

## Chapter 10

# The transfer of a business

Employees' contracts of employment transfer automatically when a business is transferred as a going concern or where a business is transferred in a situation of insolvency.



In situations when a business is sold or transferred either as a going concern or because of insolvency, the Act seeks to:

- prevent job losses;
- ensure that employees' terms and conditions of employment remain the same.

## The transfer of a business as a going concern

### Automatic transfer of employment contracts

When a business is transferred as a going concern, the new employer takes over the employees' contracts of employment from the old employer. This happens automatically on transfer of the business unless there is an agreement to the contrary between the employers and the appropriate employee representatives.

An employee's continuity of employment is not interrupted by the transfer of the business. The new employer must employ the employees on terms and conditions which are on the whole not less favourable than those which employees enjoyed with the old employer. However, if the terms and conditions of employment of the transferred employees are determined by collective agreement, the collective agreement continues to apply. The purpose of this provision (with respect to employees who are not covered by a collective agreement) is to allow for flexibility in the total package provided by the new employer. For example a white collar employee may have received a cell allowance and a car allowance from the old employer, but with the new employer does not enjoy those allowances, but benefits from a housing subsidy instead. (This is a term of employment with the new employer which is on the whole "not less favourable".)

Employees who do not wish to transfer to the new employer may resign. They will not, however, be entitled to severance pay. If their new service conditions are substantially less favourable than their previous service conditions, they may resign and bring a claim for constructive dismissal.

### Agreements between the parties

The old employer must reach agreement with the new employer as to a valuation on the date of transfer of the transferring employees' -

- accrued leave pay;
- severance pay, had the employees been entitled to severance pay; and
- any other accrued entitlements (eg bonuses).

The agreement must also specify which employer is liable for paying these amounts and what provision has been made for the payment of those amounts.

For a period of 12 months after the date of transfer both the old employer and the new employer are liable to any employee who becomes entitled to a payment as a result of being dismissed for operational requirements or as a result of the employer's liquidation or sequestration.

### Obligations of the new employer

The old employer's obligations in respect of trade union organisational rights or recognition agreements are transferred to the new employer. This facilitates the continuity of collective bargaining.

Unless the parties agree otherwise the new employer is bound by any existing arbitration award or collective agreement.

The new employer becomes liable for any unfair dismissal, unfair labour practice or act of discrimination committed prior to the transfer by the old employer. These provisions place a burden on the new employer and the new employer should factor into the purchase price the potential financial costs of transferring employees on.

### Dismissals and transfers of businesses

An employee cannot be dismissed merely because a transfer takes place but an employee can be dismissed if the transfer creates operational requirements that justify dismissal.

A dismissal due to a transfer that cannot be justified in terms of operational requirements, is regarded as automatically unfair.

If an employee resigns because the new employer fails to provide employment conditions that are substantially as favourable as those provided by the old employer, then the employee may have a claim for a constructive dismissal.

## The transfer of contracts of employment in circumstances of insolvency

Prior to the amendments of this Act, employees' contracts of employment would automatically terminate when a business became insolvent. Employees often lost severance pay and did not have a right to be reinstated if the business revived. The Act deals with this problem by providing that when a business becomes insolvent and a scheme of arrangement is entered into to avoid the winding-up or sequestration of the business, employees' contracts of employment transfer from the old employer to the new.

The new employer is automatically substituted in the place of the old employer but all the rights and obligations between the old employer and its employee at the time of transfer remain with the old employer. This is in contrast to when a business that is not insolvent is transferred.

When an employer is facing financial problems that may result in the business becoming wound up or sequestered, the employer must advise the employee representatives of that fact. An employer who applies to be wound up or sequestered must provide the employee representatives with a copy of the application.

### Further information

#### Relevant sections in the Act

Section 185	Right not to be unfairly dismissed or subjected to unfair labour practice
Section 186	Meaning of dismissal and unfair labour practice
Section 187	Automatically unfair dismissals
Section 189	Dismissals based on operational requirements
Section 191	Disputes about unfair dismissals and unfair labour practices
Section 197 and 197A	Transfer of contract of employment
Section 197B	Disclosure of information concerning insolvency

#### Forms to fill in

Form 7.11	Referring a dispute to the CCMA for conciliation
Form 7.13	Request for arbitration