



# TUPE, Pensions and Other Commercial Support Services

*As part of the largest dedicated employment team in the UK health and social care sector, Capsticks provides a niche service through specialist lawyers who are expert in TUPE, pensions and other workforce issues that impact on commercial matters and transactions. This ensures we are uniquely placed to support you in addressing the complex workforce challenges that arise from your organisation's commercial activities.*

## What is the issue and why are we equipped to deal with it?

Whether as a commissioner or a provider, the transfer of services and staff forms an integral part of doing business in the health and social care sector. As the market opens up to a wider range of providers, and the integrated services agenda gathers pace, it is more important than ever to ensure that you are fully equipped to tackle the legal and policy framework that applies to the transfer of staff.

Most employment teams deal with TUPE every now and again, but our specialist team deals with staff transfers and related matters on a daily basis. It's our 'bread and butter' so we understand TUPE inside out. This is particularly important in the health and social care context where the enhanced TUPE and pensions protection afforded to public sector staff through Government policy only adds to the challenges faced by employers.

Whether working directly with your internal HR or procurement teams or as part of the multi-disciplinary legal team supporting you on a transaction, we ensure that you navigate the TUPE process safely; complying with your legal and policy obligations and avoiding time consuming and costly disputes. We also work with you to achieve a practical solution that reflects your business and workforce objectives.

We are also uniquely well-connected in the legal health and social care sector and with key policy makers which means we get early warning of impending policy changes so we can help you stay ahead of the curve.

## What can we do for you?

### Service Transfers

Service provision changes following competitive tenders, contracting-out or insourcing are the most common TUPE transfers in the public sector, and we advise on these all the time. We provide an end-to-end service to ensure your TUPE process is successful, from identifying whether there will be a transfer of staff to the drafting and negotiation of contractual documentation. We also ensure you comply with your information and consultation obligations, including in cases where there may be redundancies arising from the transfer.

We also regularly advise on the application of the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector and other non-TUPE mechanisms used to transfer public sector staff where TUPE does not strictly apply in law. These mechanisms and TUPE were, for instance, used to transfer staff during the re-configuration of the NHS in 2013 and on the numerous large scale transfers of provider staff to both NHS and private organisations that we worked on as part of the Transforming Community Services projects.

*Case example: "One of the most common queries we deal with is whether TUPE applies to particular staff and, if not, whether there are other ways in which those staff, and their employer, can be protected. We recently advised an NHS Trust that had two groups of staff who were performing different parts of a service that had been awarded in its entirety to a new provider. We established that one staff group was deliberately organised as a dedicated team to carry out their part of the service so they transferred under TUPE. However, the other group was not properly organised to deliver the other part of the service so TUPE did not apply to those staff. The client was faced with a large redundancy bill and a destabilised staff group. We assisted the client in agreeing with the new provider that it would offer employment to all of the staff, thus significantly reducing the redundancy liability."*

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## Business Transfers

Whilst not as common as service provision changes in the public sector, business transfers commonly arise in relation to mergers and acquisitions. Our specialists have extensive experience working as part of multi-disciplinary legal teams on a variety of intra-NHS mergers and acquisitions.

We can assist you in carrying out a detailed due diligence process to identify the legal, operational and financial liabilities and obligations relating to the staff who are due to transfer. We then work with you to ensure that the transaction documents are drafted and negotiated to take account of any risks identified in the due diligence process to which your organisation may be exposed.

Amongst the numerous intra-NHS mergers and acquisitions we have worked on recently, we advised on the employment and pensions aspects of the acquisition of Heatherwood and Wexham Park NHS FT by Frimley Health NHS Foundation Trust and the merger of North West London Hospitals NHS Trust and Ealing Hospital NHS Trust.

## Procurement

We have a particular expertise advising on the TUPE and pensions related issues that arise in the context of public sector procurement processes.

We make sure you get the staffing and pensions aspects of the process right from the very outset so that bidders are provided with accurate and complete staffing information to enable them properly to formulate the staffing aspects of their bids. We also ensure that your procurement documentation is fully compliant with Government guidance relating to the transfer of public sector staff and, in particular, pensions matters.

We can also assist you in drafting the staffing and pensions aspects of the services contract and in negotiating the contract with the preferred bidder to ensure your interests are safeguarded both during the term of the contract and on expiry or termination.

*Case example: "We worked with an NHS Trust which had run into problems with its procurement processes in the past. Early on, we identified that those issues mainly arose from the fact that bidders were not properly informed about their staffing and pension obligations. Therefore, we initially assisted the Trust in working with the incumbent provider to determine the application of TUPE and the New Fair Deal to the incumbent's staff. We then assisted the Trust in collating all of the requisite staffing information and disclosing this in the PQQ and ITT together with detailed guidance as to bidders' staffing and pensions' obligations. As the bidders were able to formulate the staffing aspects of their bid on a fully informed basis, the bids were evaluated accurately and the staff and services were transferred to the preferred bidder without any issue."*

## Specialist Project Work

We regularly work as part of firm-wide, multi-disciplinary legal teams on the staffing and pensions aspects of one-off projects such as pathology joint ventures, GP confederation structures, PFI projects and FM service arrangements. We can therefore work with you to navigate the particular challenges to which this type of project work gives rise.

Amongst the larger one-off projects we have worked on, we advised on the employment and pensions aspects of the dissolution of South London NHS Trust following the appointment of a Trust Special Administrator as well as the transfer of Mid-Staffordshire NHS Foundation Trust to University Hospitals of North Staffordshire NHS Trust.

We also form part of a team at Capsticks who are dedicated to the establishment, development and support of social enterprises and particularly enjoy working with these innovative, employee-led businesses. We can advise you on employee engagement and ownership structures and on the options that your social enterprise has in providing pension entitlements to its former public sector staff and staff working on certain public sector contracts.

For example, we advised on the employment and pensions aspects of the establishment of the largest intergrated social enterprises in the country, Sirona Care & Health Community Interest Company, and the transfer of staff from both Bath and North East Somerset PCT and Bath and North East Somerset Council to the social enterprise.

## Termination of Primary Care Services

We regularly advise NHS commissioners in relation to the termination of primary care contracts with GP practices either on a scheduled or emergency basis. These can give rise to unexpected staffing challenges where practice staff and salaried GPs may transfer to an incoming provider.

## Pensions

Public sector pension issues are inextricably linked to any transfer of staff in the public sector and must be considered in the context of a raft of Government policy guidance relating to transfers within the health and social care sector. Our specialists deal with this often troublesome area all the time so we can ensure that you are fully briefed in respect of your pension related obligations, whether as a commissioner or provider of services.

Through our unique connections in this sector, our relationships with key players guarantee us a pivotal role shaping pensions policy, not just following it.

## Anything but Employment Tribunal cases!

It's not just TUPE! Our specialists deal with anything and everything that does not involve tribunal or court litigation. We can assist you in a myriad of different ways including redundancy and reorganisations, section 75 arrangements, changes to terms and conditions, contract reviews, independent contractor advice, secondment and hosting arrangements and settlement agreements to name but a few.

## Quotes

*"This Trust has always found Capsticks to provide a highly professional and client centred service. They give both sound legal advice, coupled with a pragmatic understanding of how the advice might impact on the services provided. Capsticks have an excellent understanding of the issues facing the NHS and are quick to advise on issues both at a local and national level. They are good at keeping their clients up to date with 'hot topic' issues."*

Janet King, Director of HR & Facilities, Frimley Health NHS Foundation Trust

*"The excellent services provided by Capsticks over the last two years has been integral to the Trust achieving some challenging key objectives...Their support has been one of true partnership:*

*solutions focused, pragmatic and individual members of the team have been commended for always going that extra mile."*

Pearl Bramble-Wilson, Head of Human Resources at Birmingham Community Healthcare NHS Trust

If you would like to get in touch and find out more, please contact:



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