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Dea Darren

**PAC INQUIRY INTO THE GENERAL PRINCIPLES OF THE PUBLIC AUDIT (WALES) BILL:
NOTE ON TUPE**

1. At the Committee's session on 24 September 2012, I undertook to provide a supplementary note regarding the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) in relation to the transfer of staff to the new Wales Audit Office that would be established by the Bill. Please find such a note attached.
2. In drawing up the note, I have noticed on reviewing the transcript of the session that we did not give sufficiently full details of our attempts to engage with the Welsh Government on this issue. I have therefore included such details in the note and would draw particular attention to its paragraphs 7 and 8.
3. At the 24 September session, I also undertook to provide a supplementary note regarding my concerns at the financial implications of the Bill, and I shall be sending that note separately.
4. I should be happy to provide further information to the Committee to support its inquiry so as to help ensure that the Bill develops into legislation that is fit for purpose.

HUW VAUGHAN THOMAS
AUDITOR GENERAL FOR WALES

FURTHER INFORMATION ON THE TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 2006 (TUPE) IN RELATION TO ARRANGEMENTS FOR TRANSFERRING STAFF TO THE NEW WALES AUDIT OFFICE

1. As set out in my submission of 5 September 2012 and reiterated in oral evidence on 24 September 2012, I consider that the Bill does not provide adequate TUPE-equivalent safeguards for staff transferring to the new WAO. This is not just an awkward technical legal issue, but is also a rather serious concern for my staff. I therefore think it is somewhat pressing that the Welsh Government engages with my officials so as to address these concerns.
2. During the evidence session on 24 September, the Committee asked for a paper on the reasons why I did not think that TUPE would apply to the proposed transfer, and I therefore have set out these reasons below.
3. It may helpful to first make clear that "TUPE" means the Transfer of Undertakings (Protection of Employment) Regulations 2006. The TUPE Regulations implement the European Council Directive 2001/23/EC, which is also known as the Acquired Rights Directive¹. In short, the TUPE Regulations protect the terms and conditions of employees who are subject to transfers of employment between employers. There are, however, legal exceptions to the application of the protection of the TUPE Regulations.
4. It is my view that the transfer proposed in the Bill falls within the exception to the protective operation of the TUPE Regulations established by the 1996 European Court of Justice case of *Henke*². *Henke* concerned the application of the Acquired Rights Directive where there was no outsourcing from a public sector body to a private sector body but rather just an "administrative reorganisation" between two public sector bodies. The basic principle of *Henke* is that the Directive (and hence TUPE) does not apply where there is no "business" transferred and all that is transferred is administrative functions. As the effect of the Bill is the transfer of administrative functions, rather than business, so the attendant transfer of staff will not be a TUPE Regulations-protected transfer.
5. In addition to the *Henke* exemption, there is a further exemption contained within Regulation 3(5) of TUPE. Like *Henke*, this is an exemption that applies where there is "an administrative reorganisation of public administrative authorities or

¹ Directive 2001/23/EC consolidates the Acquired Rights Directive, Council Directive 77/187 amended by Directive 98/50

² *Henke v Gemeinde Schierke and Verwaltungsgemeinschaft 'Brocken'*

the transfer of administrative functions between public administrative authorities.” The proposed creation under the Bill of a corporate body WAO is an administrative reorganisation of public administrative authorities and so falls within this exception. In other words, the TUPE Regulations do not operate to provide protection of employment terms in the case of the transfer proposed under the Bill.

6. It appears very likely that whoever drafted the Bill for the Welsh Government was also of the view that the TUPE Regulations do not operate to provide protection of employment terms in the case of the transfer proposed under the Bill. This is because the Welsh Government appears to have drafted the Bill so that, in paragraph 5 of Schedule 3, certain selected parts of the TUPE Regulations are replicated so that there is a customised and cut-down version of the TUPE Regulations. This would provide members of staff of the AGW who are transferred to the employment of WAO with a degree of protection, but not the level of protection they would receive under the TUPE Regulations themselves. The provisions in paragraph 5 of Sch 3 would not be needed to provide employment protection if the full protection provided by the TUPE Regulations applied. It therefore appears that either the Welsh Government (or at least the persons that drafted the Bill) are of the view that the full protection provided by the TUPE Regulations does not apply, or some strangely selective yet accidental and unnecessary drafting has been included in the Bill.
7. Unfortunately, we can only guess at what the Welsh Government had in mind in drafting paragraph 5 of Schedule 3 of the Bill, as the Welsh Government has not shared its instructions with us. However, it is clear that paragraph 5 does not meet the commitment made by the Welsh Government in paragraph 242 of its consultation document of 15 March 2012 that, “provision will be made so that the transfer of employment will be on no less favourable terms than would be the case if TUPE applied.”
8. We have raised these issues with the Welsh Government several times. In my response of 11 May 2012 to the Welsh Government’s consultation on its draft Bill, I pointed out that while the consultation document said that there would be a transfer of staff, the draft Bill did not include any transfer provisions. I also suggested that the Welsh Government should provide draft transfer provisions in good time for adequate consultation in advance of the introduction of the Bill. Regrettably, that has not happened. Having considered the Bill as introduced, my staff wrote to the Welsh Government on 21 August 2012 asking for clarification of the transfer provisions in the Bill, and again on 17 September 2012. Officials have spoken on the phone, but the latest situation, as I understand it, is that while the Welsh Government has been working on a response to our email of 21 August it is also continuing to check the situation with its lawyers.