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## **The limits of the transfer of rights and obligations arising from employment relationships**

### **1. Introduction**

The transfer of rights and obligations arising from employment relationships inherently means the transfer of employees, including their existing rights and obligations, to another employer, as the employment consequence of the transfer of the employer or a part of the employer and, if applicable, also other business changes ("business changes"). In the sense of Community Law, labour law aims to ensure that employees are not in any way affected by these transactions. This institute combines a considerable degree of legal protection of the employee which, however, taken its consequences may heavily distort the existing legal relations between the parties concerned. More reflection should be placed on setting the limits of this institute<sup>1</sup> merely to cases when such a high degree of protection of the employee is justified with regard to the legal certainty of the parties concerned.

### **2. Protection of the employee's position versus autonomy of will**

The transfer of rights and obligations undoubtedly leads to the protection of the employee's position in the sense that any change on the part of the employer should affect neither the employment relationship nor the employee's position in it. The employee *devolves* together with the activities that the new employer will perform, as if he were bound to the work. Where a transfer as a legal device is concerned, the autonomy of will of the employer, the employee and the new employer should be taken into consideration. Contractual freedom should also be respected, more precisely *pacta sunt servanda*, particularly the content of the existing contractual covenants between the parties in a legal relationship. The legal regulation should also acknowledge that the employee entered into a contract of employment with a specific employer and by so doing the employee showed a willingness to be in an employment relationship with this specific employer and to perform work for it in person; any change in employer should respect the employee's will in whether he intends to be transferred to another employer or not.

The above stated principles collide in the context of the legal institute of the transfer of rights and obligations which follows from Community rules supported by European case-law. Particularly the principle of autonomy of will, or to be more precise contractual freedom, on the one part and the principle of special statutory protection of the employee's position on the other part. In searching for the best solution for the transfer of rights and obligations, particularly in the case of a change

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<sup>1</sup> Compare ERÉNYI, T. *Aplikační nejasnosti při přechodu práv a povinností z pracovních vztahů*. In MZDŮVAPRAXE.CZ [online]. Wolters Kluwer, a.s., 12 March 2010

of contractor, what will be decisive will be whether the principle of special statutory protection of the employee's position is preferred over the above stated principles to such a degree that its application will de facto cause the termination of the basic employment relationship between the existing parties, the employee and the employer, so that a contracting party, the employer, is changed ex lege, for another employer. Employment constitutes the mutual contractual relationship of two parties and it shows a high level of connection and dependence between the parties, thereupon the subject-matter of the contractual relationship is the personal performance of dependent work under the organisational subordination of the employer with whom the employee entered into employment, in accordance with the employer's instructions and during the allocated working hours. By entering into employment the employee exposes himself to a dependent position towards such a party that the employee selected on the basis of his own will. The will of an employee should be protected and not only his employment, regardless of its content. As has already been stated above, where business changes relating to an employer are concerned, there are two kinds of employee protection. First of all the employee is protected against the termination of his employment on the grounds of such a change both before his transfer while at his current employer as well as after his transfer at his new employer. Protection also lies in the preservation of the legal state that existed as at the date of transfer, that is the preservation of the same rights and obligations that the employee had prior to the actual transfer in relation to the current employer. In other words, the employee's legal status in the employment relationship may not deteriorate because of business changes on the part of the employer. Upon the transfer of rights and obligations, the new employer assumes the legal status of the former employer without the actual content of the employment relationship changing.

### **3. The employee's manifestation of will not to be transferred**

A related issue that is clearly in need of a legislative change is the establishment of a legal framework supporting the manifestation of the employee's will not to be transferred to the new employer. The institute of the transfer of rights and obligations arising from employment relationships provides the employee with a high degree of legal protection based on the duration of his employment through statutory transfer to the new employer, regardless of the will of the parties concerned. The employee's autonomy of will is preserved in that if he is not interested in his being transferred, he may give a notice of termination to his current employer, in which case his employment is terminated under the notice, however, no later than on the date preceding the date of the transfer<sup>2</sup>. A shortcoming of this otherwise flexible provision that respects the employee's will and gives room not to apply statutory protection is the fact that the legal regulation in no way defines when the employee may give this notice. If it is assumed that it is the employer's statutory obligation to inform the employee about the transfer of rights and obligations arising from employment

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<sup>2</sup> S. 51a of the Labour Code

relationships no later than thirty (30) days before the date of the transfer<sup>3</sup>, then the employee is in no way limited to the possibility of giving a notice immediately upon having been provided this information, but also on the day immediately preceding the date of the transfer. The notice of termination then comes into effect upon the date of its delivery and the new employer does not have enough time to react to the employee's decision and to arrange for another employee to take up the transferred activity. This has the parties involved suffer from a high level of legal uncertainty; especially the new employer. Current legislation does not deal with circumstances when both the former employer and the new employer failed to inform the employees concerned about the transfer of rights and obligations arising from employment relationships or when they did inform the employees concerned but within a time period shorter than required by law. The employees concerned are de facto transferred to a new employer without them actually being told about this. Thus it would be wise to strengthen the position and particularly the legal certainty of the parties concerned in the context of amendments of the legal regulation of the transfer of rights and obligations arising from employment relationships. Whereby provided the duty to inform is observed within the time period stipulated by law, that being at least thirty (30) days prior to the date of the transfer, the employee will also be obliged to give a notice within fifteen (15) days as of the date he was informed about the transfer if he does not intend to be transferred to the new employer and if he intends to terminate his employment by a notice of termination prior to the date of the transfer. Should the employee do so later, his notice of termination will be the typical type and it will be subject to a standard period of notice. On the contrary, should rights and obligations arising from employment relationships be transferred without the employee having been informed about the transfer, he should still have the option to terminate his employment by a notice of termination subject to a significantly shorter notice period, such as a fifteen (15) day notice period, for example. Nevertheless, employees should be allowed to terminate their employment under a reduced period of notice only during the first two months following the date of the transfer as it may be assumed that after such time the employees must already be aware of the fact that they are working for a different employer.

#### **4. The legal basis for the transfer of rights and obligations**

The principle of the protection of the employee given business changes on the part of the employer follows from EU legislation. The EU adopted Council Directive 77/187/EEC 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 businesses as early as in 1977. It was cancelled and replaced in 2001 by Directive 2001/23/EC which more than anything else supplements the original regulation. The purpose of such EU regulation is the protection of the working conditions of employees in case of business changes on the part of the employer and

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<sup>3</sup> Section 339 of the Labour Code stipulates that the employer is obliged to effect this obligation directly towards the employee or, if applicable, his representatives – a trade union or employee council, provided such exist with the employer.

protection against the actual termination of such employment. Following therefrom the legal regulation attempts to ensure that employees are not dismissed but transferred along with all of their rights and obligations to the new employer should business changes occur on the part of the employer.

The key question for the correct application of the above stated objectives of the Directive is the correct assessment of the content and the impact of the business changes on the part of the employer considering whether the transfer of rights and obligations should occur or not. The Directive regulates decisions on whether or not a transfer should occur based on whether there is a transfer of an economic entity which retains its identity. An economic entity means an organised grouping of resources the objective of which is to pursue an economic activity, be that a central or an ancillary activity. The case-law of the Court of Justice of the European Union (referred to hereinafter as the *Court of Justice*) very much concentrated and still concentrates on defining an economic entity. Particularly the judgments in the Cases Spijkers<sup>4</sup>, Rygaard, Jouini, Oi Liikenne<sup>5</sup> and Suzen<sup>6</sup> are essential in this regard.

According to Czech legislation, the transfer of rights and obligations arising from employment relationships is possible only in cases stipulated by the Labour Code or a special legal regulation. However, contrary to the Directive the Labour Code does not set out the condition of the transfer of an economic entity which retains its identity. The scope of business changes on the part of employers that result in the transfer of rights and obligations is much broader than that stipulated by EU directives and concluded by the case-law of the Court of Justice<sup>7</sup>. According to the Labour Code, rights and obligations are transferred in cases when the activities or tasks of an employer or a part of the activities or tasks of an employer are transferred to another employer. The Labour Code stipulates that tasks and activities are particularly considered to be tasks relating to ensuring production or the provision of services and similar activities according to special legal regulations that a legal or natural person performs in facilities designed for these activities or at places usual for their performance under his own name and responsibility. Thus, according to Czech legislation, the transfer of rights and obligations arising from employment relationships is subject to a greater amount of business changes compared to the requirements laid down by the Directive. A transfer of rights and obligations typically occurs without doubt in mergers and divisions of companies, similarly like in the sale

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<sup>4</sup> In its Judgment regarding the Spijkers Case the Court of Justice laid down the criteria for applying the expression transfer of an undertaking. Mr Spijkers was employed by Company X, a company that operated a slaughter-house. By December 1992 the said company no longer engaged in its activities and the entire slaughter-house, including offices, the land and certain specified goods were purchased by Company Y. In February 1993 Company Y took over all of the employees of Company X, apart from Mr Spijkers and one other employee and it began to operate a slaughter-house.

<sup>5</sup> Judgment of 19 September 1995 – Case C-48/94 regarding Mr. Rygaard in which the Court of Justice decided that a transfer must relate to a stable, firmly organised economic entity whose activity is not limited to performing only one specific works contract. Similar is Judgment of 13 September 2007 – Case C-458/05 regarding Mr Jouini and Judgment of the Court of 25 January 2001 - Case C-172/99 regarding Oy Liikenne.

<sup>6</sup> Judgment of the Court of 19 September 1995 January – Case C-48/94.

<sup>7</sup> In its Judgment of 25 January 2001 – Case C-172/99 regarding Oy Liikenne the Court of Justice even emphasised the necessity to transfer significant tangible assets and not only activities.

of an enterprise or its part, or the leasing of an enterprise or its part, as the case may be<sup>8</sup>. Nonetheless, transfers of rights and obligations also occur in regards to so-called outsourcing and insourcing, in fact even in cases of a mere change of contractor. Nonetheless, according to Czech legislation a transfer of rights and obligations is not necessarily subject to the transfer of an economic entity which retains its identity; it merely concerns the transfer of activities from one employer to another employer. Czech legislation is not in conflict with EU legislation, nonetheless it goes significantly beyond it<sup>9</sup>. Whether intentionally or not, Czech legislation is in this sense very similar to British legislation, specifically TUPE 2006<sup>10</sup>.

## **5. Outsourcing, insourcing and change of contractor**

Outsourcing is aimed at securing certain activities, that up till now were performed by the employer's employees, by another person. The employer then no longer performs the activity concerned by itself as it is secured for the employer by a third party – a contractor. From the labour law point of view, the employer cancels the relevant employees' jobs and concludes a contract according to the Civil Code with a so-called contractor that will provide the given activity to the employer for consideration. Insourcing is the opposite of outsourcing. This is when the employer has activities that were performed for him by a contractor to date for consideration performed by his own employees. Thus, the employer will terminate the contractual cooperation with the third person and it will create new jobs for employees that will perform the activity for it as dependent work under the employer's organisational subordination, in the name of the employer, at its costs and under its liability.

Yet, where both above stated cases are concerned, it depends on the parties' will whether any business changes will come about or not. In this way employers may contemplate the consequences such conduct may have for them, particularly with regard to the statutory transfer of rights and obligations arising from employment relationships.

Another means of business changes on the part of the employer is a so-called change of contractor. This concerns situations when a company, more precisely a client, has a contract with a former contractor. The contractor provides the client with certain services or activities on the basis of the contract. This contractual relationship is terminated and the client concludes a contract for the provision of the same services or activities with a new contractor. Provided statutory terms and conditions are observed, the above situation would see a transfer of rights and obligations arising from employment relationships, including a transfer of employees from the former contractor to the new contractor. This is true provided there are no legal relations

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<sup>8</sup> For more details refer to Horáček T., *Přechod práv a povinností zaměstnavatele při změně dodavatele*, Team of Authors, ANAG 2014, pp 39 et seq.

<sup>9</sup> This is not in contradiction with EU law. Article 8 of the Directive enables Member States to adopt a legal regulation that is more favourable for employees. Nonetheless, its profitability for the existing Czech economic environment needs to be assessed.

<sup>10</sup> TUPE – The Transfer of Undertakings (Protection of Employee) Regulations 2006, adopted in Great Britain, 2006 No. 246

between the contractors, whereby they have no option to prevent this statutory transfer by an expression of their will. Given the wording of the respective provisions for the transfer of rights and obligations arising from employment relationships in the Labour Code, rights and obligations may also be transferred in the case of a change of contractor. Czech legislation does not provide any more specific conditions for assessing whether the transfer should be effected or not. In this way, former and new contractors and the employees concerned are left with a huge degree of legal uncertainty. In leaving such a broad framework of organisational changes under which the transfer of rights and obligations is effected in Czech law, it is essential to define criteria that will be decisive for the application of the transfer of rights and obligations in the event of a change of contractor. In doing so we should proceed from British legislation which is content-wise closest to Czech legislation.

Great Britain implemented Council Directive 77/187/EEC through special laws that were adopted in the 1980s and 1990s. However, these laws were criticised for their lack of precision and laxity in the implementation of the requirements of the Directive<sup>11</sup>. These shortcomings were not overcome until the year 2006, when a new law was adopted, namely *The Transfer of Undertakings (Protection of Employee) Regulations*, abbreviated *TUPE*<sup>12</sup>. Not only did this special legal regulation governing the transfer of rights and obligations arising from employment relationships implement the requirements of the Directive, it also provides protection to a wider range of employees in the event of organisational changes<sup>13</sup>. TUPE extends the possibility of the transfer of rights and obligations arising from employment relationships to outsourcing, insourcing and change of contractor. It stipulates the obligation for the transferor to provide the transferee with information about the transferred employees, it facilitates transfers in the event of insolvency and it regulates the unlawful termination of the employee's employment in connection with a transfer. The legal regulation should provide legal certainty to all of the parties concerned, specifically the former employer, the new employer and most importantly the employees affected by the business change.

Following the British legal regulation, a transfer of rights and obligations in the case of a change of contractor may be effected only if the activities will be performed in the same or similar manner and extent after their transfer, with the exception of activities that consist wholly or mainly of the supply of goods or activities of a short-term duration or a single specific task. Application of the transfer of rights and obligations arising from employment relationships is further conditioned by the existence of an organised grouping of employees that was created by the employer for the purpose of the exclusive or predominant carrying out of the activities. And finally, should tangible and intangible property be essential for the performance of the activity, it would also have to be subject to the transfer in the event of a change of

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<sup>11</sup> Randlová N. a Borovec D., *Přechod práv a povinností zaměstnavatele při změně dodavatele*, Team of Authors, ANAG 2014, p 83

<sup>12</sup> For more details refer to Wynn-Evans Ch.: *The Law of TUPE Transfers*, Oxford University Press 2013

<sup>13</sup> For more details refer to Ludlow A.: *Competitive Tendering in the Public Sector: How does TUPE 2006 Work in Practice?* (UACES 41st Annual Conference, Exchanging Ideas on Europe, Cambridge, Sep 2011)

activity. Without the above statutory assumptions being met, there will be no transfer of rights and obligations arising from employment relationships. These terms and conditions do not apply in the event of a transfer of rights and obligations arising from employment relationships on the basis of a special legal regulation, particularly under the Civil Code, when the employer or a part of the employer is transferred and the transfer of rights and obligations arising from employment relationships and primarily the transfer of employees from the former employer to the new employer is, in essence, natural.

## **6. Conclusion**

Legislation regulating the transfer of rights and obligations arising from employment relationships should lead to the parties concerned having more legal certainty in that the terms and conditions under which rights and obligations arising from employment relationships are transferred are made more precise.

Consideration should be given to the extent of business changes that will be subject to the transfer of rights and obligations arising from employment relationships. Extensive application of the transfer of rights and obligations arising from employment relationships, including the transfer of employees in the event of a change on the part of the contractor, could have the potential to have significant negative consequences where private enterprises are concerned. Negatively affected could also be the guaranteed institutes of the right to work, freedom of choice of employment, freedom to conduct a business and the free choice of trading partners for cooperation. Where contractors are to change, the new contractor that is interested in the contract does not know and cannot know the employees of the former contractor. In concluding the contract it definitely does not expect to have to take over the employees of the former contractor that carried out the activity that constitutes the subject-matter of the contract for the former contractor. In the same way the former contractor that lost the contract should, in this context, neither have to lose employees that worked on the contract nor should he have to leave them to the new contractor. These rules would certainly not be in accordance with the functioning of competition, competitive environment or autonomy of will on the part of the business organisations. In what concerns contractors these rules could lead to excess employees or, on the contrary, their sudden loss. The personal relationship between the employer and the employee built over a long period of time would also be paralysed. The investments made into the employees' education and training would go to waste as would their career development. Finally, not even the employees themselves could, by default, decide about their remaining employed by the current employer, that being the former contractor<sup>14</sup>.

As has already been stated in the introduction to this article, issues concerning the transfer of rights and obligations arising from employment relationships constitute a very specific, almost futuristic, legal regulation that attempts under all circumstances

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<sup>14</sup> Their only possibility how not to transfer to the new contractor would be to terminate their employment through a notice of termination and then to conclude a new contract of employment with the former employer.

to guarantee the employee the contracted performance of work under identical working conditions notwithstanding the will of the entity for whom the work is carried out. Thus it encroaches on the personal employment relationship between the employer and the employee and in order to preserve the employee's current employment it is willing to exchange the employer one for another. This significant interference with the legal certainty of the employer and the employee who together entered into an employment relationship as well as any significant interference with the position of the new employer should be permissible only in cases when the content of the legal relation would not be significantly affected by the business change and the transfer of rights and obligations to another employer would be legitimate from a legal perspective<sup>15</sup>.

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<sup>15</sup> Following from the SVV Project 260010, a team of investigators drew up a draft amendment of the Labour Code as discussed above and the Faculty of Law, Charles University in Prague, submitted it to the Czech Ministry of Labour and Social Affairs.