

**EXPLANATORY MEMORANDUM TO**  
**THE TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT)**  
**(TRANSFER OF STAFF TO THE SCOTTISH COURTS AND TRIBUNALS**  
**SERVICE) REGULATIONS 2022**

**2022 No. 1012**

**1. Introduction**

1.1 This explanatory memorandum has been prepared by The Ministry of Justice and is laid before Parliament by Command of His Majesty.

**2. Purpose of the instrument**

2.1 These regulations are being made to effect the transfer of administrative staff from His Majesty's Courts and Tribunals Service ("HMCTS") to the Scottish Courts and Tribunals Service ("SCTS").

2.2 From 1 November 2022, staff who meet the conditions set out in Section 2 of these regulations will transfer into SCTS.

2.3 The purpose of these regulations is to transfer the relevant HMCTS staff contracts to the SCTS and to provide protection of existing employment terms and conditions for the staff affected.

2.4 These regulations will come into force on 21 October 2022. Staff will transfer on a notified date.

**3. Matters of special interest to Parliament**

3.1 None.

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

**4. Extent and Territorial Application**

4.1 The territorial extent of this instrument is England, Wales, and Scotland.

4.2 The territorial application of this instrument is England, Wales, and Scotland.

**5. European Convention on Human Rights**

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

**6. Legislative Context**

6.1 These regulations are in the context of the devolution of powers to Scotland to implement the Scotland Act 2016 ("the Scotland Act"). This included welfare policy and delivery in Scotland.

6.2 The Social Security (Scotland) Act 2018 ("the Social Security Act") established a legal framework for a new system of benefits and devolved nine types of social security assistance, including adult and child disability benefits.

- 6.3 The Tribunals (Scotland) Act 2014 established the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland. The Social Security Act established a new Social Security Chamber of the First-tier Tribunal for Scotland to address appeals against decisions made by Social Security Scotland.
- 6.4 The Government has agreed that HMCTS staff who currently administer appeals for individuals eligible for the new Scottish benefits will transfer to SCTS to reflect the transfer of work. The Government is committed to ensuring that staff should transfer with protection of their current employment terms and conditions and continuity of service.
- 6.5 If the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (commonly known as "TUPE") had applied, the contracts of employment and continuity of service of the staff covered by these regulations would transfer as a matter of law to SCTS. However, it is the view of HMCTS that TUPE does not apply.
- 6.6 This instrument is made under section 38 of the Employment Relations Act 1999. This provides powers to make provision similar to TUPE to ensure that staff are given comparable protections to retained HMCTS staff. In addition to protection for terms and conditions of employment, the TUPE provisions for the provision of information to, and consultation of, staff are applied. In line with the provisions of TUPE, notified staff cannot be compelled to transfer but if they decline to do so then they will be deemed to have resigned
- 6.7 As with a transfer under TUPE, the regulations do not transfer contractual occupational pension entitlements (where those entitlements relate to benefits for old age, invalidity or survivors).

## **7. Policy background**

### *What is being done and why?*

- 7.1 Decisions on welfare benefits have historically been made by the Department for Work and Pensions ("DWP"). Appeals against DWP decisions are addressed by the Social Security Chamber of the First-tier Tribunal.
- 7.2 Following the Scottish Independence Referendum in 2014, the Government created the Smith Commission to meet the public commitments given to further devolution of powers to Scotland. The Smith Commission recommended that the Scottish Parliament should have control over a number of social security benefits, including disability benefits.
- 7.3 These recommendations were implemented by the Scotland Act. This gave the Scottish Parliament and Scottish Ministers increased powers over welfare policy and delivery in Scotland, including powers for the Scottish Parliament to create additional benefits; replace existing benefits with new benefits or other payments; and to determine the structure and value of such provision.
- 7.4 The Scotland Act also gave Scottish Ministers powers to determine entitlement to these benefits. These decisions are made on behalf of Scottish Ministers by Social Security Scotland, an executive agency of the Scottish Government, created to meet its statutory duties under the Social Security Act.
- 7.5 Individuals eligible for Scottish welfare benefits will initially remain on existing UK-wide benefits but will transfer over time to the new Scottish system. As these

individuals transfer, responsibility for their entitlement decisions will transfer from the DWP to Social Security Scotland and their appeals against these decisions will likewise transfer from the Social Security Chamber of the First-tier Tribunal to the Social Security Chamber of the First-tier Tribunal for Scotland. Over time, this will lead to a significant transfer of work from the former to the latter.

- 7.6 These appeals require a substantial amount of administrative work by the tribunals that deal with them. Both tribunals employ administrative staff to do this.
- 7.7 This transfer of work would leave the First-tier Tribunal to the Social Security Chamber over resourced in numbers of administrative staff. Similarly, the Social Security Chamber of the First-tier Tribunal for Scotland would be under resourced in administrative staff.
- 7.8 Without action, HMCTS would have to address this over resource by redeploying and making staff redundant. SCTS would have to recruit new staff. This would involve significant recruitment, redeployment, and redundancy costs to both HMCTS and SCTS. Experienced staff would be lost, and new staff would have to be trained.
- 7.9 To avoid the costs involved of redundancies and training new staff and loss of experienced staff, it was agreed that HMCTS staff currently working on appeals that will in future be dealt with by the Social Security Chamber of the First-tier Tribunal for Scotland, will be offered the option to transfer to SCTS.
- 7.10 The date on which the affected staff will transfer will depend on business needs and will be notified to the affected staff in due course. The transfer is envisaged to take place in two tranches. The first tranche will transfer in Autumn 2022 and the second will transfer in early 2023.
- 7.11 The intention is that this transfer be conducted on an equivalent basis to a TUPE transfer to ensure that the contracts of employment and continuity of service of the staff are protected. As TUPE does not apply to these types of transfers, these regulations are required to ensure that staff receive the protections equivalent to those provided by TUPE.

## **8. European Union Withdrawal and Future Relationship**

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

## **9. Consolidation**

- 9.1 No consolidation is taking place.

## **10. Consultation outcome**

- 10.1 The Ministry of Justice has not conducted a public consultation exercise on this specific transfer as: it does not have a wider impact beyond the affected staff; is in line with commitments previously given to transfer staff; and is implementing the same arrangements that would have occurred by law had TUPE applied.
- 10.2 In accordance with the requirements of TUPE, the affected staff have been consulted. We have consulted with the Scottish Government and SCTS. As the Employment Relations Act 1999 is legislation sponsored by the Department for Business, Energy and Industrial Strategy ("BEIS") and these regulations are typically exercised by BEIS Ministers, we have consulted with BEIS.

- 10.3 The Smith Commission conducted a public consultation in 2014 on their recommendations on devolution of powers to Scotland, which concluded with the recommendation to devolve powers over welfare benefits.
- 10.4 The Scottish Government conducted a public consultation in 2016 on their proposals for social security in Scotland, which resulted in the current structure of social security in Scotland.

## **11. Guidance**

- 11.1 This Order does not attract the need for guidance but general information about tribunals can be found on the Ministry of Justice website at: <https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about>.
- 11.2 General information about the Scottish Courts and Tribunals Service can be found on the SCTS website at: <https://www.scotcourts.gov.uk/>.
- 11.3 General information about Social Security Scotland can be found on the Social Security Scotland website at: <https://www.socialsecurity.gov.scot/>.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because the impact is expected to be minimal and well below the threshold of £5 million per annum at which an assessment must be prepared.

## **13. Regulating small business**

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

## **14. Monitoring & review**

- 14.1 These regulations are being made to secure the initial transition of staff from HMCTS to SCTS for 1 November 2022. Monitoring and review of HMCTS and SCTS effectiveness and consideration of any subsequent need for changes in staffing of functions will take place in the normal course of these agencies' business planning cycle.

## **15. Contact**

- 15.1 Robin Rimmer at the Ministry of Justice Telephone: 07866 146 449 or email: [robin.rimmer@justice.gov.uk](mailto:robin.rimmer@justice.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Kate Gregory-Smith, Deputy Director for Courts, Tribunals and Transparency can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Parliamentary Under Secretary of State Lord Bellamy KC can confirm that this Explanatory Memorandum meets the required standard.