



AGENDA ITEM No. 14 (b)

Local Government Staff Commission (Scotland)

48 Manor Place
Edinburgh EH3 7EH
Tel. 0131 220 3223
Fax 0131 220 3227

Chairman: R G E Peggie CBE
Secretary: E C Davison

CIRCULAR 4/95

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Chief Constables
Firemasters
Regional Assessors
Director General, Strathclyde Passenger Transport Executive

30 June 1995

Dear Chief Executive

PREPARATION AND AGREEMENT OF TRANSFER SCHEMES

1. The framework within which transfer schemes are to be prepared and agreed has been set by the Local Authorities (Staff Transfer) (Scotland) Order 1995. This circular contains advice from the Staff Commission on the procedures which authorities should follow within that general framework.

General procedure

2. The purpose of a transfer scheme is to effect the transfer of employees. All authorities will wish to set themselves the target of reaching an agreed scheme by the date set in the Transfer Order, 15 November.

3. The Commission's advice is that existing and new authorities should proceed in consultation with each other from the outset, by the exchange of information, draft schemes, and comments on the drafts. This process should begin immediately, if it has not begun already. The procedure should be flexible, and will need to vary to suit local circumstances. The Commission does not think it appropriate to prescribe the several stages or their timing in detail; but expects that the general pattern should be as follows—

3.1. Supply of basic staffing information to the new councils. In many areas this has already taken place, and in some cases very detailed staffing information has already been prepared. However, all existing authorities should have provided at least the basic information to the new councils and new water authorities to which they are due to transfer staff, by the end of July at very latest. Outgoing authorities may supply as

much information as they consider appropriate at this first stage; but it should in any case include a schedule of approximate staff numbers (including both staff in post and vacant posts for which there is budgetary provision) set out by department; and with broad indications of the grade mix of posts to be transferred in each department. Where the staff concerned are located outwith the boundary of the new council, particulars of locations should also be included.

3.2. Chief officers in the new councils will use this information to help them prepare departmental structures, which should identify numbers of posts required at each grade. In certain areas there will necessarily be a new structure from the outset - eg where a regional department is being disaggregated, or in a central service department to which staff will be transferred from two or more authorities. In these cases it will be important to draw up job descriptions and person specifications for the various posts, particularly those in supervisory and management grades.

3.3. In this connection the new councils will expect to receive information about the skills, job titles and current functions of the staff at each grade who have been identified for transfer to them.

4. By this stage it should be possible for the outgoing authorities to provide drafts of transfer schemes. On receipt of draft schemes new councils should consider them and respond to them by indicating points which can be agreed forthwith; matters on which further information is required or dialogue is sought; and any areas of likely disagreement. Responses should in any case draw attention specifically to any shortfalls or surpluses of staff which are foreseen.

5. All authorities are advised to bear in mind that between now and the date by which schemes must be finally agreed time must be allowed for new councils to consider the implications of draft schemes, and for old and new authorities to discuss and if possible resolve any areas of potential disagreement. There should be a continuous and flexible process of continuing dialogue and negotiation between old and new authorities.

6. Transfer schemes are required for each new council to which staff are due to be transferred and for the new water authorities, but not for the Scottish Children's Reporter Administration, nor any of the other groups of employees whose transfer will be effected not by means of a transfer scheme but directly by the Transfer Order itself (as identified in Article 3(2) of the Order)¹. However, there may be posts in central support service departments which an authority has identified, in accordance with the advice of Circular 1/95, for transfer to one or other of the bodies thus identified in the Transfer Order, but which are not covered by the terms of the Order itself. Accordingly the procedures outlined above should be followed in respect also of the new water authorities, and of the Scottish Children's Reporter Administration and other bodies to the extent that there are staff to be transferred to them who will not be transferred by the Transfer Order itself.

7. The Commission would draw attention to the following matters, to be borne in mind throughout the whole process—

- consultation with the workforce and trade unions
- action on anticipated surpluses and shortfalls of staff
- selection and matching of individuals in new authorities

¹ viz assessors and valuation staff; Children's Reporter staff; fire and police personnel; superannuation fund staff; and Strathclyde Passenger Transport Authority staff.

Consultation with the workforce and trade unions

8. The Staff Commission considers it essential as a matter of good employment practice that the workforce generally, as well as the recognised unions, should be kept continuously informed of the developing plans of the new authorities so far as they relate to staffing.

9. There are also legal obligations under the TUPE regulations, which both existing and new authorities must observe. These are outlined later in this circular, at Annex A.

Action on anticipated surpluses and shortfalls of staff

10. New authorities may identify both surpluses and shortfalls in staff. In such cases the situation at all stages should be dealt with by outgoing and incoming authorities in consultation with each other and - particularly in the case of an anticipated surplus - with the recognised trade unions. Outgoing authorities should co-operate with new councils in dealing with both surpluses and shortfalls; and in particular—

- in a disaggregating authority, if a surplus in one of the successor authorities coincides with a shortfall identified by another successor authority, the disaggregating authority should consider whether staff can be re-distributed accordingly
- they should co-operate with new councils in facilitating voluntary severance, and should seek candidates from among the appropriate sections of their own workforce, when requested to do so.

11. When a new authority identifies a possible surplus of staff it should in the first instance consider whether the staff concerned could be redeployed elsewhere in the authority, if necessary after retraining. It is possible that an authority facing a surplus in one department may at the same time foresee a shortfall of staff in another: in some cases the new authority may be able to use the one to cancel the other.

12. In general, all authorities should deal with surpluses by means short of compulsory redundancy, if possible. Where both old and new authorities have subscribed to the COSLA/Trade Union Joint Forum agreement on staff transfers the question will not arise, at any rate during the shadow year. If however a new council does for any reason reach the conclusion that there is a compulsory redundancy situation in prospect, it is essential that the council determine a rule or rules for selecting candidates for redundancy or early retirement in a way which applies equally to all the employees whom the various transferor authorities propose to transfer to it. This requirement is underpinned by the requirements of fairness as between the staff of each transferor authority, as set out in Article 6 of the Transfer Order. There will also be other legal aspects to be observed: these are outlined later in this circular, at Annex B.

Selection and matching of individuals in new authorities

13. The Commission has already, in Circular 1/94, indicated that for the great majority of staff there will be no doubt as to their destination. For very many their jobs will remain unchanged: this is particularly the case for those involved in direct service delivery, but will apply to others in central service departments too. However, in the process of drawing up and agreeing transfer schemes, individuals will have to be identified who will, on their transfer in April 1996, take up specific posts in central support services and in other services where a

new structure is to be set in place. These will in effect be new posts, and there must clearly be some uniformity in the procedures by which individuals are selected for them.

14. The Commission therefore intends to issue detailed advice as soon as possible on the whole question of selection and matching of individuals to posts after transfer. It will stress that new authorities should have special regard to the requirements of fairness in any process of selection or matching: in particular the criteria used should be such as to give fair consideration to staff from regions and districts alike. **Authorities are asked not to take any action meantime which could prejudice the application of the Commission's advice when it is issued.**

Transfer schemes

15. Transfer schemes proper should of course comply with the requirements of the Transfer Order. A number of authorities have indicated that a standard proforma scheme would be helpful. The Commission will put this in hand, but does not intend that the use of the standard form should be mandatory. The basic requirements of a transfer scheme must obviously be met in one form or another; and they can be deduced from the Transfer Order, viz—

- the document should indicate by its heading that it is a transfer scheme made under section 8 of the Local Government etc (Scotland) Act 1994.
- it should show the name of the authority which has made the scheme and the name of the new authority or body which has consented to it.
- when it has been agreed, it should show the date on which it was agreed.
- it should state the specific criteria used, in accordance with Article 8 (2) of the Transfer Order.

16. A key requirement of the Transfer Order is that schemes should contain such information as is sufficient to identify the individual employees to whom they apply. This does not necessarily mean that the names of all individuals need be included in the text of the scheme (although there is nothing to prevent that, if the authorities concerned agree; and names will eventually have to be transmitted to the new authorities for payroll purposes in any case) The Commission suggests that where all the staff in an entire operation (such as a school, or all the schools in an area) are to be transferred it may be sufficient that the transfer scheme should simply identify the establishment, or the total group of such establishments. Likewise where an entire department is to be transferred, only the department need be named in the transfer scheme. But where a department is to be disaggregated, it will normally be necessary to identify the persons to be transferred to each new authority by name. Schemes should also include staff on secondment, staff absent for any other reason, such as maternity leave.

17. Special considerations may apply to trainees whose term of training will not be completed by 31 March 1996. If they have contracts of employment they should of course be included in transfer schemes. The Commission understands however that not all trainees have contracts of employment. In every case however, whether the trainee has a contract or not, the Commission would urge the new authorities to honour the commitments given to these people by the outgoing authorities and to allow those allocated to them to complete their period of training.

18. Inquiries about this circular should be addressed to the Secretary of the Commission, Mr E C Davison, at the above address.

19. Recipients of this circular are asked to draw its terms to the attention of all staff.

Yours sincerely,


R G E Pegg

TUPE REQUIREMENTS OF CONSULTATION

1. Where it is clear that in any particular case there will be a relevant transfer of an undertaking for the purposes of the TUPE regulations certain legal obligations in relation to the passing of information and consultation will follow. The prime obligations are for the employer of affected employees to pass information to recognised trade unions. Such information must be given long enough before 1 April 1996 to enable consultations to take place between the employer and the trade unions. These obligations in relation to information and consultation apply both in relation to the transferor and the transferee. New councils will have a number of employees in advance of 1 April 1996. The obligation is as much on the new councils as on existing regional and district councils to inform and consult with trade unions.
2. Authorities are obliged to inform trade union representatives as to—
 - 2.1. the fact that the relevant transfer is to take place, when it is to take place and the reasons for it;
 - 2.2. the legal, economic and social implications of the transfer for the affected employees; and
 - 2.3. the measures which the employer envisages that he will in connection with the transfer take in relation to those employees or, if he envisages that no measures will be so taken, that fact.
3. Regional and district councils will further be obliged to give information to the trade unions as to the measures which new councils envisage that they, in connection with the transfer, will take in relation to employees transferring to their employment or, if the new councils envisage no measures will be so taken, that fact.
4. In order that existing authorities can comply with their duties to give information and to consult, new councils are obliged to provide regional and district councils with such information at such a time as will enable the regional and district councils to pass that information on.
5. Separately from passing on the information employers of affected employees are obliged to consult in connection with measures that they may individually be taking in relation to such employees, and any such consultation has to be with a view to seeking the agreement of the trade unions.
6. Both old and new authorities should recognise that the category of affected employees may include others besides those transferring by virtue of the transfer.
7. Both old and new authorities should be aware that a failure to inform or consult in accordance with the TUPE regulations may result in a complaint being made to an industrial tribunal by a union to which information should have been passed or which should have been consulted.

LEGAL IMPLICATIONS OF REDUNDANCY SITUATIONS ARISING DURING THE SHADOW YEAR

1. If the situation should arise where redundancies appear to be in prospect during the shadow year, the authorities involved, both old and new, should take full account of the implications of the TUPE regulations. Where TUPE applies, a transfer scheme cannot displace the entitlement of an individual employee to transfer with the undertaking in which he or she is employed, to the new council. If a transfer scheme is inconsistent with TUPE then the provisions of the TUPE regulations govern the transfer of staff. If there is an inconsistency between the scheme and the result after application of TUPE the scheme may provide a dual right as far as the employee is concerned. In any case of doubt **the authorities concerned should seek legal advice** as to the extent to which TUPE governs the proposed transfer.

2. **Where TUPE applies** a number of consequences follow—

2.1. The transferee authority (the new authority) must satisfy itself that it has defensible economic, technical or organisational reasons for any dismissals for redundancy which it proposes - otherwise such dismissals would be automatically unfair.

2.2. Any decisions on redundancy before 1 April 1996 are for the present employers of the staff: the new authority cannot compel the old authority to declare redundancies in advance of the transfer.

2.3. The new council as transferee would as a rule be liable to bear the risk of any claim for unfair dismissal arising from the transferor's decision to dismiss where the dismissal is for a reason connected with the transfer and where otherwise the employee might have transferred under TUPE to the employment of the transferee.

3. In the event that the old and new authorities consider that **TUPE does not apply** to the undertaking or part of the undertaking of the old authority, and in the event that neither the new council nor the Secretary of State has consented to a transfer scheme in relation to some of the staff employed in that undertaking, the old council will require to determine whether or not such staff will be redundant on or before 1 April 1996, and consequently whether it will be necessary to apply its redundancy procedures and declare redundancies accordingly. Councils will require to observe the requirements for consultation under the Trade Union and Labour Relations (Consolidation) Act 1992 in that connection, and in particular that any such consultation must include consultation as to ways of avoiding dismissals and must be with a view to reaching agreement. Such consultation must begin at the earliest opportunity and in any event, depending on the number of employees involved, by not later than sufficient to meet the time limit set out in section 188 of the 1992 Act.

4. Even in a case where TUPE does not apply however, new councils should bear in mind that they may still be liable to bear the risk of any claim for unfair dismissal arising from the decision of an old council to dismiss on redundancy, to the extent that the new councils may have residual responsibility in relation to the obligations and liabilities of the old councils.