

EMPLOYMENT RIGHTS ON TRANSFERS OF UNDERTAKINGS IN THE UNITED KINGDOM

George-Dian Bălan

“Alexandru Ioan Cuza” University of Iași

Abstract: *In April 2006, in the UK, came into force new rules relating to the obligations incumbent upon business owners if they pursue their alienation. These regulations come to meet several European directive which seeks to ensure employees' rights and prevent any abuses. In this respect, the main novelty lies in the stressed placed on the right to information and consultation, their failure to attract the party at fault liability and corresponding sanctions.*

Keywords: employment rights, company law, United Kingdom, business, regulation

JEL Classification: K20, M16

1. THE RIGHT OF INFORMATION AND CONSULTATION AS A PART OF THE EU SOCIAL POLICY

In the preamble to the EEC Treaty among its objectives there are set "the economic and social progress" of the Member States, together with "the constant improvement of the living and working conditions of their peoples". In the light of these provisions and following ample debates a Social Charter was finally adopted in 1989.

The *Community Charter of Fundamental Social Rights for Workers* provides a comprehensive framework for further consideration accorded to the role and place of work in society. It establishes some guiding principles including, *inter alia*, the improvement of working conditions, the social protection or the right of information, consultation and participation of workers, "*The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. The improvement must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundancies and those regarding bankruptcies. Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practice in force in the various Member States. Such information, consultation and participation must be implemented in due time,*

*particularly in connection with restructuring operations in undertakings or in cases of mergers having an impact on the employment of workers*¹.

Either the EU or its Member States implement the social rights specified in the Charter through the appropriate means, according to their competences. As ‘guardian of the treaties’ the EU Commission is entitled to propose action programs and strategies common to all Member States, in order to create a minimum common basis.

The first step made by the EU Council concerning the rights of employees on the occasion of a selling of a business was the adoption of Directive 77/187/EEC in 1977 (the *Acquired Rights Directive*). From the very beginning the directive was intended to support the harmonization of national legislations in this field, safeguarding the rights of employees and requiring both the seller (the ‘transferor’) and the purchaser (the ‘transferee’) to inform and consult the representatives of the employees.

The next step followed in March 2001 with the Council Directive 2001/23/EC, which amended the EC Acquired Rights Directive, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses².

2. THE UK 2006 APPROACH

The United Kingdom was the sole EU Member not to sign the Social Charter in 1989, due to its traditional ‘liberal’ approach³. As the political power changed with the election of Tony Blair as Prime Minister in 1997, the Charter was finally signed the following year (1998). During the three consecutive terms in office Tony Blair encouraged a deeper concern for social issues, although he is criticized for insufficient adherence to the traditional labour priorities.

The relevant provisions concerning the employment rights on the transfer of an undertaking can be found in the following regulations:

- the Transfer of Undertakings (Protection of Employment) Regulations 1981, as amended by the Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1987,
- the Trade Union Reform and Employment Rights Act 1993,
- the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995,

¹ Please see points 7, 17 and 18 of the *Social Charter*.

² *Official Journal L 082, 22/03/2001 P. 0016 – 0020, retrieved from: http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/1_082/1_08220010322en00160020.pdf*

³ In the 80’s Margaret Thatcher’s reforming policy is the best example of putting on the streets thousands of employees.

- the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999.

The TUPE regulations address the fear that the new business owner will dismiss the former employees, in order to bring new ones.

The 2006 regulations apply to the “relevant transfers”, as follows:

- a) when a business or a part of it is sold to another employer, including the cases where the two initial companies cease to exist autonomously and give birth to a third one; or
- b) in the event a “service provision change” takes place⁴.

Other transfers, not covered by these regulations, can be subject to Directions made under section 101 of the 2003 Act (Office of the Deputy Prime Minister - ODPM).

The scope of the regulations is to guarantee the *continuity* of employment, under the same terms and conditions, on the occasion of a transfer⁵. This way the employees of the seller (the transferor) become *automatically* the employees of the purchaser (the transferee) and their contracts of employment are considered to be made with the transferee from the very beginning. Accordingly, they can sue the transferee on grounds prior to the transfer⁶. However, for certain reasons related to the transfer and following a mutual agreement, the employment contracts can be modified.

If a transfer is about to take place, the representatives of the employees have the legal right to be properly informed and consulted on the matter. The seller has also a duty to inform the purchaser about the personnel of the company before proceeding to the business transfer.

The legal requirements apply to all sizes and *all kinds of businesses*, regardless the differences between them. They equally apply to large and to small companies, to public or private sector. Furthermore, the non-profit organizations such as charities are bound by the same regulations.

In case of *insolvency* the old company debts no longer transfer. The dismissals prior to the transfer continue once the transfer started. As a general rule, the original terms and conditions continue to apply. However, the new employer can vary the terms and conditions only in limited circumstances and only after holding consultations with the relevant representatives.

⁴ Where a contractor takes on a contract to provide a service for a client from another contractor (www.dti.gov.uk).

⁵ Even under the old TUPE regulations the employer and the employees could not agree to vary employment contracts only because of the transfer (Gillian Howard, *Drafting Employment Contracts*, The Law Society, London, 2004, p. 398-399).

⁶ For information on the conditions for bringing a case to the court (employment tribunal), please follow the link www.employmenttribunals.gov.uk.

3. LIABILITY AND PENALTIES IN THE NEW REGULATIONS

3.1. The duty to inform

The transferor has to provide the transferee in writing information about all persons who are subject to transfer and about any other person assigned to the organized group of resources. The information is not limited to certain aspects; it can be related to the age and profile of employees or to possible claims. The information should be current and relevant and in no circumstances older than 14 days. In case meanwhile some data change the transferor should notify these changes occurred as well. The information should be provided 14 days before the transfer takes place.

The duty to notify is very important and the sanctions if disregarded are quite serious. The compensation in case of failure is calculated beginning with a minimum amount of £500.00 per employee, awarded on a just and equitable basis. In case of dispute the tribunal will take into account specific contract clauses and the effective loss. However, the interested party (the transferee) is entitled to compensation even in the absence of a penalty clause or losses but only on the grounds of the lack of information.

For instance, a small business, say a supermarket, changes hands and the transferor fails to supply the appropriate information to the transferee. In the light of the new legal provisions for a staff of 10 employees the transferee is allowed to claim at least £5,000.00!

3.2. The duty to inform and to consult

The duty to consult refers to the target group of ‘affected’ employees. Within the definition of affected employees the new regulations consider:

- the employees in the group transferring
- the employees in the source group affected by the transfer
- the employees in the source group affected by measures related to the transfer
- the employees in destination affected by the transfer
- the employees in destination affected by measures in connection to the transfer

The information should be supplied enough in advance to allow meaningful consultations to take place. This reasonable period of time should be assessed on a case-by-case basis.

Consultations have to cover aspects of the fact of transfer, the envisaged date, the reason for this measure, the legal, social and economic implications, other measured envisaged or not by the two contracting parties.

The consultations must be conducted with the relevant representatives of the employees - e.g. the trade unions- or with any other elected and recognized representatives. If such representatives do not exist in the organization at that moment, some *ad-hoc* representatives should be elected.

The penalties on consultation are set out in Regulation 15. The liability is joint and several. A loss must not be proven to qualify under this regulation. It provides for the payment of 90 days per affected employee, without further conditions to be met as this is considered a protective award. At this point the question is what would be the crossing line between constructive and unfair dismissal.

The protection provided to the employees ranges from the terms and conditions of the employment contracts, including their non-modification on the occasion of transfer to the automatically unfair dismissal. However, some exceptions are admitted, related *inter alia* to certain occupational pension rights.

The applicable *penalties* are up to £ 58,000.00 in case of unfair dismissal, a minimum of £500.00 per employee in the event of failure to notify and 90 days pay per employee for the failure to engage appropriate consultations.

The implications can be easily understood through the following two examples:

We consider, for instance, a publishing company with a total of 20 persons its own staff and contract out printing arm with 10 staff (*Employment Law TUPE*, 2006). Each of the employees earns an average wage of £25,000 per annum. This company engages in a transfer with a printer with 20 staff under contract. Consequently, under the definition of “affected “staff will fall 20 + 20 = 40 employees.

In case of failure to consult the applicable penalty will be: 90 days per person (£6,000) x 40 = =£240,000.

In case of failure to notify: £500 x 10 = £5,000

Furthermore, let’s say that 2 out of 10 walk out (1 for the printer and 1 in destination group).

We are facing now two cases of automatic unfair dismissal.

The award of 12 months will be £25,000 x2 = £50,000.

As far as we can see, the total cost of ignoring the TUPE Regulations is in our case £295,000.

For further analysis, let’s suppose that tender drove down wages and accordingly the overtime allowance is reduced by £1 per hour to compensate (this was agreed at the time).

But two years later – disgruntled employee claims back pay – overtime worked was 10 hours per week.

For 1 employee £10 per week x 104 weeks = £1040.

Consequently, for 10 employees the figure will be no less than £10,400.

In the second example we consider the purchase of a pub (*Employment Law TUPE*, 2006). The pub personnel are composed of 20 bar staff, 3 chefs, 3 kitchen assistants and 2 managers. The average salary is £12,000 per year.

If failure to consult, the penalties are 90 days x 28 at £3,000 = £84,000.

In case of a claim back from seller on the grounds of failure to notify, the figure will be £500 x 28 = £14,000. The total loss for the new business owner becomes £84,000 –£14,000= £70,000 (in the case that nobody leaves).

4. CONCLUSIONS

The new revised TUPE Regulations came into force on the 6th of April 2006. Their scope is to preserve the terms and conditions of the existing employment contracts when a business, an undertaking, or a part of one is sold to a new employer. Any provision of any agreement is void so far as it would exclude or limit the rights granted under the Regulations.

The main changes in the 2006 Regulations are:

- a widening of the covering of the Regulations, in order to include cases where services are outsourced, insourced or assigned by a client to a new contractor (the so-called “service provision changes”),
- a legal duty on the seller to provide information about the transferring staff (named “employee liability information”),
- provisions addressing the particular circumstances where a business is confronting insolvency,
- clarifying provisions in respect to the ability of both employers and employees to vary contracts in the event of a relevant transfer.
- guiding provisions regarding the unfair dismissal connected with an appropriate transfer.

The rights and obligations provided in the 1981 Regulations continue to apply and to the extent that the 2006 Regulations have a different meaning the latter will prevail. Actually the new regulations rather clarify the old ones and not change them. They are an example of how employment law can interfere with company law. These regulations reflect, on the one hand, the European concerns as well as, on the other hand, the English developments in case law since the first regulations were adopted (1981).

REFERENCES

Howard, G. (2004), *Drafting Employment Contracts*, The Law Society, London.

Employment Law TUPE 2006, BPE Solicitors, Cheltenham, 2006.

European Economic Community Treaty, accessed at

http://europa.eu.int/scadplus/treaties/eec_en.htm;

Community Charter of Fundamental Social Rights for Workers, accessed at

<http://europa.eu.int/scadplus/leg/en/cha/c10107.htm>;

<http://europa.eu.int>;

www.acas.org.uk (ACAS);

www.civilservice.gov.uk;

www.dti.gov.uk (Department of Trade and Industry -DTI);

www.dwp.gov.uk (Department of Work and Pensions -DWP);

www.employmenttribunals.gov.uk (Employment Tribunal Service -ETS);

www.odpm.gov.uk (Office of the Deputy Prime Minister -ODPM).