

GUIDANCE NOTE

INFORMATION FOR SCHOOLS AND HUMAN RESOURCES PROVIDERS IN RELATION TO THE TRANSFER OF EMPLOYEES FROM LOCAL AUTHORITY TO ACADEMY OR TRUST EMPLOYMENT

1. BACKGROUND

The conversion to an Academy means that the Local Authority will cease to be the employer of the converting school's staff and instead they become directly employed by the Academy (although continuity of employment is preserved). The situation is regulated by the **Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)**, as amended by the **Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014**, which protect the employment rights of affected employees.

Both the current employer (Bradford Council) and the new employer (the new Academy) must comply with various legally enforceable obligations pursuant to TUPE. This Guidance Note sets out what those obligations are, the timescales of the transfer process and the penalties for failing to comply with them. It is not, and is not intended to be, legal advice. Before taking any action that may have legal consequences, schools and Academies should seek professional independent legal advice.

It is the responsibility of a converting school's governing body to ensure that the school's HR provider and other professional advisors are briefed on the details of the proposed transfer and provided with a copy of this Guidance Note. Where Bradford Council is the ultimate employer of the staff who will be transferring the following roles and responsibilities will apply.

The school leadership and governing body

Will take an active role in ensuring the TUPE process happens in a timely way and in liaising with the Council's Corporate HR department to provide employee information, check data held on staff records, compile the employee liability information and consult with staff and the recognised trade unions.

Bradford Council Corporate HR Department

Will support and guide the school through the TUPE process, providing template documents and staffing information where this is held.

Schools' HR providers

Will advise on the school's responsibilities with regards to TUPE and support the school with the provision of information, consultation, dealing with measures etc. (NB the provision of this advice may fall outside the scope of an HR service level agreement and may incur additional charges.)

Until its Memorandum and Articles of Association are submitted to Companies House and it is incorporated as a company limited by guarantee, the Academy will have no legal status. For as long as this remains the case during the conversion process, all and any obligations of “the Academy” referred to in this Guidance Note shall fall to be fulfilled by the Academy’s intended sponsor(s), if any, and/or those individuals who expect to be appointed as its directors and/or governing body on incorporation; and all references to “the Academy” being entitled to be notified of something, or to receive information, shall be taken to refer to its intended sponsor(s), if any, and/or those individuals who expect to be appointed as its directors and/or governing body on incorporation. For those schools without a sponsor or multi academy trust who convert to a single academy trust there needs to be a clear division of responsibilities as to who is responsible for what part of the process and how the Council will meet its responsibilities.

2. GENERAL INFORMATION AND CONSULTATION OBLIGATIONS

The Regulations impose specific duties on the current employer and the new employer in relation to the provision of information and consultation with the appropriate representatives of any “affected employees” about a proposed transfer. These statutory duties are in addition to the usual rights of recognised trade unions to information and consultation for the purposes of collective bargaining.

“Affected employees” in the context of an Academy conversion includes not just the staff of the converting school who are to transfer to the Academy but also other staff who may be affected, such as existing employees of the Academy if it is already operational and employing staff. A school contemplating conversion to Academy status should give consideration to the different types of ‘affected employees’.

The *“appropriate representatives”* in the context of an Academy conversion will be the trade unions recognised by Bradford Council. In cases where the Academy is already operational and employing staff before the transfer date, the *“appropriate representatives”* will also include any trade unions that are recognised by the Academy and who represent existing employees of the Academy who may be affected by the transfer. This may include employees in facilities management (FM), Direct Service Provisions (DSPs), children’s centres etc.

Bradford Council recognises the following trade unions:

NUT NASUWT
ATL UNISON
NAHT GMB
UNITE ASCL

All these trade unions have the expectation to be notified of the change to Academy status and to be invited to consultation meetings. It is for the unions to decide whether they will attend such meetings or not.

As soon as possible after the converting school's governing body has formally resolved to pursue conversion, it should inform Bradford Council (via Michael Jameson, Strategic Director Children's Services) and the recognised trade unions, in writing, of its intention to convert to Academy status.

The duty to inform and consult with appropriate representatives of the affected employees rests jointly with Bradford Council, as the current employer, and the Academy as the new employer. The primary responsibility rests with the Council and so it is important that as much information as possible is shared with the Council, as early as possible.

The converting school shall be responsible for ensuring that all TUPE information and consultation obligations are adhered to effectively. It must be able to demonstrate to Bradford Council that all required information has been provided and appropriate consultation has taken place.

3. PROVIDING INFORMATION

A representative from Bradford Council's Corporate HR department will make contact with the school to discuss the TUPE process and arrange a meeting to outline the steps to take and agree a timeline.

As early as possible during the conversion process, the converting school must identify a list of employees who will transfer to the Academy and a list of those who will not transfer (if any). (A template will be provided)

Both lists must be sent to Bradford Council's Corporate HR, together with the Employee Liability Information referred to at 6.1 below.

As early as possible during the conversion process, so as to provide adequate time for consultation with the recognised trade unions, the Academy must provide Bradford Council and the converting school with a letter ("the measures letter") setting out the details of any "measures" it proposes to take in relation to the affected employees after the TUPE transfer.

A "measure" is any deliberate change to the workforce or in working conditions or practices, even a relatively minor change such as setting a new pay date. "Measures" must be "envisaged" – which means planned or proposed; not a mere hope or possibility.

Once the measures letter has been received, the converting school must write to the trade unions to inform them of the following:

- (a) The fact that a proposed transfer is to take place;
- (b) The timescale for it happening;
- (c) The reasons why it is taking place;
- (d) Any legal, economic and /or social implications of the transfer for the affected employees;

(e) Any proposed measures which are envisaged by the school or if there are none.

(f) Any measures that the Academy envisages it will take in relation to the transferring employees in connection with the transfer or if there are no measures envisaged.

(g) "Suitable information" relating to the use of agency workers (if any) by the School (the numbers engaged; the locations in which they work and the type of work they undertake).

The above information must be sent by post to the trade unions at the address of their head/main offices. It is good practice to also send a copy to the trade unions' local offices. The provision of this information to the trade unions is a specific requirement under TUPE. The correspondence should be copied to Bradford Council.

It may be that measures information changes as the process progresses. The converting school should regularly obtain updates about measures; this information should be passed to the trade unions and copied to Bradford Council.

This is not a technicality. A failure to provide the above information (at all or adequately) could result in the trade unions bringing a legal claim against Bradford Council and/or the converting school and/or the Academy. This can be a substantial monetary claim.

While there is no statutory obligation to inform or consult with employees directly, most schools involve their staff by providing regular feedback to explain the various steps in the process and communicate with them effectively; such discussions can go a long way towards securing their support for the conversion and help to allay any anxieties they may have.

Full terms and conditions of employment and all employment related policies and procedures, local agreements etc. should be provided to the sponsor as soon as possible so that the sponsor can identify if any changes (measures) need to be proposed. (These will be provided to school at the initial meeting with a member of the Corporate HR Team for this purpose.)

4. CONSULTATION

The TUPE regulations place the duty on the current employer to consult with recognised trade unions as representatives of employees, not the staff affected. As a matter of good practice, staff meetings should take place to inform all staff about the TUPE process and the proposed transfer of their employment and answer any questions. This is separate process to the legal requirement to consult with the trade unions.

The converting school should meet with the trade unions as early as possible to consult on the proposed transfer. While formal TUPE consultation cannot commence until a school's governing body has approved the proposal to convert

to Academy status or an academy order has been received , informal discussions can begin as soon as the proposal is formulated. Formal consultation on TUPE matters can begin once the written information (as above) has been sent to the recognised trade unions.

TUPE consultation should be with authorised officials of the recognised trade unions. An “authorised official” may be a Steward, a Regional/District Official, or, if appropriate, a National Officer. The converting school’s Headteacher and a representative of its HR provider or Bradford Council Corporate HR should attend all consultation meetings and minutes of the meetings should be taken. Regular meetings should be held. It is common to hold consultation meetings at least every two weeks. Where schools are operating within very tight timescales, it may be appropriate for consultation meetings to be held more frequently; weekly in some cases.

Consultation should be around any measures which are proposed by or on behalf of the Academy. The consultation must be meaningful and it should be carried out with a view to reaching an agreement about the proposed measures. The discussion must be conducted with an open mind, allow time for the representatives to consider proposals and respond and any counter proposal or measure should be considered and a reasoned response given.

The converting school must communicate to the Academy any representations made by affected staff or by the trade unions. Whilst the Academy is not obliged to change its position, it too must consider any representations with an open mind and give due consideration to whether they are reasonable and give a reasoned response. The school must ensure that the trade unions are kept informed of what is happening.

Having considered any representations made by the affected staff or the trade unions, the Academy should reply in writing, copying all correspondence to Bradford Council and to the trade unions’ head/main offices. If representations are rejected by the Academy, written reasons for the Academy’s position should be provided.

TUPE does not specify how long the consultation period should be. Consultation should last ‘as long as is necessary’ and should take place ‘in good time’ to allow for adequate consultation to take place before the transfer.

A failure to consult (at all or adequately) can result in the trade unions bringing an Employment Tribunal claim against Bradford Council and/or the converting school and/or the Academy. The potential cost of this type of claim, if successful is 13 weeks gross pay for each employee affected (i.e. in scope to be transferred or otherwise affected by the proposed transfer).

The converting school must also put in place adequate procedures to ensure that it can consult with staff who are absent due to (for example) maternity, paternity, adoption or long term sickness absence.

5. PRACTICALITIES OF THE CONSULTATION PROCESS

Minutes of all consultation meetings should be carefully recorded including an attendance list (attendees should be asked to sign in and that list should be kept separately). The minutes should be signed as being a correct record by the trade unions at the beginning of the next meeting. Minutes of meetings should be provided on a regular basis, together with any further written information, to each trade union's main or head office.

Any updates given to trade union representatives made in person outside of the meetings should be confirmed in writing to that person and sent to each trade union's head/main office.

The school must maintain files including data on the employees affected by the transfer, e.g. all terms and conditions for employees whom it is proposed will transfer and the trade unions involved.

The same process for the provision of information and consultation must be conducted with any external sponsor(s). A record of any information provided to the sponsor(s) (including their consultants/advisors) must be kept together with the records of minutes evidencing consultation with the sponsor(s) and trade unions.

6. EMPLOYEE LIABILITY INFORMATION

The school must collect and prepare Employee Liability Information. This is:

- (a) the identity of the transferring employees.
- (b) transferring employees personal details
- (c) information contained in the employees' "statements of employment particulars" (Section 1 Employment Rights Act 1996).
- (d) information relating to any collective agreements which apply to the transferring employees.
- (e) information on any instances of any disciplinary action taken by the school against the transferring employees within the preceding two years in circumstances where the Acas Code of Practice on discipline and grievance applies.
- (f) information on any instances of any grievances raised by an employee within the previous two years in circumstances where the Acas Code of Practice on discipline and grievance applies.
- (g) actual or potential claims (legal action) by employees against Bradford Council and/or the school (e.g. equal pay claims, employment law claims and/or personal injury claims).

The school should compile the Employee Liability Information in the form as set out at Schedule 2. It must be checked for accuracy by the school and then passed to Bradford Council as early as possible and no later than 35 days before the transfer. The information will be checked where possible against any central records held by the Council but it does not have access to school based data from

which to verify the information. Further information relating to claims dealt with by the Council will be added by Legal before passing it on to the Academy no less than 28 days before the transfer. Where inaccurate information is supplied or information is missing from the schedule this can result in a delay to the conversion process and may expose the parties to financial penalties.

The financial penalties which may be applied are where the Employee Liability Information is not provided accurately to the Academy at least 28 days before a TUPE transfer. As the information required is fairly detailed, the school should commence the process of gathering and collating the Employee Liability Information as early as possible. Any employee information that is shared with the Academy sponsors prior to the ELI disclosure 28 days prior to the transfer date may only be done on anonymous basis to comply with the requirements of the Data Protection Act.

If any of the Employee Liability Information changes between the date it is initially provided to Bradford Council and the completion of the transfer, the school must notify Bradford Council in writing as soon as is reasonably practicable.

7. PENSIONS

The effect of TUPE is that terms and conditions of employment do not change on a TUPE transfer; they remain intact after the transfer as if the original contract of employment were made between the employees and the Academy, unless a particular change was identified through the 'measures' process. An exception is occupational pension scheme rights to "old age, invalidity or survivor's benefits", which do not transfer under the Regulations. This exclusion is construed narrowly. As a result of two European Court (ECJ) cases in 2002 and 2003, *Beckmann v Dynamco Whichelow Macfarlane and Martin v South Bank University*, certain early retirement rights provided under a scheme will transfer, as they fall outside the scope of the exception.

But in the public sector, there are provisions in place to protect public sector pension schemes when a TUPE transfer takes place (albeit these are non-statutory and do not carry the same protections as arise in relation to a TUPE transfer). This is often referred to as 'Fair Deal'. New guidance ('New Fair Deal') was issued by HM Treasury in October 2013 and updates the previous guidance on Fair Deal issued in 1999 and 2004. The expectation is that the entitlement to participate in specified public sector pension schemes will continue after the transfer takes place.

Pension issues must be considered at the very beginning of the conversion process. The Academy must satisfy itself that it will be able to provide membership of the Teachers' Pension Scheme or Local Government Pension Scheme to all eligible staff. It must consider the position in relation to teachers, who will be members of the Teachers' Pension Scheme, and also non-teaching employees, some of whom will be members of the Local Government Pension Scheme which is administered by the West Yorkshire Pension Fund ("WYPF").

Existing employees who are already members of the WYPF will not be affected by the transfer; their membership of the WYPF will continue unaffected. Any new non-teaching staff appointed after the transfer date will be eligible to join the WYPF and will be automatically enrolled. The Academy's Funding Agreement will require it to offer Local Government Pension Scheme membership to all non-teaching staff.

Local Government Pension Scheme Regulations provide that Academies are "Scheme Employers" for the purposes of the Local Government Pension Scheme. An actuarial assessment will determine the Academy's contribution rate and whether there is a deficit relating to the group of employees to be transferred. The assessment will be carried out by the Local Government Pension Scheme and paid for by the school. The Academy might also wish to carry out its own independent assessment. Any deficit in the pension fund immediately prior to conversion will transfer from Bradford Council to the Academy under the terms of the Commercial Transfer Agreement. Schools and Academies should consider seeking independent pension advice before they proceed with a transfer. The contact number for WYPF is (01274) 434999.

8. RESPONSIBILITY AND ACCOUNTABILITY

The converting school will be responsible, in liaison with its HR provider and or the Council's Corporate HR Service, for ensuring proper compliance with all TUPE information and consultation requirements on behalf of Bradford Council as outlined in this Guidance Note.

Bradford Council will maintain an overview of the process and shall be entitled to receive from the school at regular intervals confirmation that, to date, all processes have been followed appropriately and all information and consultation requirements have been met.

Any advisory and support work carried out by PACT HR in relation to a TUPE transfer on behalf of the school is not included in the schools' general HR service level agreements; it is chargeable at an additional daily rate, details of which are available on request.

Any work carried out by Bradford's Corporate HR service is in relation to the Council's responsibilities under TUPE and is not chargeable.

A failure to follow the appropriate information and consultation processes could leave the converting school open to the risk of a financial award (which may include legal costs) being awarded against it for a failure to consult.

This Guidance Note will be updated as necessary.