TRANSFER OF CONTRACTS OF EMPLOYMENT

INTRODUCTION

When a business is transferred or sold as a going concern ('as is') to a new owner, the employees' contracts of employment are transferred to the new owner automatically without any changes. All the rights and obligations of the old employer and employees are transferred to the new employer, including length of service, unless both parties agree otherwise.

BUYING AN EXISTING BUSINESS

If a new owner takes over or buys out an existing business, the new employer is responsible for all the rights and obligations related to the employees of the business at the time of the transfer. In such a case, the employees' contracts of employment are transferred automatically and no agreement is required from the employees.

Anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the committing of an unfair labour practice or act of unfair discrimination is considered to have been done by or in relation to the new employer.

Unless otherwise agreed, the new employer is similarly bound by any collective agreement concluded with the union or bargaining council. The new employer is also obligated to comply with any arbitration award made in terms of the Labour Relations Act 66 1995 (LRA), unless otherwise agreed.

An agreement on the transfer of business should be concluded between the old employer and the new employer and all relevant information should be disclosed to the employees. The agreement should be in writing and should include the following (as at the date of transfer):

- The leave accrued by the employees under the old employer.
- The severance pay that would have been payable to the transferred employees in the event of dismissal for operational requirements as at the date of transfer.
- Any other payments that the employees have accrued but which have not been paid to the employees by the old employer.
- Which employer is liable for which payments as well as what each employee is entitled to.

The transferred employees should be informed of the terms of the agreement between the old and new employer.

The new owner is obliged to offer terms and conditions that are on the whole not less favourable. Minor changes can be made provided that the employees are not worse off overall; e.g. the new owner can replace the old owner's medical aid scheme with its own medical aid, as long as this is not less favourable for the employees. If the new owner wants to change any other terms and conditions of employment, he/she would need to consult with the employees, and get their agreement to those changes.

NOTE: When a shareholder in a company (or member of a close corporation) sells the shares in the company (or CC) to someone else, this does NOT constitute a transfer of a business as a going concern. The business itself is the employer, not the shareholder, and the business remains the employer after the sale of the shares.

Also bear in mind that 'transfer' does not only mean a sale – even if the business is given away this could constitute a transfer.

BUYING A BUSINESS THAT IS BEING LIQUIDATED

In circumstances where someone buys a business that is being liquidated or where the employer is being sequestrated, the business is bought in order to prevent it from closing down. In this event the employees' contracts of employment can also be transferred to the new owner without the consent of the employees, and the new employer automatically substitutes the old employer in all contracts of employment.

However, all the rights and obligations between the old employer and each employee at the time of the transfer, remain the rights and obligations between the old employer and each employee.

Anything done before the transfer in respect of each employee is considered to have been done by the old employer. The new employer does not incur any obligations in respect of anything done before the transfer.

SELLING A PART OF A BUSINESS

If a company sells off a division or a part of its business, the new business that is formed by this sale becomes the new employer of all the employees in that division or part of the business, and takes over their contracts of employment. The same conditions would apply in such a case, as if the whole business had been sold.

OUTSOURCING AS A TRANSFER OF BUSINESS

Outsourcing is explained as a procedure of hiring outside service providers that take over the complete function of a particular department rather than employing full-time personnel e.g. catering, cleaning, or data processing of a company. It has become commonplace for companies to outsource part of their enterprise in order to focus on their core business.

There may be a transfer for the purposes of the relevant legislation even though the outsourcer retains a "very considerable degree of control" over the manner in which the contractor provides services under the contract with the outsourcer. In order to determine whether a business or part of a business has been transferred as "a going concern" it would be necessary to examine the substance of the transfer and not the form thereof.

In essence, if the employees continue doing the jobs that they have always done, but report to and are paid by a new employer, there has been a transfer as a going concern. However in each case there must be an assessment of the facts when deciding on whether there was a transfer of business. One should not treat any one fact as conclusive in itself, but rather consider all the facts.

RELEVANT LEGISLATION

- Labour Relations Act 66 of 1995 as amended, s197 & 197A
- For information on retrenchments, see info sheet — *Retrenchments*
- For information on insolvency, see info sheet - *Insolvency*

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