

Relevant TUPE Regulations

TUPE – Regulation 6 (trade union recognition)

This regulation states that where the transferor employer (BHCC) recognised an independent trade union to any extent in respect of the employees transferred then, after the transfer, the transferee is deemed to recognise the union to the same extent provided that after the transfer the transferred organised grouping of resources or employees ‘maintains an identity distinct from the remainder of the transferee’s undertaking’. This means that all rights which are dependent on recognition will apply in the transferred undertaking.

After the transfer ‘any agreement for recognition may be varied or rescinded accordingly’ and therefore although BHCC has recognised the GMB and Unison voluntarily the transferee is free to vary the scope of recognition or derecognise the unions in the same way that BHCC could do, subject to the existence of contractual obligations consequent on recognition and any obligations relating to disclosure of information or consultation which may have already arisen.

TUPE – Regulation 13 (Information and Consultation)

Where a transfer has legal, economic and social implications for affected employees, the employer of those employees, whether they are the transferor or transferee, must inform all the appropriate representatives of any of the affected employees, long enough before the transfer to enable consultations to take place between the employer and those representatives.

Legal, economic and social implications are not defined within the Regulations, however, with reference to the case law: ‘legal’ covers the impact of the transfer on employment contracts, statutory rights and collective agreements; ‘economic’ may refer to any effect on employees’ remuneration, benefits and future prospects, including potential redundancies; and ‘social’ may include information about a change in working hours, shift patterns or new work location. However, the duty to consult will only arise where an employer envisages taking measures in respect of affected employees where such implications are contemplated. A ‘measure’ has been interpreted quite widely and covers any ‘action, step or arrangement’ taken in connection with the transfer. Any proposal by a potential transferee to envisage derecognition of the pre-transfer Trade Unions subject to the automatic transfer principle (Regulation 6), or to not enter into a voluntary recognition agreement with the pre-transfer Trade Unions where the automatic transfer principle does not apply, is likely to be considered a measure and accordingly consultation must be undertaken in compliance with Regulation 13.

De-recognition

The same process for variation or rescission ought to apply after the transfer as applied before where recognition is voluntary, where Regulation 6 applies. It is unclear as to this process as it is not contained within the Green Book, however, there ought to be an agreed mechanism for de-recognition reached between the

relevant employers and trade union bodies. If no such agreement exists, then the BHCC could determine a process which would involve consultation with the union(s) so that it is agreed but as BHCC are not seeking to de-recognise them it should be a matter to be left to the transferee. If the transferring staff do not retain their distinct identity, and Regulation 6 does not therefore apply, the pre-transfer Trade Union recognition lapses, and it will then be up to the new employer to voluntarily enter a new recognition arrangement with those Trade Unions.

What the trade unions can do

Under the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULCRA') in the first instance the union(s) must apply to the employer (transferee) for recognition first. If an agreement cannot be reached then the union(s) can apply for statutory recognition for the purposes of collective bargaining. If the application is successful and the Central Arbitration Committee ('CAC') grants statutory recognition then it will be harder for the employer (transferee) to de-recognise the union(s) and remedies would become available for any failure by the employer (transferee) to comply with the statutory recognition procedure.

Relevant procurement legislation

Regulation 6 of the TUPE Regulations provides some protection to staff where there is a TUPE transfer to a new employer. The Regulations provide where the Council recognises trade unions in respect of some or all of the transferred employees, then the new employer will also be required to recognise those unions to the same extent after the transfer takes place. However, this automatic transfer requirement only applies if the organised grouping of transferred employees maintains an identity distinct from the remainder of the new employer's undertaking.

It is not possible to impose a blanket requirement as to automatic recognition of Trade Unions for commissioned and contracted services where there is an outsourcing of staff. There are restrictions imposed in legislation, which limit the discretion of the Council, if it wished to do so as set out below.

Section 17 of the Local Government Act 1988 requires the Council in exercising certain functions in respect of contracts for services to do so without having regard to the terms and conditions of employment by contractors of their workers.

However, this does not prevent the Council exercising any function to the extent that the Council considers it necessary or expedient to do so to enable it to comply with Section 1 of the Public Services (Social Value) Act 2012. This Act applies to contracts to which The Public Contracts Regulations 2015 will apply, so contracts below the relevant financial thresholds will not be covered (the threshold for most service contract is £164k, but for social services and other 'light touch' contracts it is £589k). For such contracts, the Council will have a discretion to do so where it considers it relevant and proportionate to do so, for the improvement of the economic, social, and environmental well-being of its area. On its own trade union recognition in respect of transferring staff may not improve the social well-being of the area, but it may do so as part of wider staff considerations as mentioned below.

The Public Contract Regulations 2015 also contain restrictions on the Council's discretion. Also, in general, social considerations must comply with the Treaty's principles of transparency, equal treatment, non discriminatory and proportionality. Under Regulation 58 (Selection Criteria), it would not be possible to use a requirement as to union recognition in the selection of potential bidders for a contract. However, under Regulation 67 (Contract Award Criteria), it would be possible to use as a criterion for the selection of a tender consideration of workforce matters where this is linked to the subject-matter of the contract. For instance, it may be considered that the terms of staff are relevant to the contract for the purpose of transition to a new employer. So, in an appropriate case, it would be possible to include as an evaluation criterion, the information supplied by a tenderer as to a question along the following lines:

'Brighton & Hove City Council is a collective bargaining organisation and recognises GMB and UNISON Trade Unions for this purpose. During the tender process we would ask that bidders confirm whether these arrangements will be continued or in the alternative to explain how they consult and engage with unions and / or workforce to ensure best practice in terms of employment practices'.

Under Regulation 70 (conditions for performance of contracts), it is possible to include a special condition relating to the performance of a contract where this is linked to the subject matter of the contract. While it may be possible to link a requirement as to union recognition to the tasks necessary to performance of the contract, such a requirement runs the danger of breaching other EU Treaty principles. For instance, the EU Commission has confirmed that it is not possible for contracting authorities to make payment of the Living Wage as a mandatory requirement as part of a competitive procurement process. This is because Article 56 of the Treaty prohibits any restrictions on the freedom to provide services within the EU when a business established in one member state provides services to a person or organisation in another member state.

