



Department
for Work &
Pensions

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The Transfer of Undertakings (Protection of Employment) (Transfer of Staff to the Department for Work and Pensions) Regulations 2014

Government response to the SI consultation

May 2014

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The Response to the SI Consultation for Single Fraud Investigation Service (SFIS) Project

Executive Overview

DWP wrote to Local Authority (LA) Chief Executives on 3rd March 2014 to announce the proposed approach to transferring formally LA employees and employees of contractor companies who are undertaking housing benefit and council tax benefit fraud investigation work to DWP. This commenced the period of consultation with key stakeholders, who were asked for comments on the proposed Statutory Instrument (SI) by 14th April 2014, 18th April 2014 for Trade Unions.

During the period of consultation, the project additionally engaged with several representative groups, sharing the transfer approach in meetings with:

- Local Government Association (LGA)
- Convention of Scottish Local Authorities (COSLA)
- Welsh Local Government Association (WLGA)
- Department for Communities and Local Government (DCLG)
- Scottish Government
- Welsh Government

Although not part of the official SI Consultation, the Project held regional Roadshows, at which LA employees were provided with the opportunity to raise questions. Roadshows commenced 24th March 2014 and will end on 8th May 2014. Questions individuals raised at the Roadshows mirror the themes raised during the consultation period.

56 responses to consultation have been received. Some stakeholders submitted more than one letter during consultation. A detailed list of all respondents is on page 12. The main themes arising from consultation are:

- Employee Transfer Approach
- Timescales
- Pay, Grading and Continuity of Service
- Measures
- In Scope Decisions and Funding of Residual Services

Thank you to all respondents. As a result of the consultation, all responses have been reviewed and carefully considered. In light of responses received DWP has reconsidered its approach and has made some amendments to the proposed SI.

This paper sets out the official consultation response to the key themes raised. Questions not directly relevant to the SI Consultation will be responded to appropriately through existing processes, after the publication of the SI Consultation Response.

Employee Transfer Approach / why not TUPE?

What the consultation responses said:

A large number of responses advised the belief that TUPE should apply to the transfer of employees and although supportive of the transfer DWP is proposing, the majority of responses expressed concerns that employees may not be adequately protected on transfer, if TUPE was not applied.

Those responses accepting DWP's approach to implementing a Statutory Instrument (under section 38 of the Employee Relations Act 1999) also stated they had concerns for the protection of their employees.

Specifically, DWP was asked to reconsider including the following TUPE regulations in the SI:

SI 2006/246 Regulation 5 – Effect of relevant transfer on collective agreements

SI 2006/246 Regulation 6 – Effect of relevant transfer on trade union recognition

SI 2006/246 Regulation 7 – Dismissal of employee because of relevant transfer

SI 2006/246 Regulation 8 – Insolvency

SI 2006/246 Regulation 9 – Variation of contract where transferors are subject to relevant insolvency proceedings

SI 2006/246 Regulation 11 – Notification of Employer Liability Information

SI 2006/246 Regulation 12 – Remedy for failure to notify employer liability information

SI 2006/246 Regulation 13 – Duty to inform and consult representatives

SI 2006/246 Regulation 14 – Election of Employee representatives

SI 2006/246 Regulation 15 – Failure to inform or consult

SI 2006/246 Regulation 16 – Failure to inform or consult – supplemental

SI 2014/16 Regulation 8 (1) - (1) (2) and (3) Dismissal of employee because of relevant transfer

SI 2014/16 Regulation 9 – Definition of “permitted variation”

Government response

DWP has considered whether the creation of SFIS falls within the scope of TUPE. The TUPE regulations state that “...the transfer of administrative functions between public administrative authorities is not a relevant transfer” (for the purpose of TUPE). After careful consideration, DWP has concluded that housing benefit and council tax benefit fraud investigations falls within this category, and as such, TUPE would not apply. This is commonly known as the Henke exception.

It has never been DWP's position that TUPE may apply. DWP has from the outset taken the view that TUPE is unlikely to apply. It is the case that if TUPE did apply, each LA would need to be considered separately and this could have meant that some LA staff would have been protected by TUPE and others would not. However, as Henke applies here, this is not an issue.

DWP is however committed to taking on LA employees and employees of contractor organisations who currently work on investigation of housing benefit and council tax benefit fraud activities. As suggested in the Cabinet Office Statement of Practice (COSoP), DWP has sought to effect the transfer of staff through a statutory transfer scheme. DWP has confirmed, and remains committed to, ensuring transferring employees have 'TUPE like' protection and their terms and conditions are protected on transfer.

COSoP does not require DWP to replicate all of the TUPE provisions. DWP's main concern is to protect staff terms and conditions and this is set out in the draft Statutory Instrument (SI). The draft SI does not replicate all of the provisions of TUPE; there is no requirement for DWP to do this where TUPE does not apply. Certain TUPE provisions have been omitted from the draft SI as DWP does not consider them relevant nor beneficial for employees transferring.

We have set out below the Government's response to the points raised in the responses to the consultation including a detailed response advising why specific regulations have been omitted is provided below:

SI 2006/246 Regulation 7 – Dismissal of employee because of relevant transfer and SI 2014/16 Regulation 8 (1) – (1) (2) and (3) Dismissal of employee because of relevant transfer.

Following responses received, whilst DWP considers the draft SI to provide adequate protection for employees, in light of the concerns raised in relation to this provision in TUPE a decision has been taken to include the relevant provisions of regulation 7 of SI 2006/246 (as amended by SI 2014/16) in the SI.

SI 2006/246 Regulation 5 – Effect of relevant transfer on collective agreements

Terms and conditions of the employment contract will be protected on transfer. Any terms incorporated into employment contracts from collective agreements will also be protected.

Following the introduction of the SFIS project all eligible employees will move into one organisation with one employer (DWP). It would not be practical or desirable to have a large variety of collective agreements from all of their previous employers continuing to apply. DWP would have to consider withdrawing and ending all of those collective agreements as the situation would not be manageable. There is therefore little to be gained by transferring the collective agreements just for DWP to then have to withdraw from them.

Regulation 5 has therefore not been replicated in the SI to effect the transfer of employees to DWP.

SI 2006/246 Regulation 6 – Effect of relevant transfer on trade union recognition

DWP already has arrangements in place with its recognised trade unions who represent all employee grades within DWP. It would not be practical for DWP to

recognise LA trade unions and have two sets of unions being recognised for the same grades of employees.

Regulation 6 of TUPE has therefore not been included in the SI.

SI 2006/246 Regulation 8 – Insolvency

SI 2006/246 Regulation 9 – Variation of contract where transferors are subject to relevant insolvency proceedings

Insolvency provisions would not be relevant in the context of the Civil Service and therefore have not been included in the SI.

SI 2006/246 Regulation 11 – Notification of Employer Liability Information

SI 2006/246 Regulation 12 – Remedy for failure to notify employer liability information

We are already engaging with LAs (and their contractors) to identify relevant staff and obtain employee data. There is no specific need to have this provision in the SI as this work is progressing in any event. Further, regulations 11 and 12 are for the benefit of the transferee. By not including these provisions, there is no detriment to the transferring employees.

SI 2006/246 Regulation 13 – Duty to inform and consult representatives

SI 2006/246 Regulation 14 – Election of Employee representatives

SI 2006/246 Regulation 15 – Failure to inform or consult

SI 2006/246 Regulation 16 – Failure to inform or consult – supplemental

DWP is already consulting on the SI as part of a wider engagement activity. We are also informing LAs on measures. LAs will be responsible for their own consultations with their TUs. The provisions in TUPE only require information and consultation to be “long enough before a relevant transfer”. This process has already commenced and there is therefore no specific need for this to be included in the SI.

SI 2014/16 Regulation 9 – Definition of “permitted variation”

This Regulation applies in relation to variations of contract where the transferor is subject to relevant insolvency proceedings. It is therefore not relevant in the Civil Service context and therefore has not been included in the SI.

As regards variations to contract generally, COSoP recognises the need for flexibility to harmonise terms and conditions on a transfer. DWP has already confirmed that no changes are at present proposed and in any event changes will only be made following discussion and agreement with relevant staff. Our view is that it would be more beneficial to employees to have the opportunity to agree changes to terms and conditions where this is of benefit to them. We do not therefore propose to impose the restrictions in TUPE on making changes – under TUPE changes can only be agreed where there is an economic, technical or organisational reason entailing changes in the workforce.

In summary DWP considers that the transfer approach as laid out in the Statutory Instrument does protect employees’ terms and conditions of employment.

Timescales

What the consultation responses said:

Several of the responses were around the lack of clarity on when LA employees would transfer to DWP.

Government response

The employee transfer will take place in two stages:

- Phase 1 (Nine already identified pilot areas) to transfer in July 2014
- Followed by a 3 month pause to review (July – September) to perform a post implementation review and address lessons learned.
- Phase 2 to commence in October 2014 for a rolling period of employee transfers (approx 20 local authorities each month) until March 2016.

DWP wrote to LA Chief Executives on 3rd March 2014, commencing the consultation period on the transfer approach and requesting each LA to notify DWP by 14th April of any mitigating circumstances that may affect their transfer date. The information CEOs provided will allow the rollout schedule to be developed. It is expected that CEOs will have been notified of their position in the rollout schedule for Phase 2 around the same time this SI consultation response will be published.

DWP HR will work with nominated LA HR representatives 4 – 6 months prior to the confirmed transfer date to consider Terms and Conditions and develop measures. This timescale will allow sufficient time to develop measures and provide the level of detail required for LAs to be able to consult with local Trade Unions.

Employees will be notified in writing in advance of the transfer date if they are to transfer. Only those employees notified in writing in advance will transfer under the SI.

Pay, Grading, and Continuity of Service

What the consultation responses said

Several responses related to pay, requesting to establish how transferring employees pay and grading will be treated post transfer. Queries ranged from:

- All LA employees are paid on the 15th of the month, two week retrospectively and two weeks in advance – will this continue post transfer?
- How will DWP allocate a pay grade for transferring employees?
- How will DWP treat people who are earning more than their assigned grade?
- Some LAs advised that they have a pay progression system, whereby employees continue to move up the payscale each year, which is contractual – how will this be treated post transfer?

The above list is not exhaustive.

Government response

Although specifically Pay, Grading, and Continuity of Service are not part of the consultation on SI, they are issues concerning stakeholders and do form part of the employee transfer approach.

DWP has stated that under the terms of the SI current pay and continuity of service will be protected. Where a transferring employee's salary is higher than that of the assigned grade the higher salary will not be reduced.

Where DWP cannot replicate like for like terms and conditions (for example a Dental Plan) DWP HR will work with LA HR representatives to develop measures, so that transferring employees will not be disadvantaged. LAs will have the opportunity to consult with their TUs on these.

Based on an employee's current role, responsibilities and activities DWP will assign a grade based on criteria in the DWP Grading Framework.

DWP pays their employees monthly, retrospectively on the last working day of the month via our Resources Management System. DWP is unable to alter this and will not be able to continue to pay transferring employees on the 4-weekly LA pay system. DWP will therefore develop a measure to address this.

Measures

What the consultation responses said

Several questions were asked around how DWP will match contractual Terms and Conditions. Examples given were varied, however a selection have been included for completeness below:

- some investigators have access to a car club (a pool of cars provided under council contract and available for employees to carry out their duties)?
- where will transferring employees be located?
- what arrangements will be made to compensate employees for additional travel expenses?
- how will contractual homeworkers be treated?
- how will contractual part-time workers be treated?

This list is not exhaustive.

Government response

Terms and Conditions will be protected. DWP will work with each employer to understand what is a contractual term and condition and what is a benefit. DWP HR will engage with nominated LA HR representatives 4 – 6 months prior to the confirmed transfer date to consider Terms and Conditions, develop measures and agree the office that employees will transfer to.

It is anticipated that the majority of employees will transfer into a DWP office and be co-located with Fraud Investigators, for those in a location where currently no Fraud employees are based they will be located in a DWP office. For those with mobility issues or in remote areas DWP will work with individual employees on a case by case basis to develop a reasonable measure.

The 4 – 6 month timescale will allow sufficient time to develop measures and provide the level of detail required for LAs to be able to consult with local Trade Unions.

Pensions

What the consultation responses said

A few queries were raised about Pensions, specifically asking:

- if employees will be able to stay in the Local Government Pension Scheme (LGPS)
- if they transfer to the Principal Civil Service Pension Scheme (PCSPS) will there be a Government Actuary's Department certificate of broad comparability with the LGPS?
- how will accrued pension provision be treated?
- what is the DWP normal retirement age?

Government response

Pensions are not included in the SI.

Transferring employees will be admitted into the PCSPS (NUVOS) on day one of their transfer.

They will be given the option of transferring their accrued provision from LGPS to PCSPS based on the certificate of broad comparability.

DWP does not have a mandatory retirement age for employees in grades below Senior Civil Service (SCS). Employees can decide to retire and draw pension benefits at any time from their PCSPS pension age of 60 or 65 (depending on which scheme they are in) but are not required to retire at those ages. The Department does not discriminate on the basis of age.

“In scope” decisions and Funding Residual LA Services

What the consultation responses said

A few LAs (either at the Road Shows or via their official response to consultation letter) raised their concerns about deciding who will be in scope for the transfer to DWP when they do not know their future funding.

Government response

The letter issued to LA CEOs on 3rd March 2014 set out the housing benefit and council tax benefit fraud investigation activities that will transfer from Local Authorities to DWP. Effectively DWP are transferring both the work and all the employees principally undertaking those activities. The exporting employer will submit a proposition of who is in scope to transfer. DWP HR will work with that employers HR representatives to agree the proposition and who is in scope for transfer.

However, within LAs it is clear that employees may undertake varied duties. Additionally, the LAs need to ensure they have sufficient capability to maintain their Corporate Fraud work. DWP HR has committed to working with LA HR representatives and offer additional support to help the LA decide who should transfer.

There are 3 key funding areas relating to SFIS:

Additional funding for LG Corporate Fraud

DWP has agreed a funding package with Department for Communities and Local Government (DCLG) and the Devolved Administration to support Corporate Fraud in Local Authorities and they will agree the plans for allocation.

Recycling of Funds

As the service is moving from LAs to DWP, the SFIS Project Business case recommends that an amount of money is recycled from the Housing Benefit Admin Grant. The proposals do not make any changes to the Admin grant for 2014/15 due to the introduction of the SFIS project, however there are proposals that future years' grants should reduce to reflect the cost of this service moving from LAs to DWP. These reductions are being discussed with the LA Associations and the announcement of the grant for 2015/16 will take place in the Autumn of 2014.

New Burdens Assessment (NBA)

The proposals for the NBA for 2014/15 are currently with DCLG and the devolved administrations and the LA associations, we have also set up a practitioner group to work through and agree the calculations. Once the NBA has been agreed for 2014/15 we will develop those for future years.

List of organisations who responded to the consultation:

Argyll and Bute Council
Barnsley Local Authority
Bradford Metropolitan District Council (2)
Brent Council
Bristol City Council
Broadland District Council
Bromsgrove and Redditch Borough Councils
Broxtowe Borough Council
Cambridge City Council
CAPITA
Carlisle City Council
Chelmsford Borough Council
Cherwell District and South Northamptonshire Council
Chichester District Council
Convention of Scottish Local Authorities (COSLA) (2)
Coventry City Council
Doncaster Metropolitan Borough Council
East Devon Council
East Staffordshire Borough Council
Gateshead Council
Gedling Borough Council
Glasgow Council
Guildford Borough Council
Harrogate Borough Council
Hinckley & Bosworth Borough Council
Hull County Council
Islington Council
Kirklees Council
Lambeth Council
Lichfield District Council
City of Lincoln Council
Local Government Association (LGA) (2)
Luton Borough Council
Mansfield District Council
Medway Council
Midlothian Council
Milton Keynes Council
Northampton Borough Council and Norwich City Council
Nottingham City Council
Chloe Smith MP – Norwich
Portsmouth City Council
Rushmore Council
Scottish Government
Security Operations Group
Society of London Treasurers – Southwark
South Staffordshire Council
Teignbridge District Council
Three Rivers District Council

Tonbridge & Malling Borough Council
UNISON (2)
Wycombe Council