure that the correct collective agreements transfer across. For example, unions would be able to check this list of collective agreements and make sure the transferee and transferor are fully complying with regulation 11 (2) (e). Furthermore, relevant recognised unions should have access to the information provided under regulation 11 (1) (e). This would enable unions to get in touch with the relevant transferred workers to offer them support throughout the transfer.

Workers should be informed of their right to object to the transfer

The TUC proposes that employers should be required to inform transferring employees of their right to object, and their right to treat their contract as terminated in the event of a substantial change in their working conditions to their material detriment, and of the consequences of exercising that right (regulations 4(7), (8) and (9)). This is important because it can ensure that an employee remains entitled to redundancy payments rather than being treated as if they have resigned.

TUPE should be amended to provide that an employee who treats their employment as terminated by reason of a substantial change in their working

conditions to their material detriment is able to claim for wrongful dismissal (regulations 4 (7), (8) and (9))

Currently, an employee who claims that they have been dismissed in circumstances where there has been, or will be, a substantial change in their working conditions to their material detriment is not able to pursue a claim for wrongful dismissal in the event that they claim that they have been dismissed without the requisite period of notice. This means that a worker (who didn't have the two years qualifying service to claim redundancy) whose employment conditions will substantially change to their material detriment would have no legal claim, following their employer's breach of contract. These workers should be entitled to at least their contractual notice period if their terms and conditions are substantially changed to their material detriment as a result of TUPE.

Employment status

It was previously accepted that the TUPE regulations cover employees only and not 'limb (b) workers'. However, the 2019 judgment of the employment tribunal in the case of Dewhurst v Revisecatch Ltd t/a Ecourier concluded that TUPE applies to limb (b) workers as well as employees.

While the judgment in the Dewhurst v Revisecatch Ltd t/a Ecourier case is not binding, it has created some uncertainty for businesses around whether TUPE applies to limb (b) workers.

The TUC believes that there is a compelling case for the reform of employment status rules so they reflect the reality of the workplace and raise the floor of rights for working people. This should include a new single and broad 'worker' definition in UK employment law. The law should be clarified and extended so that all workers can benefit from protection of their key terms and conditions when their employment transfers.