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| **Education and Children’s Services** |  |

**Branch Advice**

**Contractual Rights for Members in Schools That Become Academies**

1. This advice covers schools that move to academy status as a result of the 2010 Academies Act and the 2016 Education and Adoption Act. The term “school” as used in this document refers to schools, academies and multi academy trusts. It aims to give branches some information about the rights of staff transferring into academies. The law is complex and branches should contact their region if they believe that the legal rights of members are being infringed.
2. Where employees working for schools are transferred to academies, the transfer is governed by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (”The Regulations”). The Regulations aim to preserve employees’ statutory and contractual employment rights on transfer. The Regulations were amended by the [Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 SI 2014/16](http://www.legislation.gov.uk/uksi/2014/16/contents/made). All references in brackets are to the Regulations as amended.
3. Following a transfer under the Regulations, a contract of employment of any person employed by the school, is deemed to have been made between the person employed by the school and the new academy (Regulation 4(1)). Accordingly, the academy will take over the school’s rights, powers, duties and liabilities under the employment contract. So after the transfer any act committed by the school before the transfer, is deemed to have been done by the academy. Similarly, any breach of duty by the employee before a transfer is deemed to be a breach of duty to the academy (TUPE 2006 Regulation 4(2)). The purpose of the Regulations is to preserve an employee’s rights rather than to create new rights.
4. All aspects of an employee’s contract of employment and associated rights are transferred *except* for any criminal liability (Regulation 4(6)); *and* rights concerning occupational pension schemes (Regulation 10). However, as academies are scheduled bodies under Schedule 2 of the Local Government Pension Scheme (‘LGPS’) (Administration) Regulations 2008, staff (transferred and new staff) employed in academies can join the LGPS.

**Rights for transferred employees under the TUPE Regulations**

1. Regulation 4(1) and (2) have the following effect:
2. An employee is deemed to have continuous statutory and contractual employment rights. These include the right not to be unfairly dismissed, the right to redundancy or Statutory Maternity Payments and maternity leave and pay. Collective agreements also transfer to the new employer (Regulation 5).
3. If the school fails to pay the employee’s wages, the employee can sue the academy to recover the underpayment.

***Dismissal***

1. If the school has dismissed an employee before the transfer or the academy dismissed the employee after a transfer, and the sole or principle reason for the *dismissal is the transfer*, then the school or academy will be liable for a claim of automatic unfair dismissal under the Employment Rights Act 1996 (Regulation 7(1)). The employee will have to have completed 2 years of service prior to dismissal to make a claim of unfair dismissal and any claim must be brought within 3 months less one day of the dismissal. However, if the dismissal is linked to exercising a statutory right, or due to discrimination, then there is no requirement to have completed 2 years’ service. Always seek legal advice from the Region in relation to dismissals and time limits.

The school can fairly dismiss an employee before the transfer or the academy can dismisses the employee after a transfer, if the sole of principle reason for the dismissal is an economic, technical or organisational (ETO) reason entailing changes in the workforce. So for an example, if the dismissal is because they have changed the way something is organised, and they also change the job functions the employer is likely to have a defence (see paragraph 8 below). However an employer must still act reasonably and follow procedure to ensure that the dismissal is fair.

1. If no such ETO reason exists, or even if it does, but it does not entail a change in the workforce (e.g. there are no redundancies, or changes in the job functions), then the school or academy will be liable for a claim of unfair dismissal under the Employment Rights Act 1996 (Regulation 7(2)). The employee will have to have completed 2 years of service prior to dismissal to make a claim of unfair dismissal and any claim must be brought within 3 months less one day of the dismissal.
2. If the academy wishes to change its location following a transfer, and there is an ETO reason for that change of location, and the employee does not want to move, the employee will be entitled to a redundancy payment. The employee will not be entitled to make a claim for unfair dismissal, unless they were unfairly selected for redundancy, or the method of dismissal was unfair.
3. If the school has discriminated against an employee prior to the transfer, and the employee’s employment transfers to the academy, the academy will be liable in any proceedings brought by the employee within 3 months less one day of the act of discrimination.
4. If, an employee is dismissed for a justifiable reason such as gross misconduct, then it will not amount to unfair dismissal.
5. Where an employee informs the school prior to the transfer that s/he objects to the transfer and being employed by the transferee, their employment will terminate on the date of the transfer and the employee will not be eligible for a redundancy payment. This will not be regarded as a dismissal (Regulation 4(7) and (8)). The objection must be to being employed by the new employer and not to some other aspect of the job with the new employer. Where it is the latter, then the person will still transfer over.
6. If the transfer involves a substantial and detrimental change to the employee’s working conditions to the material detriment of the employee (Regulation 4(9)), the employee could treat their employment as having been terminated, and make a claim for constructive unfair dismissal. These are difficult cases to bring and the employee will need to prove it. Where an employer is acting in breach of contract, then the employee may terminate their contract without notice (Regulation 4(11)).

***Variation of Contract***

1. Following a transfer the Regulations protect employees from variations to contract post transfer. The new employer can vary terms and conditions **if** the changes have nothing to do with the transfer.
2. Where the sole or principal reason for a variation **is** the transfer, then such a variation is not permissible. The academy is likely to be acting in breach of contract. Also, harmonisation of terms and conditions with the new employer’s current terms and conditions is not allowed. However, it is permissible for the new employer to seek to agree a brand new set of terms and conditions for all staff, wherever they have all transferred from, as this is unlikely to be related to any one particular transfer. This must be negotiated with the recognised trade unions. If the new terms and conditions look suspiciously like the new company’s terms and conditions then this is likely to be harmonisation and so unlawful.
3. The new employer is permitted to vary terms and conditions if the sole or principle reason for the variation of terms and conditions is an economic, technical or organisational (ETO) reason entailing changes in the workplace (e.g. redundancies or changes in job functions). If there is no ETO reason, or even if there is one, but it does not entail a change in the workforce, then the academy may be liable for a claim of breach of contract. The important point is to immediately seek advice from your region if the new employer is proposing any changes to terms and conditions.
4. However, Regulation 4A provides that transferred contracts will not bind the academy to any term of a collective agreement agreed *after* the date of the transfer if the academy is not a participant in the collective bargaining machinery that determines a dynamic term of the contract. This regulation put into effect the European Court of Justice decision in *Alemo Herron v Parkwood* [2013]. So for example, if the employee is on NJC terms and conditions prior to the transfer, and a pay increase is agreed post transfer, the employee will not be ‘entitled’ to that pay increase if the academy is not a participant in NJC. This means that the employee’s pay remain as they were at the point of transfer.
5. Most new employers however, continue to honour increases to pay and other terms and conditions derived from national collective agreements. Branches should negotiate with the new employer to continue to mirror national agreements covering pay and other terms and conditions, as a minimum. Usually employers will cover this in a recognition agreement; however, a more secure way of ensuring compliance is for the new employer to agree to include a term in the employees’ individual contracts of employment stating that national agreements will continue to apply.
6. Also, regulation 4B allows terms and conditions derived from collective agreements to be varied even if the transfer is the sole or principal reason for the variation, provided that the variation takes effect more than one year after the date of the transfer; and following the variation, the rights and obligations of the employee’s contract, considered together, are no less favourable to the employee than those which applied immediately before the variation. Therefore the new terms and conditions cannot overall be less favourable. Where employers seek to do this, branches should contact their Region to seek advice.
7. What this means is that those terms and conditions that arise out of an individual contract of employment will have greater protection from variation under TUPE than those that derive from collective agreements.

**Recognition Agreements with Trade Unions**

1. TUPE 2006 transfers any recognition agreements between the school and a recognised trade union across to the academy (Regulation 6(1)).
2. However, an employer can give notice to de-recognise a trade union (though this is a very rare occurrence) – If this happens then branches must seek urgent advice and support from their Region.

**Duty to Inform and Consult**

1. Prior to the transfer, both the school and academy must notify trade unions or employee representatives about certain information and if measures are to be taken which could affect the employees (TUPE 2006, Regulation 13).
2. Regulation 13 sets out the obligations to inform and consult.  Under regulation 13(2) the school must inform the appropriate representatives of any affected employees of (amongst other things) the legal, economic and social implications of the transfer for any affected employees. This includes the effect of the relevant transfer upon the contracts of employment of affected employees and in particular, whether the school considers that particular employees will or will not transfer.  That information must be provided long enough before a relevant transfer to enable the school to consult with trade unions and the appropriate representatives of any affected employees.
3. Under Regulation 14(1), the school must inform recognised unions of the following:
4. The fact that the transfer is to take place;
5. The approximate date of the proposed transfer;
6. The reason for the proposed transfer;
7. The legal, economic and social implications of the transfer for the affected employees; and
8. Any measure which is envisaged the school or the academy will take as a result of the transfer, or if no such measures will be taken, this should be stated.
9. The Transferor must also inform the unions about any agency workers they engage.
10. “Measure” means an action which the school or academy intends to implement, not a vague idea of future arrangements (Regulation 13(2)). If measures are to be taken by either the school or the academy that affect employees, then the party which is to take those measures must consult with unions, consider their views and seek agreement before any final decision is reached (Regulation 13(6)). The school or academy must discuss matters with unions with an open mind and make every effort to secure their agreement to any proposals and accommodate any objections. The school or academy must consider representations, reply to them and state the reasons why, if they are to be rejected.
11. If the school fails to inform representatives of the material facts or if representatives are not consulted about measures which may be taken, then the union may bring a legal challenge to an Employment Tribunal, for a declaration and compensation for a failure to consult (again within 3 months less one day of the transfer). An Employment Tribunal claim can only be taken in the name of the union and the award is intended to be punitive, rather than compensatory. The maximum award is 13 weeks’ gross pay for each affected employee. The Regulations provide that both the school and academy will be jointly liable for a failure to inform and consult (TUPE 2006, Regulation 15(7) (9)).
12. There is no obligation on the academy to consult after the transfer -consultation and negotiation rights should however, be agreed and set out in a recognition agreement.

**Conclusion**

1. Given the speed with which schools are converted into academies, and that some consultation periods often include school holidays, it can be difficult to achieve meaningful consultation. Nonetheless whilst the Regulations do not prescribe the manner in which the information is to be provided nor set out any sort of timetable within which to comply, it is necessary for there to be meaningful consultation.
2. For further advice and assistance, members can click [**here**](https://www.unison.org.uk/catalogue/22317) for UNISON’s TUPE Branch Guidance or contact UNISON for further advice.