

Chapter 19: Transfer of undertakings

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1. Would you devise a legal regime that seeks to protect employees by preserving their continuity of employment on the transfer of a business?

Author's answer: The alternative would be to reassert the common law position, i.e. to re-embed the personal non-transferable nature of the employment contract. Although this recognises and protects the liberty of the parties to choose with whom they contract i.e. *delectus personae*, in effect it is a double-edged sword for the employee, since it would also enable the employer to offload labour simply by transferring its business and assets to an associated legal vehicle. Since the associated vehicle would constitute a separate employer, the continuity of employment of the employee would be severed and he/she could be dismissed without recourse to the protections in the unfair dismissal regime in Part X of the Employment Rights Act 1996. The employer could arrange this quite easily by hiving off its business and assets into a new company it incorporates specifically for that purpose. Hence, in the absence of the preservation of the continuity of an employee's employment in the guise of the Transfer of Undertakings (Protection of Employment) Regulations 2006, the legal position would be too readily open to abuse.

2. If so, on what basis or bases would you justify the introduction of such a regime and what would it look like?

Author's answer: The main ground for the justification of the approach in TUPE that treats the personal employment contract as transferable is worker protection. This is the basic notion that workers should be protected from unscrupulous transferees who are simply buying businesses to offload labour. For example, imagine the situation if TUPE did not exist to provide such protection. In such a case, the transferor/employer could simply incorporate a new company ("Newco") and sell the business to Newco. If Newco decided not to take on the workers, it could simply communicate to them that they were not being transferred and taken on. The fundamental point is that Newco would not need to dismiss them, as the common law rule that the employment contract is personal and non-transferable would quite simply operate to sever the employment contract as soon as the business was transferred from the transferor to Newco. As such, if Newco as the transferee does not take them on, the workers would have no unfair dismissal protection or statutory redundancy rights. The end result is that the transferor and Newco will save themselves considerable sums that they would ordinarily have to pay to the non-transferred workers.