Make Work Pay

Call for evidence on Transfer of Undertakings (Protection of Employment Regulations)

This response is made by Unite the Union. Unite is the UK's strongest trade union, representing over one million members across all sectors of the economy including manufacturing, financial services, transport, food and agriculture, construction, energy and utilities, information technology, service industries, hospitality, health, local government and the not-for-profit sector. Unite organises in multiple sectors where outsourcing and contracting out is widespread, including in services such as cleaning, catering, facilities management, road transport, warehousing and local government and health.

Executive summary

Unite reps, members and officers report that outsourcing and contracting out leads to job losses, an erosion of pay and conditions and increased inequality. Restructuring is highly stressful and can damage the health and well-being of both the outsourced and remaining workers, leading to lower staff motivation, higher staff turnover, and lower productivity. Outsourcing often involves competition on wages bill, creating a "race to the bottom" on pay and conditions, with those in low paid and insecure employment often paying the price for restructuring. It has a particularly negative impact on women and black and ethnic minority workers, who are more likely to work in outsourced sectors. Outsourcing also leads to the fragmentation of the workforce and growing casualisation, including through the increased use of agency working and self-employment. This means workers lose out on their basic rights at work. It is also difficult for workers to organise collectively and to negotiate improved pay and conditions.

The Transfer of Undertakings (Protection of Employees) Regulations (TUPE) Regulations (based on the Acquired Rights Directive (ARD) (2001/23/EC)) were designed to minimise these detrimental effects by protecting employment and safeguarding the pay and conditions of outsourced employees. However, in recent years, the already weak protection provided by TUPE Regulations has been further eroded. In 2014, the then government weakened protection for employees' pay and conditions and limited collective bargaining rights.

The TUPE regulations also fail to protect union recognition and to ensure that workers can be represented by their union of choice in negotiations following a transfer. It is all too easy for employers to defeat recognition rights by derecognising unions at the point of transfer or by dispersing the workforce and breaking up bargaining units. The lack of effective protection for recognition means employers can take advantage of restructuring and outsourcing exercises to drive down workers' pay and conditions. Rights for union representatives in the UK to be informed and consulted on proposed transfers are inadequate and fall well below the standards enjoyed in other European countries.

Overall, UK TUPE rules have failed to keep pace with EU standards, meaning it is cheaper and easier for multinational companies to restructure and outsource work in the UK than in other European countries. As a result, UK employees are more vulnerable to job losses and to downward pressure on their terms and conditions than their European counterparts.

Unite therefore welcomes the Department for Business and Trade call for evidence. As outlined below, the TUPE Regulations are in need of substantial reform. It is vital that the government acts on this consultation by implementing wide-ranging reforms. These include:

- Protection for union recognition must be strengthened to ensure the transfer of union recognition is automatic.
- Information and consultation requirements relating to TUPE transfers must be strengthened and aligned with those which apply during collective redundancy processes.
- Existing collective agreements should transfer automatically to the new employer and should operate "dynamically".
- The one-year limit on protection for transferred collective agreements must be removed, with protection for collective bargaining being ongoing.
- The economic, technical and organisational reasons (ETO) exemptions for variations to terms and conditions should be removed to simplify the regulations for both workers and businesses.
- It should only be possible to agree variations to pay and conditions which are favourable to workers.
- Pension entitlements should be protected to the same standard as other contractual terms.

- Where a Tupe transfer is disputed, employees who are at risk of losing their job, should be able to apply to an employment tribunal for interim relief and should be entitled to reinstatement of employment where they request it.
- The coverage of TUPE protections should be extended to include share transfers, and transfers between public authorities.

Responses to consultation questions:

Current protections offered by TUPE

Question 1:

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?

- **Other**

Unite does not agree with the framing of this question.

The intention behind both the original TUPE Regulations and the Acquired Rights Directive was "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]

The aim was to facilitate restructuring in a manner which safeguards employment and income security of employees affected and create a level playing field for business, preventing competition based on cuts to pay and conditions.

References to "strike the right balance" and "supporting employer needs" here and throughout the consultation are therefore not consistent with the purpose of this legislation.

Overall, Unite believes that the current TUPE Regulations do not meet their stated purpose. They do not adequately protect terms and conditions of workers, rights to union recognition or the rights for workers to continue to benefit from collective agreements when a transfer takes place.

Question 2:

To what extent do you agree or disagree that the current TUPE regulations sufficiently protect employees' employment rights when a transfer takes place?

- **Strongly disagree**

[1] Recital 3, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001L0023

Unite strongly believes that the currently TUPE regulations do not adequately protect employees' employment rights when a transfer takes place. Changes made to the regulations in 2014 eroded the already weak protections, by limiting the protection for employees' terms and conditions and restricting collective bargaining rights. As a result, employers can take advantage of restructuring and outsourcing exercises to drive down workers' pay and conditions and reduce their wages bill.

The TUPE regulations fail to protect union recognition. As a result, workers lose their ability to be represented by the union of their choice and for their union to engage in negotiations with the employer following a transfer. This inevitably disempowers workers.

The TUPE regulations should be the subject of substantial reform. As a matter of priority:

- The rules relating to the transfer of union recognition must be strengthened to ensure the transfer of union recognition is automatic. Where employers fail to engage in collective bargaining after a transfer they should be penalised. Trade unions and affected workers should be entitled to protective awards, at least equivalent to those which apply where an employer fails to consult on collective redundancies.
- Existing collective agreements should transfer automatically with workers and should operate "dynamically", with outsourced workers benefitting from enhancements negotiated by the union and their original employer.
- The one-year limit on protection for transferred collective agreements must be removed, with protection for collective agreed terms and conditions ongoing.
- Information and consultation requirements relating to TUPE transfers must be strengthened and aligned with those which apply during collective redundancy processes.
    - The regulations should include a broad duty on the transferor and the transferee to engage in meaningful consultation with trade unions.
    - Consultation with unions should be required before any decision is taken on the transfer.
    - The transferor should be required to consult unions on the need for a transfer.
    - Unions should be involved in procurement processes.
    - The transferor and transferee should be required to provide unions with additional written information including on measures which are proposed following the transferring, including proposed changes to pensions.

    - Appropriate parts of the employee liability information be shared with the relevant union (regulation 11).
    - There should be a duty on the transferee employer to continue consultation following the transfer.
    - Penalties for failure to consult on TUPE transfers should be increased in line with collective redundancy protective awards.
    - Employers must not be able to avoid consultation duties by misusing the special circumstances exemption.
    - The small business exemption for employers with 50 or fewer employees from the duty to information and consultation elected representatives should be removed.

- Pension entitlements should be protected to the same standard as other contractual terms.
- The economic, technical and organisational reasons (ETO) exemptions for variations to terms and conditions should be removed to simplify the regulations for both workers and businesses.
- Transfer related variations to pay and conditions should only be permitted where they are favourable to workers.
- Where a Tupe transfer is disputed by the transferor and/or transferee, employees who have or are at risk of losing their job, should be able to apply for interim relief at an employment tribunal (ET). This will preserve their terms and conditions of employment until a full hearing takes place to determine if TUPE applies. ETs should also have the power to reinstate an individual's employment with either the transferor or the transferee.
- An employee who treats their employment as terminated because of a substantial change in their working conditions to their material detriment should be able to claim for wrongful dismissal.
- The definition a service provision change should be reviewed and statutory guidance prepared to ensure that employers cannot adjust or reorganise services to avoid TUPE protections.
- The coverage of TUPE protections should be expanded to include share transfers, and transfers between public administrations.
- TUPE rights should apply to all workers, including agency workers and not be limited to employees.

Question 3:

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?

- **Strongly disagree**

Consultation can provide genuine benefits during restructuring exercises. Providing workers with 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. Consultation ensures that workplace representatives are informed about the potential implications of proposed transfers and that meaningful negotiations take place on any envisaged measures following the transfer. Genuine consultation can reduce the risk of legal disputes and employment tribunal claims.

However, there are serious shortcomings with existing information and consultation arrangements in practice. The information and consultation requirements are often ignored or circumvented by employers. Some employers choose to bypass the need to elect representatives and to inform and consult employees directly, in contravention of their obligations. Individual workers and non-union worker representatives often feel ill-equipped to engage with the information provided and may be reluctant to challenge the employer proposals for fear of the consequences.

Where consultation with union representatives does takes place, it often starts after decisions about transfers have been taken and amounts to little more than a "tick-box exercise". Consultation is often not carried out in good faith, with employers failing to supply key information about affected workers or refusing to give proper consideration to union proposals.

Information and consultation requirements relating to TUPE transfers must be substantially strengthened and aligned with those applying during collective redundancy processes.

The regulations should create a broad duty on both the transferor and the transferee to engage in meaningful consultation with a view to reaching agreement with trade unions.

The rights should involve the following:

Early consultation

- Consultation with unions should be required *before* any decision is taken on the transfer.
- Unlike for collective redundancy consultation, the regulations do not set out a timescale for consultation. Given that a TUPE transfer can have significant

effects on the employees, Regulation 13(2) should be amended to specify minimum timescales mirroring those which apply in redundancy situations.

- Unions should be involved in early procurement and outsourcing processes. Employees and their representatives have expert knowledge on how business and services operate and how they can be improved. Early consultation can assist in capturing such insights and improving decision-making. Effective engagement through workplace representatives can make a valuable contribution to decisions relating to service reviews, tendering specifications and future service and delivery plans. It can also avoid industrial unrest and contribute to good industrial relations.

> CASE STUDY
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> In 2016, the Co-op was planning to outsource their drivers to Eddie Stobart, a company which had a poor record of driving down pay and conditions. Unite reps and members strongly objected to the transfer with over 700 members voting to take industrial action.
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> After detailed negotiations, Co-op agreed always to consult the union on the choice of transferee.
>
> It was recognised that cost should not be the determining factor and that any future outsourcing plans would protect workers' pay and conditions [2]

Improved information should be provided to recognised unions:

- The requirements on employers to share information with recognised trade unions should be strengthened.
    - Currently, employers are required to provide employee liability information just 14 days before the transfer a transfer takes place. This is too short a period. More time is needed to allow for meaningful consultation between trade unions and the transferor and the transferee, on any plans to make changes to employees' terms and conditions following the transfer.
    - The employee liability information should be shared by the transferor before it is released to transferees. This would enable trade unions to check the accuracy of the information relating to contractual terms and conditions, collective agreements and potential and on-going ET claims or other forms of litigation, workplace policies and procedures. It would

[2] https://www.thegrocer.co.uk/news/the-co-op-group-and-unite-reach-agreement-on-transport-plans/533609.article

also reduce the prospect of legal disputes and ET claims following any transfer.

- Transferors and transferees should also be required to provide unions with full written information about 'measures' including information about pensions, well before the transfer takes place (regulation 13(2).

Meaningful consultation with the transferor *and* the transferee

Currently, the duty on employers to consult on 'envisaged measures' only applies to the transferor but not to the transferee (Regulation 13(6)). This is despite the fact the transferor will often not envisage making any changes.

In contrast, the transferee often will have plans for redundancies, restructuring or other organisational change, including on how the transferred staff with integrate into the business. However, the first time that workplace representatives have discussions with a new employer is after the transfer has taken place and employees have started to work. Early consultation with the new employer can provide reassurance to transferred employees, reduce the staff turnover, improve motivation and productivity and reduce costs.

The lack of a duty on transferees to consult with unions prior to a transfer and the absence of any liabilities or penalties for transfers for failing to consult are a major gap in TUPE regulations.

The duties on transferors and transferees to consult with recognised trade unions must be expanded and strengthened:

- The transferor should be required to consult unions on the need for a transfer at an early stage. Discussions should include whether alternatives are available.
- Both the transferor and transferee must be required to engage in meaningful consultation with recognised unions *before* the transfer about any measures which are envisaged. This should include consultation on arrangements for paying staff.

EXAMPLES:

Unite reps from many sectors, including civil aviation, buses and road transport, all report that **changes to the methods and timings for being paid** regularly create problems for workers following a transfer.

Often new employers pay staff on a monthly basis. Transitioning from weekly to monthly payments can have serious implications for workers and their ability to plan to cover their bills.

Similarly in some workplaces, transferred workers have been expected to move to a pay system involving 2 weeks' pay in advance and two weeks' pay for work already done. This can leave transferred workers out of pocket and struggling to budget for their household needs.

The absence of early consultation can lead to workplace disputes and can damage worker morale when starting a new job. Workers are often willing to consider industrial action to preserve their normal pay system.

Where employers consult with unions in advance about payment systems such issues can be resolved early.

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Changes to shift patterns or roster changes after a transfer can also have a devastating impact on workers and their ability to balance working life with caring responsibilities.

- Pre- transfer an employer is permitted to conduct collective redundancy consultations under regulation 13(6). However, employers are only under a duty to consult only with the representatives of its *own* affected employees abour envisaged measures. Regulation 13 should be amended to ensure there is always a duty on the transferee and transferor to consult about measures affecting existing and future employees before the transfer.

- Transferees and transferor should be required to continue consultation post-transfer where changes to working practices are expected. Regulation 13(6) should be amended accordingly. This change would reverse the decision in *Amicus v City Building Glasgow LLP*. In this case, the EAT in Scotland held that a transferee's information and consultation obligations under TUPE cease at the date of transfer.

- Penalties for failure to consult on TUPE transfers should be increased in line with collective redundancy protective awards. The maximum cap for protective awards for failing to consult properly on TUPE should be increased from 90 days to 180 days.

- Employers must not be able to avoid the duty to consultation by misusing the special circumstances exemption (regulation 13(9)). This would reverse the decision in *UNISON v Somerset County Council* where 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 unions were consulted. Consultation is integral to protecting members' interests during a transfer and therefore should not be sidelined in this way.

- The duty to inform and consult with recognised unions should continue to apply where the application of TUPE regulations is in doubt or is contested. Employers should not be able to avoid the duty to consult, simply because they have informed the union that TUPE does not apply.

- The small business exemption for employers with 50 or fewer employees from the duty to information and consultation elected representatives should be removed.

Question 4:

To what extent do you agree or disagree that collective agreements are sufficiently protected under a TUPE transfer?

- **Strongly disagree**

a) Protection for union recognition before, during and after a transfer

One of the primary weaknesses of the current TUPE regulations is the inadequate protection for union recognition. It is all too easy for employers to defeat recognition rights, by derecognising unions at the point of transfer or by breaking up "organised grouping of workers" which transferred and/or bargaining units after a transfer.

The existing regulations are not "fit for purpose" and fail to protect recognition following transfers. Currently, trade union recognition only transfers to the new employer if the transferring employees keep a separate identity as an "organised grouping of workers" within the new employer's organisation. These constraints weaken the collective voice of workers at a time when they are particularly vulnerable.

This is confirmed by the experiences reported by officers and reps from a wide range of sectors organised by Unite.

- In civil aviation – staff were transferred to a contractor and integrated into the wider workforce. The employer had a sole recognition agreement with another union and refused to recognise Unite. Because the "organised grouping of workers" did not remain intact, recognition rights were not retained under the TUPE regulations. The group of workers who had initially been transferred were subsequently contracted to work for another employer. However, no rights to recognition were transferred to the new employer.
- Heathrow Airport Limited (HAL) took the decision to TUPE the Campus Security operation to ICTS. Campus security run all the security posts that surround the airfield/runways and give access to caterers, aircraft cleaners, construction workers and aircrew etc. ICTS refused to allow recognition to transfer as they already had a sole recognition agreement with another union. Unite members didn't want to transfer for two reasons: a) they didn't want to work for ICTS and b) they didn't want to be members of another union. Unite succeeded in finding roles for the all the 700 members who worked in Campus in the terminals. Nevertheless, the union lost recognition for a key group of workers.

- Ealing parking attendants: Unite had been campaigning for several years for the service to be taken back in house by the local authority. The authority initially agreed to insource the staff, but at the last minute they notified Unite the workers would be integrated with another group of workers for whom there was a pre-existing sole recognition agreement. The other union refused to agree to a joint recognition. As a result, Unite lost approximately 50 members.
- Unite had maintained sole recognition on a council parking services contract for 15+ years through various TUPE transfers. The service was then transferred to a LATCo (Local Authority Trading Company), which had recognition for separate refuse services, with another trade union. Despite this being a distinct group of workers, the employer de-recognised Unite on transfer, only agreeing to engage with the union who had recognition for refuse workers. Unite members strongly objected to this imposition and even took strike action, but the employer and contracting authority cynically used the TUPE process to de-recognise the longstanding union of the workers' choice, because there had been difficult disputes on the contract.
- Unite had maintained recognition following outsourcing of gas repair services for one council and had clear rep structures and pay agreements in place. Following another recent TUPE transfer to a new provider, the union has been derecognised, and the new employer has refused to uphold the pay agreements in place. The employer claimed this was because the recognition agreement was missing from the disclosure of information. Yet the union had been involved throughout the TUPE consultation process. The workers are now financially worse off, and the reps have no facilities arrangements, because of the TUPE transfer to a new contractor. The contracting authority has failed to help resolve this.
- In a further example, one council outsourced children's services and recognition and reps' structures originally transferred. After some time however, the new provider established an internal staff consultation body and began to use this for staff consultation instead of the recognised trade unions. The new employer then introduced a new facilities agreement, in order to significantly reduce reps' entitlement and meetings with HR and management became much less frequent. One Unite representative even pursued a legal claim against the employer for bullying and victimisation and the contracting authority was asked to intervene.
- A housing repair services was transferred to a LATCo. Though terms and conditions improved after transfer, union recognition was undermined, due in part to the apparent lack of experience of industrial relations in the new employer. Meetings between the union and management became less frequent,

and reps struggled to secure the same facilities time as previously. The new employer fails to consult with the union on all relevant matters.

- One local authority housing department had been outsourced for a number of years to one provider and maintained TU recognition. The contracting authority then made a decision to divide the department into 4 separate contracts, then put out to re-tender. One of the four contracts was brought back in house, but the other three were each awarded to a different private contractor. The elected representatives were brought back into council employment, but the majority of trade union membership were then split and transferred to new employers, without their elected reps. This significantly undermined the union and any collective response to the consultations and fractured Unite rep structures.

The TUPE Regulations should be reformed to ensure that:

- The transfer of union recognition with the new employer is automatic in all circumstances. Workers should not lose their recognised union.
- The 'organised grouping test' means it is too easy for the transferee employer to restructure the workforce to avoid recognising a union and the requirement to engage in collective bargaining. The 'organised grouping test' should be removed and union recognition should transfer automatically to the new employer.
- Employment Tribunals (ETs) should have the power to issue a declaration as to the existence of recognition.
- Where the new employer fails to engage in collective bargaining after a transfer, the employer should be penalised.
- Trade unions and affected workers should be entitled to protective awards, at least equivalent to those which apply where an employer fails to consult on collective redundancies.
- The bargaining unit should also be revised to include existing employees who are employed on similar terms and conditions as the transferred employees and new joiners who work in the same service.
- Even if a recognition agreement transfers, the collective bargaining machinery that underpins the agreement and makes it effective, doesn't always transfer. This effectively undermines the collective agreement. Pre-existing arrangements for facility time for union reps and negotiating arrangements should be retained following a transfer.
- The statutory recognition scheme should also be revised to protect recognition rights following a transfer. When the 2006 Regulations were first introduced, the government indicated that further regulations would be introduced to ensure

that recognition awards issued by the CAC and outstanding applications are preserved in transfer situations. Those regulations were not introduced and the CAC subsequently decided 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.

b) Collective agreements should be protected during and after a TUPE transfer

The 2014 changes made to the TUPE Regulations severely restricted the rights of outsourced workers to benefit from collective agreements which previously set their pay and conditions. Outsourced workers no longer benefit from enhancements negotiated by unions and their original employer and following a transfer and collectively negotiated terms and conditions are only protected from variation for one year.

These changes created a significant incentive for employers to break collective agreements and to reduce labour costs by outsourcing, subcontracting or contracting out services. This has contributed to increased inequality, in-work poverty and a downward pressure on pay and conditions. These changes have a particularly detrimental impact on low paid women and BAEM workers who are more likely than their counterparts to work in outsourced services.

To reverse these changes and the ensuing detrimental impact on workers, Unite strongly believes that the TUPE regulations should be amended to provide:

- Terms and conditions negotiated through collective agreements must automatically transfer with employees and should not be subject to variation.
- The one-year limit on protection for transferred collective agreements must be removed, with protection for collectively agreed terms and conditions being ongoing.
- Employees' terms and conditions must instead be "dynamically aligned" with any enhancements negotiated between unions and managers in the commissioning body.

These changes would reverse the 'static' approach to incorporation of collective agreements following the *Alemo-Herron* case. Prior to the ECJ's decision in the *Alemo-Heron* case, it had long been accepted that UK employees could rely after a transfer on contractual terms providing that pay and other conditions would be determined in line with collective agreements agreed between the transferor and recognised trade unions. This approach had previously been endorsed by the UK courts (*E.g. Whent v T Cartledge Ltd* [1997] IRLR 153). It is also consistent with the normal rules of contractual interpretation. Unite believes that this principle should be restored.

Question 5:

To what extent do you agree or disagree that employee pension rights are sufficiently protected under a TUPE transfer?

- **Strongly disagree**

Pension provision is an issue of vital importance for employees. Pensions are among the more valuable benefits for workers, and any changes can have a substantial impact on individuals' retirement incomes. However, in general TUPE offers very limited protection with regards to pension schemes.

The Pensions Act 2004 requires employers to provide minimum pension entitlements following a transfer, although not pension schemes are not required to mirror the employees' previous entitlements. As far as TUPE rights go, provisions differ for occupational schemes and other types of Defined Contribution (DC) schemes. The level of protection afforded also differs between the public and private sectors.

In the private sector, any pension an employee has built up to the date of the transfer will be protected. Their *pension* might transfer to the new employer. This depends on whether they have:

- a personal pension – that is a pension that employees arrange themselves
- a workplace pension – a pension arranged by the old employer

If they have a personal pension which the old employer was contractually obliged to contribute to, their pension rights will automatically transfer to the new employer. The new employer must pay the same amount into the personal pension as before the transfer.

If they have a workplace pension, it is unlikely to transfer to the new employer. This is because it is exempt from TUPE. However, the new employer does not have to continue the same pension but must provide a reasonable alternative scheme. Early retirement terms might also transfer to the new employer.

The protections afforded for private sector pensions was also weakened in 2014. Before 2014, where there is an occupational scheme, the obligation on the new employer was to match any employee contribution 1:1 up to 6% of basic pay in a DC scheme. This applied whether the prior scheme was Defined Benefit (DB) or Defined Contribution (DC). In 2014, the rules were modified in respect of DC schemes to allow the new employer to match what the previous employer had actually paid into a DC pension provided that the contribution satisfied the applicable auto-enrolment minimum.

This means, for example, that if the employer had an occupational scheme but only contributed 3% prior to the transfer then the new employer need only pay 3%. They would not be obliged to pay 6%. However, if the employer was paying 15% then the new employer would have to pay a minimum of 6%.

When employees transfer from the *public sector to an outsourced private provider*, it is welcome that TUPE is supplemented by the government's 2004 Fair Deal policy which forms part of the Cabinet Office Code on Staff Transfers. This policy is designed to ensure that public sector staff receive a ‘broadly comparable’ pension and that previous service is honoured if they transferred to other parts of the public sector or to the private or voluntary sector. Under these rules, transferring employees are generally entitled to remain in their existing public sector pension scheme (such as the NHS, Local Government Pension Scheme (LGPS), Civil Service, or Teachers' Pension Scheme) or be offered access to a new scheme that is "broadly comparable”.

Since 1999, the LGPS has also allowed admitted body status to contractors to ensure their staff preserve pension membership and continuity. The NHS has a similar option which has also worked well. These welcome changes have helped to provide employees with income insecurity and to reduce the reliance on means-tested benefits in their retirement.

However, the protection afforded to workers has proved a bit hit and miss, particularly within the LGPS. Although, unions have been working with Government to develop the New Fair Deal to try and improve access, including for those members who had lost access to the scheme, for example in Further Education.

While the Fair Deal provides additional protection, overall, the exemption of workplace pension rights from TUPE regulations creates a serious detriment for workers not only in the private sector, but also in the public sector.

- It means that workers often face reduced retirement income and may become more dependent on benefits.
- The exclusion of pensions from TUPE provisions incentivises perverse employer behaviour with employers seeking to restructure with the primary purpose of cutting employees’ pension entitlements.

Policy proposals

Unite believes that:

- Occupational pension provision should enjoy the same protection as other pay, terms and conditions were an employee transfers to a new employer.
- The lack of adequate consultation on pension provision during a transfer places workers at a serious disadvantage.[3] Workers should have a right for their representatives to be consulted about the pension provision that the new

[3] A tribunal decision (NATTKE v Rank Leisure COIT) held that pension changes were not ‘measures’ for the purpose of the information obligations.

transferee is intending to put in place. The TUPE regulations should be amended accordingly.

- Legal changes should also be introduced to tackle employers' use of outsourcing and the creation of subsidiaries to avoid pension obligations. In our opinion, subsidiaries should be treated on the same basis as parent organisation. This would mean that cheaper pension costs is not a consideration in the decision whether to set one up.
- The government should also legislate to ensure that new staff recruited by contractors are eligible to join the LGPS. This change would require increased funding from the Ministry for Housing, Communities and Local Government.
- While the provisions of the Fair Deal are generally welcome, the policy should be set out in regulations which apply to all employers, rather than being included in Best Value Directions would be preferable.

Determining whether a 'relevant transfer' has taken place

Question 6:

To what extent do you believe that it is clear when a 'relevant transfer' has taken place and TUPE regulations apply?

- **Mostly unclear: it should be improved**

Uncertainty over whether a relevant transfer has taken place is one of the perennial issues arising from the operation of the current TUPE regulations. Many employers are simply not aware of TUPE, deny that a relevant transfer has taken place or seek to contest any TUPE related obligations.

As the following classic example, illustrates, the major problem is that in such circumstances employees are left hugely vulnerable.

CASE STUDY

Unite is currently facing issues relating to the catering contract of American Airlines. Dnata catering initially held the catering contract but reported failed hygiene standards.

The airline temporarily transferred their contract from Dnata Catering to Do & Co. The transfer was deemed to be 'temporary'. But American Airlines subsequently terminated the contact with Dnata. Do & Co are objecting to there being a TUPE transfer arguing there was no service provision change and Dnata claim that the workers are not redundant.

In cases such as that above, the affected employees have been left with no job and no redundancy pay and they will have to await a determination at an ET to received compensation

Unite believes that in such cases, employees should have a right to apply to the employment tribunal for interim relief. This would mean individual has the right to be paid until a full hearing takes place. ETs should also have the power to reinstate an individual's employment with either the transferor or the transferee.

To improve clarity and accountability the government should also:

- Develop clearer statutory guidance on service provision changes, (with sector-specific examples)
- Require employers to explain and evidence their reasoning on TUPE applicability
- Ensure that employers are required to consult with recognised unions even though the present of a relevant transfer is contested.

Process of a TUPE transfer

Question 7:

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

In general, the TUPE process can work well when employers voluntarily disclose relevant information, at a sufficiently early stage in the process, and engage in a co-operative and meaningful consultation process before, during and after the TUPE process. Maintaining positive relations with recognised trade unions is also important to facilitating the TUPE process.

Otherwise, this response highlights many of the problems associated with the TUPE process. Nevertheless, Unite remains of the view that TUPE regulations provide important protection for workers and must not be repealed or further diluted.

However, the government should clarify the regulations and develop detailed guidance which supports employers, trade unions and workers to navigate the TUPE process.

Question 8:

If you have previously been involved in a TUPE process, did you encounter any issues with the process?

- **Yes**

Unite officers and reps have extensive experience of the TUPE process and are very familiar with its shortfalls and complexities.

Throughout this response we have highlighted the issues and limitations of TUPE protections for transferring pay, terms and conditions, collective bargaining and the retention of union recognition following a transfer.

Here, we focus on three additional issues relating to the TUPE process:

a) Service provision changes
b) An organised grouping of workers
c) The involvement of multiple transferees

a) Service provision changes

The introduction of the provisions relating to service provision changes in 2006[4] significantly reduced the risk of a dispute about the application of TUPE. However, the problems have not been entirely resolved. For example, employers and the courts continue to focus on the differences between services before and after the transfer when determining a service provision change has taken place. This undermines the purpose of the legislation in protecting workers.

Recent case law highlights how difficult it is to anticipate how the legal factors might be applied by tribunal. This inevitably creates uncertainty and anxiety for workers:

❖ *OCO Group v Jones [2009] All ER (D) 138 (EAT)* establishes that service provision changes require the activities to be essentially the same for employment contracts to transfer to a new employer.

  A contractor provided catering services to BMW at its Cowley plant. Those services comprised a restaurant and deli bar, together with four satellite food outlets and a shop. The service provided cooked breakfasts, hot lunches, a salad bar and sandwiches. When that contract ended, a new contract was awarded to the new provider for a 'dry goods kiosk' selling sandwiches and salads, but not hot food. The Employment Appeal Tribunal found that there was no Service Provision Change because the activities performed by the provider were 'wholly different' .

❖ *In Salvation Army Trustee Company v Bahi & others [2017] IRLR 410,* the EAT similarly ruled that when a contract for services changes hands, courts must

[4] Following the decision of the Employment Appeal Tribunal in *Astle and Others v Cheshire County Council [2005] IRLR 12*, where there was a dispute over the question of whether or not TUPE applied, following a decision by Cheshire County Council to outsource its architectural services to a panel of consultants

take a practical, common-sense view to decide if the "activities" remain fundamentally the same.

In this case, a transferor charity provided what the ET described as ‘accommodation-based support’ for men and women under a contract with Coventry City Council. Following re-tendering, the transferee sought to argue that the post-transfer activities were not fundamentally the same as before the transfer: the clients came from different age groups, there was a single point of referral, provision of a 24-hour concierge and a change in the maximum period clients could stay in supported accommodation. In this case the Employment Appeal Tribunal rejected that contention.

- In *Enterprise Management Services Ltd v Connect-Up Ltd*[5] when a local authority re-let a contract for the provision of IT services to schools, the new contract had removed from it a service component amounting to 15% of the content of the original contract. This change amounted to a ‘significant difference’, meaning that there was no Service Provision Change.

A recent Unite case study also illustrates the difficulties in determining whether there is a relevant transfer:

CASE STUDY: LEGENDS EDINBURGH, PROBLEMS WITH A PROSPECTIVE TRANSFER

Legends is a rock and metal club in Edinburgh that has been operating as such on the same site for decades, most recently owned by Bruce Taverns Limited. The business employed 9 members of staff: a General Manager, Assistant Manager and seven staff employed as ‘Bar Staff’. However, one of the ‘bar staff’ worked in the role of a concert promoter: creating the programme, booking bands, marketing the gigs and running the events. The bar staff were employed on zero-hours contracts with statutory minimum terms and conditions. The managers were salaried employees, both with over two-years’ service. The contract of employment identified Legends as the ‘primary place of work’ but contained a mobility clause, so staff could be expected to work at sites across Edinburgh. In reality the staff had always all worked at Legends.

In early 2026, the venue was bought by Encore Bars Limited, who planned to turn the venue into a Country and Western-themed bar and transfer all staff. This was not initially directly communicated to workers, who found out from workers at a neighbouring Encore Bars venue. The staff were highly resistant to a transfer due to the differences in the nature of the businesses: metal music vs country, clientele of regulars vs a focus on parties and events, a long-established ‘community’ vs a venue capitalising on a trend. Legends staff were further concerned because Encore Bars had bought over

[5] *UKEAT/0462/10/CEA*

a neighbouring venue and there were reports that staff TUPE transferred were ill-treated as the business did not want them.

Neither employer had an understanding of the TUPE regulations. There was no meaningful consultation or information. There did not seem to be meaningful dialogue between the employers regarding the TUPE transfer—their focus was on the property, both operating under the assumption the staff would transfer without any questions. Encore Bars seemed to drive the process, hosting a meeting in which they told staff what would happen, but were not open to questions. Bruce Taverns did not meet with its staff. Nothing was provided in writing by either employer.

The scenario posed the following issues:

- Was it a relevant transfer? Workers contested that the activities were not the same due to the cultural difference and the customer base was acknowledged to be changing. Eligible staff all preferred redundancy to a transfer.

- For the ‘concert promoter’, there was problem in the superficial job description that did not accord with their role. In effect, the transfer would have meant a different job that they had never worked.

- A similar issue existed for staff that worked on Legends social media. This was not covered in the job description, yet was a significant proportion of the workload, and was due to be removed entirely from the role at Encore.

The job descriptions were very scant with responsibilities poorly defined, providing no assurance that work would continue in a similar manner with the new employer.

The lack of information and consultation to the workforce, while information was being published online by both employers stating close closure and opening dates, created a great deal of anxiety. Both employers were focused on the sale of the venue, taking for granted that the staff would transfer.

Following Unite’s intervention, highlighting the potential challenges to the transfer, all staff were found jobs at other Bruce Taverns venues to avoid the transfer entirely. However, if the union had not been present, it was far from clear whether there was a relevant transfer.

b) Identifying an “organised grouping of employees”

Applying concepts such as “organised grouping” and “assignment” can be difficult in work settings, where roles are blended and staff work across different functions. In civil aviation, for example, it is clear some groups of workers are dedicated to a contract – e.g. check-in staff services for a particular airline. However, for other workers, it is less clear. For example, baggage handlers will often provide services to multiple airlines.

Similarly, for some cabin crew staff, it is not always clear whether staff are assigned to contracts where they work on a variety of routes. Determining the percentage of time which workers spend on different contracts can be complicated and create uncertainty.

There are concerns that some workers miss out from TUPE protections, when the transferor doesn't assign certain workers to the "organised grouping". For example, case law has created uncertainty around whether workers who are on long-term sick leave transfer.[6]

The 'organised grouping of employees' test creates space for inconsistent decision-making and allows employers to select which workers should be transferred.

c) Multiple transferees

The involvement of multiple transferees can seriously complicate transfers. 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. Unite is concerned that splitting roles between multiple transferees can cause problems for workers. Workers can be expected to work in locations many miles apart.

All the above complex legal tests create uncertainty and confusion and mean there are potential gaps in the legislation:

- Focusing on whether services provided before and after the transfer are identical allows employers to rely on minor changes to service post transfer to argue that TUPE does not apply.
- Employers can also disperse the transferred workers, in order to argue there is no 'organised grouping of employees' carrying out the activities.
- As noted above in the American Airlines case, employers can seek to tender contracts on a temporary basis in an attempt to avoid TUPE.

These gaps undermine the purpose of the legislation which is to protect workers affected by outsourcing or restructuring.

Unite believes that the definition of a service provision changes should be amended and statutory guidance prepared which confirms that TUPE still applies even though:

- The activities carried out are not identical after the transfer.
- The transferred workforce has become fragmented and integrated into the wider workforce.
- There has been a diminution in the level of service provided.

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

- The client to whom the service is provide has changed.
- Multiple transferees are involved.
- A contract is awarded on a temporary basis.

It should also not matter whether the ‘organised grouping of employees’ is deliberately organised to carry out the activities.

Greater clarity could also be achieved by amending regulation 3 to make it clear that a service provision change can occur where activities are split between more than one new contractor and there is more than one organised grouping of employees. Guidance should also encourage employers to co-operate with each other, in a constructive and pragmatic way, to resolve any issues which may arise, in relation to which part of the service a particular employee should be assigned to, having regard to the employee’s job role, time spent on particular activities and the views of the employee representatives.

To improve clarity and accountability the government should legislate for:

- clearer statutory or ACAS-style guidance on service provision changes, (including sector-specific examples)
- A requirement on employers to set out and evidence their reasoning on TUPE applicability
- Earlier consultation with recognised unions where applicability is in doubt.
- Earlier mechanisms to resolve whether TUPE applies transfer, such as expedited ET determinations on TUPE applicability.

Question 9:

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

The responses throughout this consultation illustrate the issues that unions and worker face in relation to the TUPE process.

One additional point to raise here relates to the application of TUPE in insolvency situations.

In the current economic climate, where workers are struggling with the cost-of-living crisis, rising unemployment, increased inequality and household poverty, Unite believes that the TUPE Regulations have a key role to play in the rescuing of businesses, in maintaining employment levels, retaining skills staff, protecting household incomes and sustaining consumer confidence.

However, insolvency can also complicate the TUPE process as illustrated below:

CASE STUDY
The Clements case arose following the company's liquidation. Clements haoperated catering services within Queen's University Belfast and maintained a landlord/tenant relationship.

Following the liquidation of the company, the University chose to restructure the arrangements and divide the work between new operators rather than replace Clements with a single contractor or in-housing the services. This created significant uncertainty over whether TUPE applies at all, whether there has been a relevant transfer, and, if so, which employees would transfer to which incoming operator.

There was a lack of clarity over responsibility. The liquidating employer effectively washed its hands of the process. At the same time, Queen's University has been reluctant to engage on TUPE issues. As a result, neither the outgoing employer nor the University has been willing to provide the information required for meaningful consultation. The union has been unable to obtain even basic information including details of the work which is transferring, which operators are taking it on, how employees are being allocated, and what consultation arrangements are proposed.

This situation is further complicated by the presence of multiple prospective new operators (as many as 4/5). The fragmentation of the work has made it extremely difficult to establish whether there are identifiable "organised groupings of employees," whether groups will transfer together, or whether some employees fall outside TUPE altogether. The incoming operators have stated they are acquiring the business "sold as seen" and have no obligation to engage with Unite or provide access while the TUPE position remains disputed.

Perhaps the most significant issue has been the impact on the workers. TUPE is intended to preserve employment and provide certainty, yet the opposite has occurred. Members have effectively been dismissed while Unite, the landlord (QUB) and new operators debate whether TUPE applies and who is responsible for the workers.

Question 10:

Which, if any, of these issues did you face during a TUPE process? Please select all that apply.

As illustrated throughout this response, Unite officers and reps have experienced significant problems with all of the following issues:

- 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

Question 11:

To what extent do you agree or disagree that the TUPE process can be challenging for employers to navigate?

- **Disagree**

In general, Unite disagrees with this assertion.

However, we recognise the need for full and proper exchange of information between the transferor and the transferee about employment related liabilities prior to any transfer. Lack of transparency is not in the interest of contractors or transferred staff.

We therefore support the disclosure of TUPE liabilities at an early stage. Currently, the Regulations only permit transferees to seek remedies relating to the disclosure of information after a transfer has taken place. Consideration could be given to measures permitting selected transferees to compel transferors to disclose all relevant information prior to the transfer taking place. We recognise such measures will have limitations, as transferees will not always be aware of gaps in the information provide before the transfer has taken place. However, in some cases, such measures may assist in reducing employment disputes after the transfer.

Question 12:

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

Implementing the reforms proposed in this response and would mean that the current loopholes in the regulations are closed.

This would create more of a level playing field for 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.

Question 13:

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

Please see the response to Question 2 above.

Current guidance and support during a TUPE transfer

Question 14:

In the process of undergoing TUPE, what support, if any, did you use?

- other – please specify

Union officials are trained and experienced in dealing with TUPE transfers. Where needed, they can access specialist legal advice and support.

Our reps, members and the wider workforce also have expert knowledge on how business and services operate and how they can be improved.

Question 15:

How helpful do you believe the guidance (GOV.UK and Acas) currently available on TUPE is?

- **somehow unhelpful: it should be improved**

Government and Acas should prepare updated, comprehensive and clearer statutory guidance to accompany future revised regulations, including sector specific examples. It would also be helpful for the government to provide clearer guidance on how TUPE interacts with redundancy and new fire and rehire provisions.

Variation of terms and conditions of employment

Question 16:

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?

- **Strongly disagree**

Unite firmly opposed to changes introduced in 2014 which expanded the circumstances where employers could rely on economic technical and organisational (ETO) reasons to justify a reduction to pay terms and conditions following a TUPE transfer.

In *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* [1988] IRLR 315, the European Court of Justice confirmed that the objective of the Acquired Rights Directive is to ensure, as far as possible, the safeguarding of employees' rights in the event of a change of proprietor of the undertaking and to allow them to remain in the service of the new proprietor on the same terms and, therefore, a worker cannot waive the rights conferred by the Directive.

Unite believes the 2014 changes to the ETO revisions were not consistent with this CJEU judgement or with the Acquired Rights Directive.

Under the revised TUPE regulations, variations are now permitted if

a) *made for an ETO reason and agreed by both employer and employee.* These provisions fail to recognise the inherent imbalance in the negotiating power of employees compared with employers. Employers can rely on these provisions to pressurise workers to accepting reduced pay and conditions on the grounds that savings are required
b) *the contract expressly permits the change.* These provisions incentivise employers to use contractual clauses authorising unilateral variations in terms and conditions.
c) *the change is entirely unconnected with the transfer:* This provision applied pre-2014.

Since 2014, employees have faced increasing pressure to agree to changes to their pay terms and conditions. Variations can include the following

- **Changes to the methods and timing of pay for staff**

As noted in response to question 3 above, many workers in lower paying jobs are still paid on a weekly basis and they budget accordingly. Often new employers pay staff on a monthly basis. Transitioning from weekly to monthly payments can have serious implications for workers and their ability to plan to cover their bills.

Similarly in some workplaces, transferred workers have been expected to move to a pay system involving 2 weeks' pay in advance and two weeks' pay for work already done.

This can leave transferred workers out of pocket and struggling to budget for their household needs.

The absence of early consultation can lead to workplace disputes and can damage worker morale when starting a new job. Workers are often willing to consider industrial action to preserve their normal pay system.

Where employers consult with unions in advance about payment systems such issues can be resolved early.

- **Changes to shift patterns or roster changes**

Employees are often expected to accept changes to their shift patterns or roster when they transfer to a new employer. This can have a devastating impact on individuals and their ability to balance working life with caring responsibilities.

- **Full service provision changes**

Some employers view the provisions on ETO variations as an easy route to adopt to reduce pay and other key terms and conditions post-transfer. In sectors such as health and local government, there is growing use of service reviews. Transferees use service reviews to trigger redundancies or substantial reorganisations.

CASE STUDY

During a TUPE transfer for a parking service local authority contract, the new service provider advised there were no significant measures and that contracts of employment and terms and conditions of the workers would be protected under TUPE on transfer.

Within 6 months of the transfer, the employer announced there would be a full restructure for ETO reasons and all workers would be required to reapply for their jobs. They would then all be issued with new contracts of employment, with reduced terms and conditions and extended working hours. The matter was only resolved through strike action by the workforce, and it came to light during the dispute that the service 'restructure' had been agreed between the provider and contracting authority during the tendering process yet was still not included as a measure during the TUPE transfer.

Unite firmly believes that variations should only be permitted where they are favourable to the employee. 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 regulations should also be amended to ensure that transfer related dismissals cannot be potentially 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)).

Question 17:

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)?

- **Strongly disagree**

The economic, technical and organisational reasons (ETO) justification for variations to terms and conditions should be removed.

The use of ETO reasons to vary contracts can contribute to increased inequality, in-work poverty and a downward pressure on pay and conditions. These changes have had a particularly detrimental impact on low paid women and BAEM workers who are more likely than their counterparts to work in outsource services.

Permitting variations to employee's terms and conditions for ETO reasons provides a significant loophole for employers to evade TUPE protections and enables employers to pressurise workers into accepting worse terms and conditions of employment.

Unite firmly believes that variations should only be permitted where they are favourable to the employee.

Question 18:

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 specific?

- **Strongly disagree**

Question 19:

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

Unite firmly believes that the TUPE regulations should be amended to remove the permission for variations to be made where the sole or principal reason is an economic, technical or organisational reason entitling changes in the workforce (regulation 4(5)(a)).

Failing this, we would support the introduction of a statutory definition of an ETO variation. This should be accompanied by a statutory code of practice.

Cost and impact of a TUPE transfer

Question 20:

To what extent do you agree or disagree that the overall cost of TUPE-protected transfers is too high for businesses?

- **Strongly disagree**

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 productivity.

Question 21:

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.

Not applicable.

Question 22:

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

Not applicable.

However, situations where employers contest TUPE transfers or fail to engage in constructive consultation and negotiation with unions can be very resource intensive for unions.

Additional considerations

Question 23:

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 socio-economic background?

- **Yes**

The government's own equalities impact assessment Prepared to accompany the 2024 consultation paper[7] concluded that excluding workers from the scope of TUPE could have a particular impact on older, black and minority ethnic workers and disabled workers.

When reviewing the TUPE regulations, following this call for evidence, and preparing proposals for reform, it is vital for the government to ensure that the revised regulations are comprehensive in scope, clear and easy to enforce. It is therefore vital that this matter is considered as part of a broader assessment of employment status

Question 24:

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

Unite believes that the government should also make the following reforms to the TUPE Regulations.

Extending the scope of TUPE regulations

a) *Share transfers*

Currently, TUPE protection does not apply to most share transfers. The main exception is where following a share transfer where, for example, a parent company acquires a subsidiary and subsequently integrates the subsidiary so deeply that the parent company takes over day-to-day management and the original employing entity no longer effectively functions as an independent business. But it is not always clear at the outset whether TUPE will apply.

Unite believes it is unfair that certain transactions attract the protection of TUPE whilst others do not. Takeovers and mergers can have devastating consequences for the workers affected. The lack of TUPE protection, employees often have limited protection for conditions of employment and unions do not have the right to be informed and consulted on the potential impact of ownership changes on the workforce.

[7] 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

The TUPE 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. Extending TUPE to all share transfers would increase transparency and certainty for employers and workers. It would also ensure that TUPE rules apply consistently to all business transfers and that workers are equally protected where there is a change in employer.

a) *Public authorities*

TUPE regulations should be extended to apply to all transfers within public authorities.

The current uncertainty whether TUPE protections apply to reorganisations with the public sector causes unnecessary confusion and anxiety for affected staff. At present discussions are taking place over the transfer of staff from NHS England to the Department of Health and Social Care. However, it is still not clear how this transfer will work and whether the TUPE regulations will apply, TUPE "like" protections, or the Cabinet Office Statement of Practice (CoSoP). The reorganisation affects thousands of members of staff.

We would support the removal of the regulation 3(5) exemption for public administrative transfers.   As a minimum, the regulations should be revised to clarify that the procurement or outsourcing of public sector operations are capable of amounting to 'economic entities, resolving the problems created in the Nicholls and Bicknell cases.

Failing this, the Cabinet Office Statement of Practice should be retained and the Government should exercise its section 38 powers to ensure that TUPE protections apply to all transfers relating to public services.

Improved dismissal protections

a) *Interim relief*

As noted above, where a Tupe transfer is disputed by the transferor and/or transferee, employees who are at risk of losing their job, must be able to apply for interim relief from an employment tribunal, thereby preserving their terms and conditions of employment until a full hearing takes place to determine if TUPE applies. Employment Tribunals should have the power to reinstate an individual's employment with either the transferor or the transferee.

b) *Wrongful dismissal*

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.

This means that a worker (who didn't have the 2 years qualifying service to claim redundancy) whose employment conditions will substantially change to their material detriment would have no legal claim, following their employers 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.

Strengthening the Right to Object

Unite recommends that employers should be required to inform transferring employees of their right to object to a transfer, and their right to treat their contract as terminated in the event of a substantial change in their working conditions to their material detriment. This is important because it can ensure that an employee remains entitled to redundancy payments rather than being treated as if they have resigned.

Extending TUPE protections to all workers

TUPE protections should be extended to apply to all workers, including zero hours contract workers and agency workers.

Share options should transfer

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'.

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

WIDER REFORMS

Alongside reforms to the TUPE Regulations, the government should also deliver on commitments to:

- **Reform equal pay law**, including by reinstating 'single source' test. The single source test allows employees to make equal pay comparisons with workers in different organisations and locations, where a single body or organisation is

[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.

responsible to set both pay rates. This policy would improve equality in the outsourced sector.

- **Reinstate the two-tier workforce code** in a way which ensures that new joiners benefit from the same terms and conditions as outsourced staff, with pay and conditions being dynamically aligned to collective agreements negotiated in the commissioning body.
- **Deliver the biggest wave of insourcing in a generation.**