TERMINATION OF EMPLOYMENT UPON CHANGE IN OWNERSHIP OF BUSINESS

Once upon a time an employee enjoyed the freedom to enter into a contract of employment with an employer of his choice. The common law declared that should there be a change of employer, an employee's service could not be transferred to the new employer without his consent.[1] If an employee could not exercise this freedom of choice his status would be relegated to that of a slave. However, the judicial pronouncement which championed the rights of employees as human beings to choose for whom they wished to labour was found to eventually work against them. Freedom of contract works both ways: while an employee may decide to continue to work for the new employer, the new employer may decide to exercise his right not to employ him.

Therefore, where contract fails, legislation succeeds (or at least *hopes* to succeed). In Malaysia legislation takes the form of the Employment (Termination and Lay-Off Benefits) Regulations, 1980.[2] The Regulations place a duty on the employer to pay termination benefits to an employee whose contract of service has been terminated. As a prerequisite to the payment however, the Regulations require that such an employee be employed under "a continuous contract of service"[3] for a period of not less than 12 months ending with the "relevant date".[4] Regulation 4 of the Regulations lists out the excepted circumstances under which termination benefits would not be payable. One of them concerns the renewal or re-engagement of the employee by the same employer under a new contract of service on terms and conditions which are not less favourable than the employee's old contract of service.[5] However,

[1] *Nokes* v *Doncaster Amalgamated Collieries* [1940] AC 1014, HL.
[2] PU (A) 338 of 1983, hereinafter referred to as "the Regulations".
[3] *Ibid*, reg 2: "continuous contract of service" means uninterrupted service with an employer, including service which may be interrupted on account of sickness, authorized leave, an accident, a strike which is not illegal, a lockout or a cessation of work which is not due to any fault on the part of the employer.
[4] *Ibid*, reg 2: "relevant date" means (a) in relation to termination, the date with effect from which the contract of service of an employee is terminated.
[5] PU (A) 338 of 1983, reg 4(2).

the renewal or re-engagement must be effected immediately on the ending of an employee's employment under the previous contract. An employee is also not entitled to any termination benefit if, not less than seven days before the date with effect from which his services are to be terminated, the employer has offered to renew his contract of service or to re-engage him under a new contract whose terms would not be less favourable than the old contract and the employee has *unreasonably refused* the offer.[6]

Regulation 6 is the quantifying provision which lays down the formula for calculating the amount of termination benefits payable to an employee. The amount is dependent upon the number of years of an employee's *continuous* service with the employer. Change in the ownership of a business is governed by regulation 8, which is similar to section 13 of the Redundancy Payments Act, 1965 of England. In examining the legal questions and problems involved in this issue, a reference will first be made to the English position and the Malaysian position will then be set out for comparison and analysis.

The Redundancy Payments Act, 1965 (England)

Section 13 of the Redundancy Payments Act, 1965 (herein after referred to as "the Act") provides as follows:-

> 13(1) the provisions of this section have effect where —
>
> (a) a change occurs (whether by virtue of a sale or other disposition or by operation of law in the ownership of a business for the purposes of which a person is employed, or of a part of such a business, and
>
> (b) in connection with that change the person by whom the employee is employed immediately before the change occurs (in this section referred to as the previous owner) terminates the employee's contract of employment, whether by notice or without notice.
>
> (2) If, by agreement with the employee, the person who immediately after the change occurs is the owner of the business or of the part of the business in question, as the case may be (in this section

[6] *Ibid*, reg 4(3), emphasis added.

> referred to as 'the new owner') renews the employee's contract of employment (with the substitution of the new owner for the previous owner) or re-engages him under a new contract of employment, s 3(2) of this Act shall have effect as if the renewal or re-engagement had been a renewal or re-engagement by the pervious owner (without any substitution of the new owner or the previous owner)."

Section 3(2) of the Act is similar to regulation 4 of the Regulations in that it sets out several excepted circumstances for which no redundancy payments are payable. One of the exceptions concern the renewal or re-engagement of an employee by the same employer under a contract of employment whose terms and conditions are not less favourable than those under the old contract (there is a similar exception in the Malaysian Regulations in regulation 4(2)).

From the above provision, the position in England can be summarised as follows:

(i) The change in ownership of business would not, by itself, cause the termination of an employee's contract of employment with his employer. The law does not provide that such a change should cause an employee's contract of employment to be "deemed to be terminated". It is for the employer to terminate his employee's service, either with or without notice, if he feels that service is no longer required.

(ii) However, should the new owners require the services of the employee, and the employee has agreed to so provide his services for the new owners, the law provides that the employee is to be treated as if he had been re-engaged or that his contract of employment had been renewed *by the previous owner*. The effect is that the employee automatically falls within one of the classes of exceptions for which no redundancy payments are payable. The result is that the employee's contract of employment is continued under the new owners as if no change had ever taken place. Thus, the law preserves continuity of employment in a situation where, but for the law, such a continuity would surely have been called in question. As Lord Fraser of Tully-belton clearly explained:

> "S 13 of the 1965 Act provides that S 3(2) shall apply in a similar

way, *mutatis mutandis*, where a change occurs in the ownership of a business or of a part of a business, and the new owner renews the employee's contract of employment on terms not less favourable than he had before. The employee is then not to be taken to be dismissed, and he is accordingly not entitled to a redundancy payment from his previous employer, but his period of employment with the previous employer is so to speak carried forward and counts as a period of employment with the new employer, and the change of employment does not break the continuity of his period of employment."[7]

Therefore, when a change in ownership of a business occurs, but an employee continues to be employed by the new owners, such an employee would not be eligible for redundancy payments from the previous owner as his period of employment is continued under the new owners. In *Dallow Industrial Properties Ltd* v *Else*,[8] E had been employed by J Ltd since 1936, and C had been employed by them since 1933. In 1962, J Ltd transferred their business of manufacturing stoves to Bristol and their premises at Luton were put up for sale, pending which J Ltd used the premises for the storage of stoves manufactured by them, E being employed as a maintenance worker and C as a security officer. In 1964 the premises were sold to the appellants who carried on no manufacturing business but who bought the premises in order to convert them into 15 factory units to be leased to manufacturers. Soon after the sale, builders began to convert the premises. E and C were given notice to terminate their employment with the appellants 101 weeks after the appellants had bought the premises. E and C claimed redundancy payments from the appellants alleging that the sale of the premises by J Ltd to the appellants was a transfer of a trade, business or undertaking so that the period of employment of E and C with J Ltd could be added to their period of employment with the appellants, thus bringing them within the 104 weeks requisite period under section 8(1) of the Act of 1965.[9]

Lord Justice Diplock (as he then was) delivered the judgment of the Court. He held that J Ltd did not transfer to the appellants any part of their trade, which was that of manufacturing stoves which was run by them as a separate and self-contained part of

[7] *Melon & Ors* v *Hector Powe Ltd* [1980] IRLR 477, 478 (IIL).
[8] [1967] 2 All ER 30.
[9] 104 weeks was the requisite period under the previous provision of the Act of 1965.

their operations in which assets, stock-in-trade and the like were engaged; all that they did was to sell to the appellants some real property which had been used for the purposes of their trade and which the appellants were using for the purposes of an entirely different business, namely, the management and disposition of factory premises. Therefore, there was merely, in essence, a transfer of assets and as such the transaction did not come within the purview of section 13 of the Act, the result being that the continuity of E and C's employment with J Ltd was broken by the transfer, and therefore E and C could not take into account the number of years of service which they had put in with J Ltd for the purposes of obtaining redundancy payments from their new employer, the appellants. Lord Justice Diplock opined:

> "In order to come within S 13(1) there must be a change of ownership, not merely in an asset of a business as in this case, but a change of ownership in the combination of operations carried on by the trader or by the non-trading body of persons, and there can only be a change of ownership in a business or part of a business ... if what is transferred is a separate and self-contained part of the operations of the transferor in which assets, stock in trade and the like are engaged."[10]

One thing is clear, therefore, regarding the scheme of section 13 of the Act: it is primarily designed to preserve continuity of employment during a change in ownership of business. Therefore, if an employee is subsequently employed by the new owners, he cannot argue that he should be taken to have been dismissed by the previous owners as a result of the change and claim the benefits proferred under the Act from them.

As to what would constitute a "change in the ownership of business", English cases seem to suggest that there must be a sale or a transfer of the business as a going concern.[11] A point of particular importance, not to mention difficulty, concerns the change in ownership of companies via share acquisition deals in which the entire shareholding of a company is bought over by another company or person. The English position on this point

[10] At p 33.
[11] See *Dallow Industrial Properties Ltd* v *Else*, above; also *Melon & Ors* v *Hector Powe Ltd* [1980] IRLR 477; *HA Rencoule (Joiners and Shopfitters Ltd* v *Hunt* (1967) 2 ITR 475.

can be considered as settled: such a change would not constitute "a change in the ownership of business" envisaged by the Act. In *Cameron* v *Hector Finlayson & Co Ltd,*[12] the share capital of the respondent company was sold but the company continued in business and the applicant remained in its employment after the sale. The Industrial Tribunal decided that although the share capital of the company was acquired by another firm, the company still survived and carried on business. There was, therefore, no *legal change* of ownership of the business and section 13 did not apply. The applicant was treated as having voluntarily transferred to work at the respondent company's new premises, and as such, his continuity of employment had not been broken, and in the event of his subsequently being dismissed as redundant, his whole service with the respondent company would be considered. The word "ownership" was therefore not given a literal interpretation by the Court, in the sense of determining who actually runs the Company behind the scenes. In the circumstances, it was unnecessary to do so as the Court had decided that there was no change of whatever nature.

In England, the Redundancy Payments Act, 1968 is now superseded by the Employment Protection (Consolidation Act), 1978 (EPCA). However, due to a Directive from the European Community, (EEC Directive 77/187) Parliament has enacted the Transfer of Undertakings (Protection of Employment) Regulations, 1981. Both statutes co-exist, as the Regulations do not "repeal or explicitly modify any of the relevant provisions of EPCA 1978. As a result there remains some uncertainty as to the relation between the new Regulations and the previous provisions on continuity of employment and redundancy payments on the transfer of a business."[13] However, these new legislations do not materially alter the previous position in England regarding continuity of employment during a change or transfer of a business. However, the Transfer of Undertakings (Protection of Employment) Regulations 1981 is much broader in scope, in that it creates a duty to inform and consult with any recognised Trade Union about an impending business transfer and it has various other provisions designed to protect

[12][1967] 2 ITR 110.
[13]Bourn, Colin, *Redundancy Law & Practice*, 1983 edn, Bworths, p172, para 9.3.

the rights and interests of affected employees via their Unions in cases affecting a transfer of undertaking.[14]

Employment (Termination and Lay-Off Benefits) Regulations, 1980 (Malaysia) prior to *Kumpulan Kamuning*

The relevant provisions of this Regulation have already been outlined in the introduction to this article. Emphasis will be placed here on regulation 8(1). The old regulation 8(1), concerning a change in ownership of business, provided as follows:

"8(1) where a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a business for the purposes of which an employee is employed or of a part of such business, the contract of service of the employee shall be deemed to have been terminated unless -

(a) within seven days of the change of ownership, the person by whom the business is taken over immediately after the change occurs, offers to renew the contract of service of the employee or to continue to employ the employee under the terms and conditions of employment which are not less favourable than those under which the employee was employed before the change occurs; and

(b) the employee accepts such offer."

The difference between the above provision and section 13(1) of the English Act is evident. Under the Regulations, an employee's contract of service is *deemed to be terminated* upon a change in the ownership of a business if there is no offer of continued employment. However, under the English statute the change in ownership of a business by itself would not occasion the termination of an employee's contract of service with his old employer. It is for the employer to terminate his employee's contract of service if such service is not required under the new employer.

If the employee accepts the offer of continued employment with the new employer, his contract of employment is not terminated by the change. Regulation 8(3) states the effect of such an acceptance

[14]For further reading, please refer Bourn, Colin, *ibid*, Chap 9; Collins, Hugh, "Dismissals on Transfer of a Business", The Industrial Law Journal, Vol 15, No 4 (Dec 1986), p 244; Smith & Wood, *Industrial Law*, 3rd edn (1986), Bwoths, p 336."

as continuing the employee's period of employment under the old employer with the new employer, and that such a "change of employer shall not constitute a break in the continuity of the period of his employment." The position under the English Statute is clearer; it deems the acceptance of such an offer of continued employment as a renewal or re-engagement of the employee's service by the *previous owner*. Therefore the employee's case falls automatically under one of the exceptions for which redundancy payments are not payable. The Malaysian position should, logically, be similarly interpreted, that is, an acceptance of an offer of continued employment would not occasion the payment of any termination benefits as the employee's contract of employment is not broken and his period of employment is supposed to be continuous. This is further fortified by the fact that under regulation 8(1) it is clearly stated that if the employee accepts the offer of continued employment his contract of service shall not be deemed to be terminated.

One problem however, had arisen under the Malaysian Regulations. Since regulation 8(1) gave the employee the right to either accept or reject an offer of continued employment, an employee may "abuse" this right by at first rejecting the offer of employment and receiving termination benefits from his old employer and subsequently entering the employment of the new employer. This was precisely what happened in the case of *Kumpulan Kamuning Sdn Bhd* v *Rajoo & Ors.*[15] The respondents were rubber estate workers employed by the appellant company. The appellant sold part of its estates to the National Land Finance Cooperative Society Ltd (NLF). The respondents kept themselves out of work for two months but later took up employment with NLF as new employees. They claimed termination benefits from the appellant company. The appellant tried to argue that by refusing the offer of continued employment the respondents had acted unreasonably in that they purposely kept themselves out of work for two months though they continued to live in the estate quarters throughout and then they took up employment with NLF as new employees.

> "As such they had manoeuvred themselves into a position whereby they rejected continuity of service in preference to termination of service

[15][1983] 2 MLJ 200.

for the sole purpose of claiming termination benefits - a result which the appellants alleged was never intended by the legislature."[16]

The Federal Court (as it then was) rejected the appellant's argument:

"... on a proper construction of regulation 8, the respondents had absolute choice whether to accept or refuse the offer made by NLF for continued service without assigning any reason."[17]

Further, his Lordship stated that since the words used in regulation 8 are not ambiguous, the strict and literal approach should be adopted. Therefore, unless the omission of the "unreasonableness" element in regulation 8 could be shown by the appellants to give rise to an absurd an unjust situation, the court would not read anything more into the regulations.[18]

As a result of the decision in *Kumpulan Kamuning*, regulation 8(1) has been amended, and the amendment, hereinafter referred to as the "new regulation 8(1)", and its implications will be discussed below.

The Employment (Termination and Lay-Off Benefits) Regulations 1980, after *Kumpulan Kamuning*

The new regulation 8(1) reads as follows:

"8(1) where a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a business for the purposes of which an employee is employed or of part of such business, the employee shall not be entitled to any termination benefits payable under these Regulations, if within seven days of the change of ownership, the person by whom the business is to be taken over immediately after the change occurs, offers to continue to employ the employee under terms and conditions of employment not less favourable than those under which the employee was employed before the change occurs and the employee unreasonably refuses the offer."

Regulation 8(1) is now peculiarly drafted in the negative: termination benefits are *not* payable to employees who *unreasonably* refuse

[16]At p 401.
[17]Per Mohamed Azmi FJ, at p 403.
[18]At p 404.

an offer of continued employment. It should follow therefore that benefits would be payable to employees who refuse reasonably. What would constitute a reasonable or unreasonable refusal has yet to be decided by the Malaysian courts at the time of writing.

The EPCA 1978, which replaces the English Act of 1965 contains a provision quite similar to the present regulation 8(1). It provides that in cases of change in ownership of business, if the new employer offers to renew the employee's contract upon terms and conditions which are not less favourable than the old contract or re-engage him in suitable employment, the employee cannot unreasonably refuse the offer. If he does, he may be ineligible for a redundancy payment from the old employer, and if he accepts, there is deemed to be no dismissal so that he cannot claim a payment from the old employer.[19] Therefore, like the position under the new regulation 8(1), an employee's discretion is restricted by the reasonableness element.

Although there is a difference in drafting, the effect of a change in ownership of a business on an employee's contract of employment remains basically the same. The three paragraphs of regulation 8 talks of:

(i) Unreasonable refusal, the result being no termination benefits payable;

(ii) No offer of continued employment, the result being the employee's contract of service is deemed to be terminated; and,

(iii) Offer of continued employment, the result being continuation of employee's period of service under new employer so that the change in employers would not constitute a break in the continuity of his employment.

It can be seen that the only modification made to the old regulation 8 is the addition of paragraph (i) regarding the requirement of a reasonable refusal. Apart from that, the effect of the new regulation 8 is substantively similar to the old regulation 8: when there is no offer of continued employment, an employee's contract of service is deemed to be terminated; when there is an offer of

[19]EPCA, 1978, section 94, read together with sections 82(5) and 84(1).

continued employment, an employee's service continues under the new employer as if there had not been a break in the continuity of his employment by the change.

"Change in ownership of business" under regulation 8(1)

What exactly is the meaning of that phrase? When the owner of a company sells off his entire shareholding in that company to another company or owner, has a "change in ownership of business" taken place?

In *Associated Motor Industries (M) Sdn Bhd* v *Thangaraju A/L Poomie,*[20] the appellant, a limited company, was in the business of assembling motor vehicles. All its shares were bought and owned by another limited company, Wearne Brothers. Subsequently, Wearnes sold its entire shareholding in the appellant company to Ford Motor Company. The respondent, an employee of the appellants before the takeover by Ford, alleged that he was no longer bound to serve the appellant as a result of the takeover. He contended that by the sale, the appellant had terminated his services within the meaning of the old regulation 8(1) of the Regulations and he was therefore entitled to termination benefits. He further alleged that the sale had effected to change the ownership of the business from Wearnes to Ford which struck at the root of the definition itself.

Judgment of the High Court was delivered by Justice Razak, in favour of the respondents. Regarding the meaning of the words "change in ownership of business", the learned Judge stated:

> "Going by the plain words, the sentence mean that to be actionable the change must be not necessarily of the business although it may be so, but of the *ownership* of the business itself. In other words, once the owner of a company has changed from one to another then there has under the definition been a change of ownership, regardless of the fact that the business had not changed."

In this case, in order to see who was the owner of the business, the veil of incorporation had to be lifted to see who was "pulling the strings" behind the appellant company, and it was found that

[20]Originating Motion No A44 of 1982 (unreported).

as a result of the sale of shares, the ownership of the appellant company had passed from Wearnes to Ford. The learned Judge felt that a literal interpretation of the word "ownership" had to be resorted to due to what he felt was the intention of the legislature in drafting the then regulation 8(1) which gave to the employee an "unfettered discretion to elect whether he likes to serve a new employer or not, regardless of the terms of the employment." The learned Judge stated:

> "Regulation 8 provides that the employee, may, nevertheless get paid for leaving, eventhough he rejects the new employer's terms, which are not less favourable than before under his old employer and although he does not have to give any reason for his rejection. Clearly, the regulation mean to say that if he did not like to work under the new employer, for reasons best known to him, then he was at liberty to do so. In such an event, he was deemed to have been terminated, although there is actually no termination in the true sense of the word ... the legislature felt he should not be compelled to do so unless he wanted to. I suppose it felt that compulsion does not keep to achieve industrial peace and harmony between the employer and the employee but would only seek to undermine it instead."

Going by the provision in the old regulation 8(1) one could say that Justice Razak was right in interpreting that provision the way he did. As the learned Judge correctly pointed out, although there is a similarity between regulation 8(1) and section 13 of the English Act, the provisions are not the same and English authorities should be viewed with caution. With the "unfettered discretion" conferred upon employees to elect whether to serve a new employer or not, the determination of "who is the owner" of the business becomes a crucial exercise. The word "ownership" is important, because when the owners change, it affects the employee's future in the business - it would automatically terminate their contracts of employment or, for those employees who have been offered continued employment, they have to decide whether to accept or reject such offer, and in exercising this right the question of "who ultimately wields power" in the business could be an important factor from their point of view -

> "... because in the final analysis, it is that person who is going to say whether an employee is to be dismissed or not, what the future holds in store for the employee, good or bad ... that person has to be the

owner of the business, because it is obvious it is he alone who can wield the power of the employer."[21]

With regulation 8(1) as it stands now, especially with the withdrawal of the employee's "unfettered discretion", the question arises whether Justice Razak's method of interpretation would still hold true. It was put to the test in the case of *Abdul Aziz b Atan & 87 Ors* v *Ladang Rengo Malay Estate Sdn Bhd*[22] All the shareholders of the respondent company by a written agreement sold and transferred their entire shareholding to a certain buyer. The company carried on the business of a rubber and oil plam estate. The employees of the company applied for termination benefits. The question before the Court was whether there was a change in ownership of business by virtue of the sale of shares.

In the High Court, Justice Shanker decided that the mere sale of shares did not constitute the kind of "change" as envisaged by regulation 8(1):-

> "Eventhough the said shares had changed hands here, the fact remains that the company is still the owner of the Estate, that is, there is no change in the ownership of the business ... The focal point of Regulation 8 is the word "change" ... The Regulation require a metamorphosis not only in the ownership of a business but also in the business for the purposes of which an employee is employed."[23]

In this regard, the learned Judge said the regulation is similar to section 13(1) of the English Redundancy Payments Act, 1965. Therefore, English cases could be used as guidance in the determination of what would constitute a change in the ownership of business. The High Court's decision was upheld by the Supreme Court.[24]

It is easy to jump to the conclusion that the learned Judge had not placed enough emphasis on the word "ownership", and that he should have lifted the corporate veil to see who actually runs the company. The word "change" cannot be viewed in isolation, as the regulation does not talk about any kind of change but a change "in the ownership of a business." However, the High Court's decision can be supported on the following basis, that is, the learned

[21]Per Justice Razak.
[22][1985] 2 MLJ 165.
[23]At p 167.
[24][1986] 2 MLJ 98.

judge's interpretation does not adversely affect the employee. The learned Judge decided that the sale or transfer of shares did not constitute any "change" at all, as the legal corporate entity continues to be the same. Therefore, if the employees continued in service under the new owners, this did not mean that their services with the old owners had been terminated. They could be said to have voluntarily transferred their services to the new owners.[25] There being no change of whatever nature, the employee's continuity of employment is not affected, and should they be subsequently dismissed by the new owners, they would be entitled to take into account their years of service with the old owners for purposes of claiming termination benefits from the new owners.

Secondly, there is perhaps a lot of wisdom behind the English decisions which have interpreted section 13 of the English Redundancy Payments Act as excluding from its purview changes in ownership of business via share transfers. In the context of today's brisk financial and economic activity, shares change hands and owners of companies change hands very frequently. It would indeed be a very cumbersome exercise to put both the employer and employee in a constant state of making offers of continued employment and accepting responses thereto, especially when they both could continue in peaceful industry under the aegis of one and the same corporate entity.

It could therefore be the purpose behind the statute that such changes via share transfers be excluded. The "change" therefore must be a change of a substantive nature, that is, a legal change. Perhaps the drafters should clarify the situation by removing from Regulation 8(i) the word "ownership", because in case of a company, one cannot help but lift the corporate veil in order to ascertain who the owners of the company are. If the legislature does not intend for the c.orporate veil to be lifted in this case (as perhaps it is wiser that it should not) then the legislature should express itself in a manner more consonant with its real intention.

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[25]See *Dallow Industrial Properties Ltd* v *Else*, *supra*.