

Secondments

Bargaining Advice for Local Government Branches

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1. Introduction

Secondments have been widely used instead of TUPE transfers in contracting-out situations. However, the 'Celtec' ruling has caused employers all round the country to question the legality of agreeing secondments in place of TUPE transfers. In addition, existing secondment arrangements are starting to be called into question.

UNISON believes secondments are still a viable option, but have to be done with care.

2. Secondment, TUPE, or no change?

Where services are contracted out or changed so that they are delivered in partnership between organisations, the employment position of staff may change. A key factor is whether the service (the 'undertaking') has been transferred to another provider.

Where a service has been contracted-out and another organisation is providing it, this is more straightforward. Staff will normally be TUPE transferred to the new provider, unless arrangements are made for them to be seconded. If a secondment is used instead of TUPE transfer, then a precise model must be followed.

But if there is very close partnership working the position of staff may not be clear-cut – for example in the provision of health and social care between Local Authorities and Primary Care Trusts. Here, staff may remain as employees of their original employer, but there may be a risk that they will be deemed to have unwittingly TUPE transferred.

a) Secondments or TUPE?

Where a service is transferred, staff will normally be TUPE transferred as well unless special secondment arrangements are put in place. The decision on which arrangement to use depends on collective considerations (by the branch) and individual considerations (by the member).

There are a wide variety of circumstances when staff may be seconded:

- Local authority care staff seconded to a housing association after a stock transfer.
- Staff from a local authority and/or a health trust seconded to a newly established Health and Social Care Partnership or a Children's Trust.
- A shared services arrangement established with staff seconded to another employer.

i) For the individual

Secondment may seem attractive because it maintains the existing employment relationship, which may give more security as they don't have to rely on TUPE for protection for their terms and conditions. Pensions may also be more secure, although the Local Government Pensions Direction 2007 gives strong protection to pensions for TUPE transferred staff.

This is especially true when the service is being transferred for a shorter period of time (under 5 years, say) or the long-term basis of the partnership is uncertain. The original employer may be more financially stable.

Some staff may also wish to retain access to continual professional development and supervision arrangements in their original employer, although as time progresses there may be new career opportunities with the new employer.

ii) For the branch

The branch has got to look at the long term interests of all members and potential members, as well as existing protection. A transfer means that the Best Value Code of Practice will apply to protect against a two-tier workforce. This is a valuable aid to recruiting new starters into UNISON. A two-tier workforce is also likely to undermine collective bargaining strength, and mean the union is seen as protecting the better off workers.

In the long-term, secondment arrangements can be difficult to sustain because of complexities around areas like grievance and disciplinary procedures. Equal pay issues may also arise over longer periods of time.

b) Problems with secondments – the Celtec ruling

A recent legal judgement means great care has to be used when negotiating secondments.

The House of Lords Celtec –v- Astley¹ judgement looked at staff who were seconded to a new employer, instead of being TUPE transferred. It said that legally the staff were TUPE transferred, irrespective of what they, their old employer, or their new employer intended and agreed. This is because of a fundamental principle of TUPE which does not allow waiver clauses. This has two important implications:

- Secondments are still a viable option, but have to carefully follow a set procedure.

¹ www.thompsons.law.co.uk/lttext/114-time-transfer.htm

- It is vital that there is clarity on all sides about whether there is a transfer of undertaking, especially where this may not be obvious (for example where there is joint-working, integrated-services, or pooled budgets between different organisations).

3. How to do a safe secondment

If a secondment is going to be used as an alternative to a TUPE transfer (other secondments are not affected), then the following procedure must be followed:

- (i) employees must be given the option to transfer to the new employer;
- (ii) employees must choose of their own free will not to take up the option of transferring to the transferee's employment, but instead to remain in the employment of the transferor; and
- (iii) employees should enter into a new contract of employment with the transferor through termination of the existing contract of employment by agreement, and substitution of a new contract which permits secondment.

The decision must be taken on an individual basis. Typically each affected member of staff will be sent a bundle of forms, one of which will be a letter refusing to transfer, and one of which will be a new contract (on secondment), both of which they sign and return. By refusing to transfer they will technically be resigning, but they will then be immediately re-employed by virtue of the new 'secondment' contract. Continuity of employment should be preserved.

Each individual will have the option of transferring or being seconded.

4. Secondment checklist

Whether you are dealing with a new contracting out situation or an existing 'secondment', there are a number of key issues to address:

- (i) The new employer guarantees to implement the outcome of any pay and grading review or equal pay settlement which would have applied if the posts had not transferred
- (ii) The old employer guarantees to pay any back pay negotiated as part of a pay and grading review or arising from an equal pay claim
- (iii) The new employer has admitted body status into the LGPS or other relevant pension scheme, or that the local authority seeks a Directions Order allowing it to offer continuing membership of the NHS pension scheme where health staff are transferring

- (iv) Agreement to give the individual right to transfer back to their original employer at end of contract with continuity of service preserved
- (v) Agreement that where individuals wish to return to their original employer on a voluntary basis e.g. to take up a promotion opportunity or a new job, then the original employer will agree to treat them as if they had continuous service

If a secondment is legally a TUPE transfer there may be implications for equal pay. This is because the time limits for lodging claims start from the moment the transfer happens.

It important that branches map where they have secondments and look at each in turn. To protect UNISON's legal position on Equal Pay branches should consult with their Regional Officer wherever a mass secondments is in place or proposed.

5. Integrated working

The Celtec judgement, and the care needed over secondments, also has repercussions for joint working between organisations, including Section 75 (previously section 31) partnerships in social care between Local Authorities and NHS Trusts, Childrens' Trusts arrangements, Joint Futures in Scotland etc.

These partnerships cover a variety of situations, including integrated working, pooled budgets, joint commissioning, and establishing new care trusts.

The problems arise if integrating working results in a transfer of undertakings (TUPE) situation, where it is deemed that the provider of a service has changed. This could mean that the staff could be legally deemed to have transferred from one employer to another, irrespective of what any of the parties wishes or believes.

In these situations, a risk assessment should be performed. However, it also needs to be determined if a potential 'new employer' is legally capable of employing staff.

a) Legal status of the 'employer'

Especially where a 'partnership' is involved, it is important to establish the legal status of the new 'employer'. This is because the 'partnership' could be a new organisation, or merely a description of working arrangements between two or more existing organisations. If it is merely a working arrangement, then it does not give rise to a transfer.

For example, a 'Health and Social Care Partnership' might be a real employer, or it may just be the name given to a joint working arrangement

between a local authority and health trust. It depends on how it is set up, managed and governed. Whilst most will have some kind of agreement between the partners, and some will have a Partnership Board, the local authority and the NHS body often each retain their respective statutory responsibilities and Partnership Boards do not have any executive decision-making powers.

UNISON's legal guidance suggests that the following should be used to indicate who the employer is:

- (i) Whose disciplinary and grievance procedures are used
- (ii) Whose HR policies are applied
- (iii) Who manages the budget from which wages are paid
- (iv) Who manages the employees
- (v) If there is a clear agreement setting out who the employer is

If a 'partnership' is set up with these clearly defined, then staff should be 'safe' from being deemed to have transferred to the new body.

b) Checklist for partnerships

1. Ensure that there is a written agreement setting out the ongoing responsibilities of the partner employers for all aspects of the management, and payment of their own staff.
2. Try to keep the elements of day-to-day management which are devolved to the 'other' employer to a minimum – for example ensure that responsibility for payroll, disciplinary and grievance, employee records, appraisal and training remains with the originating employer, with agreed protocols between the partners for sharing of information in relation to these.