

St David's Hall

TUPE/Welsh Government's Code of Practice on Workforce Matters/Agency Workers

Briefing Note

Introduction

1. The following explains the impact of TUPE legislation and the Welsh Government's Code of Practice on Workforce Matters (the Code) arising from Options 2 and 3 of the Cabinet Report in relation to St David's Hall, Cardiff. It also sets out the implications for agency workers.
2. The Cabinet report states that the Council has received an unsolicited offer from Academy Music Limited ("AML") setting out a proposal to acquire and operate St David's Hall as an Academy venue by way of a long-term lease. The offer includes taking full responsibility for the liability of the building, ring-fencing and protecting a classical programme, protecting the acoustic value of the auditorium and securing existing jobs. This is Option 2.
3. Option 3 within the Cabinet report is to consider the appropriateness and viability of undertaking a public procurement exercise [by engaging with providers in the market] to establish whether the wider market would be able to provide improved value.

TUPE

4. Should Option 2 or 3 be chosen, and the venue and its operations transfer from the Council to AML or another organisation, the result would be that the Council's employees would transfer under the Transfer of Undertakings (Protection of Employment Regulations 2006) (TUPE).
5. Under TUPE, employees have certain protections in law. Their terms and conditions of employment, such as pay, holidays and sick pay provision, (apart from occupational pensions) and continuity of service transfer with them. They also receive certain protections around dismissal and redundancy.

The Code of Practice on Workforce Matters (The Code)

6. The Code should be applied whenever public services in Wales are to be outsourced to a third party. Procurement and contracting exercises should be conducted on the basis that the TUPE Regulations 2006 will apply unless there are exceptional reasons why this should not be the case.
7. The implications for Cardiff Council are that at the earliest possible stage in the contracting process the Council must state that employees will be eligible to transfer and this will normally have the effect of causing TUPE to apply.

8. Even where TUPE does not strictly apply, the Code requires that the principles of TUPE should be followed, and the employees should be treated no less favourably than they would have been had the Regulations applied. This includes compliance with the provisions of A Fair Deal for Staff Pensions, which was revised in 2013.
9. The Code requires the contracting authority, in this case the Council, to monitor the implementation of the Code by service providers wherever it applies, and to provide an annual report to the Welsh Government.
10. The Code also requires that new joiners to the transferred-out workforce are offered terms and conditions (e.g, pay, holidays, sickness provisions) which are no less favourable than those of the transferred employees. This does not apply to pensions, but new joiners must also be offered a reasonable pension provision as indicated in the Code.

Pensions

11. Existing employees are likely to be in the Local Government Pension Scheme (LGPS) and under any TUPE and the Code the Third Party would have to either enter an Admission Agreement to join the LGPS or set up a broadly comparable arrangement outside of the LGPS.
12. The Council has experience of TUPE transfers and the most significant are the Leisure Services contract, and more recently, the transfer of the New Theatre.
13. In the case of the Leisure Services contract the Council required the operator to acquire 'Admitted Body' status to the LGPS and this pension scheme should both continue to apply to the employees who transferred, but also new employees employed after the transfer to deliver the leisure services in Cardiff.
14. In the case of the New Theatre, the operator secured 'Admitted Body' status for the employees who transferred, and new employees can access the organisations' own pension scheme.

Issue for Decision

15. There is a clear expectation of the Code that new employees are offered no less favourable terms. This needs to be clearly set out in contract arrangements.
16. As the Council has experienced different arrangements in the application of the Code as far as pension arrangements are concerned, there needs to be a decision on the expectations of the Third Party with regard to the pension provisions.
17. Whilst the expectation for the Third Party to secure 'Admitted Body' status is clear, does the Cabinet wish for new employees to be able to access the LGPS as was the case for the Leisure Services contract/TUPE transfer, or to apply the same arrangements as applied to the New Theatre.

Agency Workers

18. The Council recently agreed a Fair Worker (Long Term Agency Worker) Policy which provides for offers of permanent employment to those agency workers who have 4 or more years continuous assignment (with breaks equivalent to annual leave) in a role with the Council. Those with more than 2 years, but less than 4 years, continuous assignment (with breaks equivalent to annual leave) will be offered a temporary contract of employment with the Council.
19. The pool of agency workers engaged at St David's Hall who meet the criteria set out in the Fair Worker Policy will be offered either permanent or temporary contracts, as appropriate. It is expected this will apply to those agency workers who have been continuously engaged in the same role for a fixed number of hours per week, for either 4 or 2 years. This will mean that they will be covered by the TUPE legislation.
20. Those agency workers who do not meet the criteria will be engaged continuously in a role for 4 years or more. Agency workers at SDH who have been continuously engaged in the same role for a fixed number of hours per week for the last 4 years, and those that have been doing the same for a period of 2 years, will be offered contracts of employment in accordance with the (either permanent contract or temporary).
21. In other cases, AMG will need to determine for themselves the level of use of agency workers moving forward. They will be provided with the names of the agencies used by the Council for St David's Hall.