



# **Transfer of Undertakings**

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- Council Directive 2001/23/EC codifies two earlier directives in a single instrument
  
- Transposed into Irish law by S.I. 131/2003
  - S.I. 306/1980 and 487/2000 now revoked

- Employees (Provision of Information and Consultation) Act, 2006
- S.21 of the Act transposes Art. 3(2) of Directive 2001/23, and imposes a duty on the transferor to supply employee liability information to transferee

- Applies to all employees working under a contract of employment
- Contract of Employment = a contract of service or apprenticeship
- Public servants (State, Government, HSE) are employees for the purposes of the regulations

# Agency Workers



- Do not automatically transfer
  
- Note definition of “employer”
  - “employer” means in relation to an employee, the person with whom the employee has entered into or for whom the employee works under...a contract of employment, subject to the qualification that the person who, under a contract of employment...is liable to pay the wages of the individual concerned in respect of the work or service concerned shall be deemed to be the individual’s employer

# Agency Workers



- Only if the agency worker is paid by the transferor is he deemed to be part of the undertaking
  
- However, note
  - S.13 Unfair Dismissals (Amendment) Act, 1993
  - Diageo Global Supply –v- Rooney (LCt)

# Purpose of Regulations



- The purpose of the Regulations:
  - Safeguarding the **rights of employees**
  - In the event of the **transfer of an undertaking**,  
business or part of a business
  - As a result of a **legal transfer**
  - Which involves a **change of employer**

# What is a “Transfer”?



- The basic definition of a transfer was set out by the European Court of Justice in the case of *Spijkers –v- Gebroeders Benedik Abbatoir* (1986)
- A transfer occurs upon the transfer of an undertaking from one employer to another of a **stable economic entity** which retains its identity

- Following factors must be considered:
  - Type of undertaking
  - Whether assets (tangible/intangible) are transferred
  - Whether employees are to be taken over
  - Whether customers transferred
  - Degree of similarity between activities carried on before and after transfer
  - Period, if any, of suspension of activities

# When has a transfer occurred?



- One must ask:
  - Is there a stable economic entity which retains its identity after the transfer?
  - Has the transfer given rise to a change in the identity of the entity?
  - Have all of the various factors set out in the Spijkers case been considered?

# What is an economic entity?



- An economic entity means an organised group of resources which has the objective of pursuing an economic activity whether or not that activity is for profit or whether it is central or ancillary to another economic or administrative entity
- See Reg 3(2)

# Legal Transfer + Change of Employer



- A *legal* transfer must have occurred
- This has been interpreted broadly by the courts
- Must a change of employer

# Sale of business assets



- The sale of business assets alone will not necessarily constitute a transfer
- See case of Doyle –v- Headen and McDonald t/a Midland Roofing and Crane Hire

# Doyle –v- Headen and McDonald



- Claimant was employed as a crane driver by Midland Roofing
- Crane not owned by Co, but leased
- Co wound up, Headen and McDonald formed partnership t/a Midland Roofing and Crane Hire to facilitate sale of crane
- Crane sold to a third party who also employed Claimant to operate it

# Doyle –v- Headen and McDonald (continued)



- Transaction 1: Co to partnership held to be a transfer by the EAT
- Transaction 2: Partnership to third party not a transfer, simply sale of an asset
- Therefore, Claimant not redundant after first transaction, but after the second
- Partners liable for redundancy

- Public and private undertakings covered, whether or not operating for gain
- Exception: administrative reorganisation of public administrative authorities

- Reg 6
- Regulations regarding transfer of rights do not apply where undertaking is the subject of bankruptcy or insolvency proceedings
- Exception - where the sole/main purpose of the proceedings is the evasion of an employer's obligation under the regs

# Scope – beyond Ireland



- The regulations do not apply cross border, either within the EEA, or beyond it
- However, Information and Consultation obligations still apply
- May be redundancy entitlements as a result

# Intra-Group Transfers



- The regulations *may* apply to an intra-group transfer
- E.g. where one subsidiary of a group transfers its business to another subsidiary of the same group

# Change of Contractor



- Sometimes referred to as “second generation contracting out”
- Very controversial in terms of whether the regs apply
- The transfer occurs between parties with no contractual nexus
- From the *Suzen* case, the ECJ appear to have adopted a strict approach

- “The mere loss of a service contract to a competitor cannot by itself indicate the existence of a transfer within the meaning of the Directive. In those circumstances, the service undertaking previously entrusted with the contract does not, on losing a customer, thereby cease fully to exist, and a business or part of a business belonging to it cannot be considered to have been transferred to the new awardee of the contract.”

# Implications of Suzen



- Not sufficient that there is a transfer of the right to carry on a business
- A transfer of “significant tangible or intangible assets” or a transfer of a “major part” of the employees must have taken place
- What assets are significant will depend on the nature of the business

# Application of *Suzen* in Ireland



- Cannon –v- Noonan Cleaning Ltd and CPS Cleaning Ltd (1998) ELR 212
- Powers and Ors –v- St Paul’s Nursing Home and T&M Cleaning Ltd (UD 611/1997)
- Digan –v- Sheehan Security Corporation Ltd (UD235/2003)

# *Cannon case*



- EAT held no transfer because
  - No tangible assets transferred
  - No employees were transferred

- St Paul's decided to contract out the cleaning work
- The transferee was "prepared" to take on the old employees but without recognising service or terms and conditions
- EAT held there was a transfer

# “Contracting in”



- Contracting in = bringing a previously outsourced function back in-house
- Legally speaking, there is little difference between contracting out arrangements and contracting in arrangements
- The Suzen principles appear to apply to both

# Employers' obligations



- Transfer in itself not grounds for dismissal
- Employment may be terminated where there are economic, technical or organisational reasons for doing so (redundancy may apply)

# Obligations on Employers



- Contracts of employment must be transferred
  - The transferee is obliged to maintain the employees' entitlements under their contract of employment
  - Failure to do so may result in a claim for constructive dismissal

- Pensions – Reg 4(3):
  - Regs do not apply to employees' rights to old age, invalidity or survivors benefits under supplementary company or inter-company pension schemes that do not fall within the Social Welfare Acts

- No general obligation on Transferee to transfer rights under or in connection with an occupational pension scheme from transferor in respect of future benefits
- Terms of Collective Agreements must be observed

# Employers' Obligations



- Employees' representatives must be informed at least 30 days before the Transfer of
  - The reasons for the transfer
  - The legal, economic and social implications for the employees
  - The measures envisaged for the employees with a view to reaching agreement
- Not necessary to provide full details of financial/legal agreement reached

- Rights Commissioner within 6 months
- In exceptional circumstances, this can be extended to 12 months
- Appeal to Employment Appeals Tribunal within 6 weeks

# Questions