12 Transfer of Business

INTRODUCTION

The transfer of a business may have a number of legal consequences for its employees. Some of these have been mentioned already. For example, an employee’s continuity of employment may be preserved if he is kept on by the new owner (Sch. 13 para. 17(2) – see page 17); if an offer of alternative employment is made by the transferee, the provisions of S.84 may come into operation via S.94 to exclude the employee from redundancy pay (Chapter 4).

The Transfer of Undertakings Regulations 1981 (S.1. 1981/1794) are the most recent addition to the statutory rules applicable when a business is transferred. They were introduced, somewhat unwillingly, by the UK in response to the threat of proceedings by the European Commission for failing to implement the EEC Directive 77/187 on ‘the approximation of the laws of member states relating to the safeguarding of employees’ rights in the event of transfers of undertakings’. This unwillingness is quite apparent from the sloppy drafting of the Regulations and the insistence on using EEC jargon rather than adapting the language of the Directive to UK law.

The Regulations did not repeal or amend the old law – apart from one or two very minor amendments which have no relevance to redundancy law. Thus S.94 and para. 17(2) still apply, with the Regulations sitting awkwardly on top.

This chapter covers the Regulations in greater detail, and explains exactly what is meant by a ‘transfer of a business’.

MEANING OF ‘TRANSFER OF BUSINESS’

Sch. 13 para. 17(2), which preserves continuity of employment when a business is transferred (see page 17), applies where a ‘trade or business or an undertaking . . . is transferred from one person to another’.

S.94, which brings into operation the rules explained in Chapter 4 concerning offers of alternative employment when a business is
transferred, applies where ‘a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a business . . . or part of such a business’.

The *Transfer of Undertakings Regulations* apply to a ‘transfer from one person to another of an undertaking . . . ’ (Reg. 3) taking place on or after 1st May 1982 (Regs 4 to 9 and Reg. 14) or 1st February 1982 (Regs 1 to 3 and Regs 10 to 13). ‘Undertaking’ includes ‘any trade or business but does not include any undertaking or part of an undertaking which is not in the nature of a commercial venture’ (Reg. 2). Such a transfer may be effected by more than one transaction. This, if the business assets are sold first, followed by a later sale of the ‘goodwill’, the two transactions may be regarded as a single transfer.

Despite the difference in wording, it has been held that S.94 and para. 17(2) cover the same circumstances. They are both part of the same scheme, so that, although an employee may lose his right to redundancy pay under S.94, he retains all rights that have accrued by virtue of his period of continuous employment with the former employer.

Probably, the Regulations will apply in the same circumstances as well. The EAT seemed to assume this was so in *Premier Motors v. Total Oil* ([1983] IRLR 471). There are, however, one or two minor differences. The Regulations cover the UK, whereas the EP(C)A covers only Great Britain. They also apply even if the transfer or the employment of those in the business to be transferred is covered by foreign law (Reg. 3(3)).

A distinction of rather more consequence is that the Regulations do not apply to the transfer of undertakings which are ‘not in the nature of a commercial venture’. What this phrase means precisely has yet to be decided by the Courts. It seems that the essential ingredients of a commercial venture are the intention to make a profit and the taking on of the risk of loss. If these are absent, the undertaking will probably not be an ‘undertaking’ for the purposes of the Regulations. This raises interesting questions in the case of ‘privatisation’ of nationalised industries which rely on government subsidies. Are they to be regarded as ‘commercial ventures’? Only time and case law will tell. Probably if they are intended to be run as ‘commercial ventures’ after the transfer, they could at least be described as ‘in the nature of’ a commercial venture, so that the Regulations will apply.

‘Transfer’ for these purposes means a change in the identity of the employer. Thus a business is not transferred merely because the