A LOOK AT LABOUR LAW IN THE CONTEXT OF TRANSFERS OF UNDERTAKINGS

BY

RONNIE EKLUND

© Stockholm Institute for Scandianvian Law 1957-2009

1. INTRODUCTORY REMARKS

The sale of an enterprise is a frequent occurrence in modern industrial life.[1] The acquisition rate in Swedish industry has been high since the sixties. For example, 681 larger acquisitions were registered in 1981. However, a peak was reached in 1975 when 828 acquisitions took place. The number of employees in the acquired businesses in 1981 was 64 877. Only those acquisitions in which at least one of the companies had a turnover of 10 million SEK are accounted for in official statistics.[2] No data are collected as to sales of smaller businesses.

It is commonplace that if a business is sold the statutory framework in industrialized countries does strike a balance between competing forces and interests. Usually, general principles of law of contracts and obligations, rooted in a liberal tradition, do not furnish enough protection to the assumed weaker party—namely the acquired enterprise employees.

The purpose of this paper is to outline a few devices used, provided for either by statute or in case law, the aim of which is to give the said employees some protection in case a business is sold. No doubt there are many such devices in both collective labour law and individual labour law, but I will be concentrating on the contract of employment aspect and so the following questions are pertinent to the subject:

- What is the acquiring enterprise entitled or obliged to do?
- What is the legal position of the acquired enterprise employees? May they claim continued employment? What acquired rights are safeguarded in case employment continues?

[1] A transfer of an undertaking will encompass more than a sale of a business, for example a merger, lease. See in general, Ronnie Eklund, *Anställningsförhållandet vid företagsöverlåtelser*, Stockholm 1983, pp. 48 ff. However, if a cafeteria business is taken over by another entrepreneur in open bidding (a sort of subcontracting), and the change of employers is the choice of a third party, this is not deemed a transfer in Swedish labour law according to Labour Court judgment (henceforth AD) 1978 no. 153. There has to be a nexus established between the acquired enterprise and the acquiring enterprise employers involved in a transfer in the strict legal sense to make the Swedish labour law provisions applicable to a transfer of a business. See also, Eklund, *op. cit.*, pp. 76 ff. A transfer of shares is not touched upon at all in what follows, since it does not imply a change of employer as such.

[2] Data from *SPK* (*Statens pris- och kartellnämnd*). *Fusioner inom svenskt näringsliv*. SPK:s utredningsserie 1983: 1. Recently published statistics reveal that another peak in the acquisition rate was reached in 1982. 851 acquisitions were registered and the number of employees in the businesses acquired was 49 366. Source: *SPK. Tabeller. Antal förvärv inom olika näringsgrenar 1980, 1981 och 1982 och antal anställda i uppköpta företag året före förvärvet.*

© Stockholm Institute for Scandianvian Law 1957-2009

What I intend to do is to describe seven legal models any one of which covers some or several aspects of the acquisition issue viewed from the contract of employment point of view. The task requires a terminology. Therefore, the legal models are denoted as follows: 1. The individual model. 2. The divided individual model. 3. The substitute model. 4. The underlying assumptions model. 5. The voluntary substitute model. 6. The acquired rights model, and 7. The preferential hiring model.

The legal solutions depicted are either mutual, or one-sided. A mutual model requires equally much (or little) from both parties (acquiring enterprise and acquired enterprise employees). A one-sided model requires only something from one of the parties. Most of the models deal with the issue of a duty to contract, that is, whether there is a *legally binding contract* of employment in force between the acquiring enterprise and the employee of the acquired enterprise the day after the transfer of a business has occurred. Another model is only concerned with the *content* of such a contract, provided a contract comes about.

Of course, the background is factual. The different legal models are from Denmark, England, Finland, Sweden, Western Germany and the Common Market. Details are left out.

Though these models do mirror various legal systems, the reader is free to consider even more variants. Other combinations than those described are feasible, and, above all, other legal models might be conceived of.

2. THE INDIVIDUAL MODEL

Such a model requires nothing from either of the parties. The acquiring enterprise and the acquired enterprise emplyees are free to contract, or not to contract. Thus, this is a pure illustration of a freedom of contract theory in the Western liberal tradition. It is pertinent to choose England as an example. The individual model prevailed in England up to 1982, when the Transfer of Undertakings (Protection of Employment) Regulations 1981 (*infra* at 4.4) reversed established English doctrines.

The pillar of English labour law is the individual contract of employment. It has been deemed that none of the parties is entitled to replace himself without the consent of the other. Therefore, if a business is sold the identity of the employer has been of decisive importance.[3] The most cited landmark decision is *Nokes* v. *Doncaster Amalgamated Collieries Ltd.*[4]

[3] See, for example, K. W. Wedderburn, *The Worker and the Law*, 2nd ed. Harmondsworth 1971, p. 15, P. L. Davies, "Mergers and Other Changes in Structure or Control of Enterprises and Their Effects upon Workers" (British report), *Actes du VIIIème Congrès International de Droit du Travail et de la Securité Sociale*, Milan 1977, p. 886.

[4] [1940] 3 All E.R. 549. Quoted from p. 556 (Lord Atkin), p. 555 (Viscount Simon). Taking

© Stockholm Institute for Scandianvian Law 1957-2009

> A coal-miner, Nokes, had worked at the colliery of a certain company. At some time that company was merged with Doncaster Amalgamated Collieries, Ltd. Nokes knew nothing about it. One day he absented himself from work. The company sued Nokes and claimed a sum of damages for breach of contract. Nokes contended, *inter alia*, that no contract of service existed between him and the respondent company, and argued that a prior court decision under the Companies Act, 1929, sec. 154, as to the merger could not effect a transfer of a contract of personal service, which by law was incapable of assignment. The House of Lords (4 to 1) agreed. In a lengthy, and emotionally expressed opinion Lord Atkin held, *inter alia*: "I confess it appears to me astonishing that, apart from overriding questions of public welfare, power should be given to a court or to anyone else to transfer a man without his knowledge, and possibly against his will, from the service of one person to the service of another. I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve, and that this right of choice constituted the main difference between a servant and a serf." Viscount Simon added: "I do not see why there should be any great practical difficulty in the old company announcing to its workpeople that the undertaking is about to be transferred to a new company, giving the necessary notice to terminate existing engagements, and informing the wage-earners that the new company is prepared to re-engage them on the same terms, and that continuing service after such a date will be taken as acceptance of the new offer."

The rule of the *Nokes* case has been that one employer cannot assign the benefit of a contract of employment—the claim for work—to another without the consent of the employee concerned.[5] There is equally scant support for a transfer from one employer to another of obligations, for example, to pay wages, if a business is sold.[6] In legal writing it has been held that the negative protection afforded Nokes is dearly bought.[7]

The English redundancy payments system as set up in the Employment Protection (Consolidation) Act 1978 (formerly Redundancy Payments Act 1965) provides a good example, and demonstrates the inherent logic of an individual model.

This system provides that an employee who has been continuously employed for a requisite period—2 years, is entitled to a sum of money, called a redundancy payment, if the employer dismisses the employee for reason of redundancy, for example, when the employer ceases to carry on his business.[8]

into consideration the 1981 Regulations, the *Nokes* case is no longer regarded as the leading one. See Paul Davies and Mark Freedland, "Transfer of Undertakings (Protection of Employment) Regulations 1981", *Encyclopedia of Labour Relations Law* (P. O'Higgins and B. A. Hepple, eds.), London 1982, para. 2-2095.

[5] See, for example, P. L. Davies, *The Regulation of Takeovers and Mergers*, London 1976, p. 97.

[6] See, for example, Roger W. Rideout, *Principles of Labour Law*, London 1972, ch. 4 at note 19, M. R. Freedland, *The Contract of Employment*, Oxford 1976, p. 352.

[7] In particular M. R. Freedland, *op. cit.*, pp. 355 ff., Otto Kahn-Freund, "Company Amalgamations. Contract of Employment", *M.L.R.* 1940, pp. 221 ff. (in a contemporary note), Bob Hepple, "Worker's Rights in Mergers and Takeovers. The EEC Proposals", *I.L.J.* 1976, p. 202.

[8] EPCA sec. 81.

© Stockholm Institute for Scandianvian Law 1957-2009

And this is just about what happens—for technical legal reasons—in case a business is sold. However, there is an important caveat provided for in the Act if the acquiring enterprise offers to re-engage the employee.[9] If that offer constitutes an offer of suitable employment and the employee refuses such an offer, he loses his claim for redundancy payments from his former employer. And in considering whether such a refusal is unreasonable, no account shall be taken of the substitution of one owner of the business for another.[10]

This is an attempt to deemphasize the importance of the legal attachment to a single employer, and is certainly an encroachment upon the employee's freedom to choose his own employer.[11] The employee is put under economic pressure to accept a *bona fide* offer of re-engagement.[12]

On the other hand, if continued employment is provided, the employee may count the time he was employed by the acquired enterprise in calculating future redundancy payments, if such an exigency arises.[13] The latter device is a good illustration of the acquired rights model.

It could also be added that the individual model has long been upheld in the most ardent manner in Swedish labour law relating to transfers of undertakings.[14]

The individual model as here outlined is mutual, it requires equally much (or little) from either party. In the next section I will turn to a variant of the individual model.

3. THE DIVIDED INDIVIDUAL MODEL

The domicile of this model is Western Germany before 1972. The model is one-sided and the focus is upon the acquired enterprise employee. The major question was:

- Is he under an obligation to perform work for another employer—the acquiring enterprise?

Two other questions were also raised. First: Could the contract of employment be transferred to another party as a whole? Second: Had the acquiring enterprise a right to

[9] EPCA sec. 94.
[10] EPCA sec. 94 (4).
[11] See, for example, M. R. Freedland, *op. cit.*, p. 365, P. L. Davies, *supra* note 5, p. 100.
[12] Cf. the Swedish Employment Protection Act 1972, as amended 1982, sec. 13. According to a general provision it is held that if an employer is dismissing an employee he is allowed to deduct wages that the employee had, or could have earned in some other employment that is considered to be suitable during the pending period of notice. However, the employee is not obliged to accept employment for a limited period only (AD 1977 no. 6), or employment that will entail a change in working hours (AD 1979 no. 124) during the period of notice.
[13] *Evenden* v. *Guildford City Association Football Club Ltd.* [1975] 3 All E.R. 269.
[14] See, in particular, Eklund, *op. cit.*, pp. 18 ff.

© Stockholm Institute for Scandianvian Law 1957-2009

reject the employees of the acquired enterprise? Both questions were answered in the affirmative.[15]

The major issue requires a bit more attention. The logic of a divided model is simple. *The contract of employment*, reflecting in total a mutual debtor–creditor relationship, *was divided into its two major parts, a claim for work and a duty to pay wages.*[16] And the crucial question put was whether the former employer could assign his claim for work to another employer if the business was sold.

The answer was in the affirmative. Though nobody could require any employee to accept a new employer as a matter of principle,[17] the predominant view in legal writing was that a claim for work was to be treated like any other claim under the German civil code—BGB (*Bürgerliches Gesetzbuch*). According to secs. 398–99 any claim is assignable provided the content does not undergo a change through such an assignment.

But—and this seemed to be a hurdle—BGB sec. 613 provided that a contract of employment was *in dubio* untransferable. The hindrance was overcome by setting up another presumption.[18] It was argued that sec. 613 was a rule of interpretation and did not apply in cases where the parties had manifested another intention. And in particular, it was held that employees in general were not seeking a job with a specific employer or paying attention to his identity. On the contrary, they were looking for a job somewhere and their attachment was to the business. Experience also demonstrated that employment continued on the same terms and conditions when a business was sold. For these, and some other reasons, Hueck & Nipperdey held that it was more or less a custom that the former employer should have a right to assign his claim for work to the acquiring one. This was supposed to correspond to the mutual, or tacit, intention of the original parties. However, a contract of employment was not assignable if the contractual relationship was of a more personal kind, for example, as in the case of domestic servants.[19]

This is in fact the core of the divided individual model. Of course, the employer could not assign his duty to pay wages. That part followed general principles of the law of obligations as provided for in the BGB sec. 415. The consent of the creditor was required. But the employee's consent could be given both expressly and tacitly. If, for example, the employees continued to perform work for the acquiring enterprise without objecting to the change of employers this was deemed to be consent.[20] A substitution of one employer for

[15] See summary in Eklund, *op. cit.*, pp. 100 f.

[16] See, for example, Alfred Hueck and Hans Carl Nipperdey, *Lehrbuch des Arbeitsrechts. Erster Band*, 7th ed. Berlin 1963, pp. 511 ff.

[17] See, for example, H. T. Soergel and W. Siebert, *Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Band 3. Schuldrecht II,* 10th ed. Stuttgart 1969, § 613 Anm. 10.

[18] See, for example, Hueck & Nipperdey, *op. cit.*, pp. 514 f.

[19] *Op. cit.*, p. 515 at notes 11–12.

[20] *Op. cit.*, p. 519 at notes 22–23.

© Stockholm Institute for Scandianvian Law 1957-2009

another then came about. The same terms and conditions of employment were safeguarded.[21]

However, if no substitution came about the employee was nevertheless under a duty to perform work for the acquiring enterprise as long as he was in employ with the former employer, usually lasting for the period of notice. His original employer had also a duty to pay his wages.[22]

So, the essence of a divided individual model required something from the employee, viz. a duty to work for another employer by whom he had never chosen to be employed. It was a legal construction and, as it turned out to be, a hollow one, since it was overruled in case law after the amendment of the BGB sec. 613 a in 1972, after which German labour law in relation to transfers of undertakings took another course of direction.

4. THE SUBSTITUTE MODEL

In a mutual substitute model both the acquiring enterprise and the acquired enterprise employees are under similar obligations. Their freedom of action is restricted. The acquiring enterprise is under a duty to honour contracts of employment in force at the time of a transfer, and the employees get a new employer without lifting a finger.[23] The one-sided model is deemed to require that only the acquiring enterprise is the obliging party.

The issue is taken up in an EEC Directive of February 1977 relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. Transfers of shares are not touched upon. The EEC Directive deals with several questions: the safeguarding of employees' rights, the status of union representatives, collective agreements and consultation requirements.

> Only those parts of the Directive dealing with the contract of employment level will be dealt with here. As mentioned above, German law introduced a statutory amendment to the BGB in 1972 and this has been used as a model for the Directive.[24] Denmark enacted a separate statute in 1979. In England the legislative process was delayed, but in 1982 some Transfer of Undertakings (Protection of Employment) Regulations 1981 came into force.

To highlight the major issue some words need to be said about this transnational and national legislation.

[21] See, for example, BAG Urt. v. 24.10.1972 = *NJW* 1973, p. 822, *BB* 1973, p. 476.

[22] See, for example, Hueck & Nipperdey, *op. cit.*, pp. 518 f., Soergel & Siebert, *op. cit.*, § 613 Anm. 10, 13.

[23] In fact, this is what the Swedish Companies Act 1975, ch. 14, provides in mergers, see Eklund, *op. cit.*, pp. 193 ff.

[24] According to Gerrick Hoyningen-Huene and Cristine Windbichler, "Der Übergang von Betriebsteilen nach § 613 a BGB", *RdA* 1977, pp. 329 ff.

© Stockholm Institute for Scandianvian Law 1957-2009

4.1 *The EEC Directive*

Owing to inadequate civil law legislation among the member states, scant protection was afforded employees in the event of transfers. Such changes in industrial structure were frequent, so some kind of balance between the competing interests had to be struck. Such is the brief background to the Directive.[25]

The first and foremost safeguard is considered to be provided for in art. 3(1). It is held that the transferor's rights and obligations arising from a contract of employment in force on the date of a transfer shall be transferred to the transferee. So-called acquired rights are assumed to be protected this way.[26] It is further provided in art. 3(1) that member states may hold the transferor liable to obligations due at the time of a transfer. Company-based pension rights and the like are not protected. However, it is assumed that the member states will provide for the adequate safeguarding of such benefits, art. 3(3).

The transfer in itself does not constitute grounds for dismissal, but dismissal for economic, technical or organizational reasons may take place, art. 4(1). The latter qualification is dictated by economic common sense, states the Commission Report.[27]

And finally, if a transfer should entail a substantial and detrimental change in the working conditions of an employee, he or she is entitled to terminate the contract and hold the employer responsible, art. 4(2). This is, in fact, what is called a constructive dismissal in English law.[28] However, the width or applicability of the proviso is not clear from the Directive or elsewhere.[29]

The core of the Directive is art. 3(1).[30] But does the transfer place an obligation on both parties, in particular on the employee of the transferor? In most cases the question will not arise as the employees will be happy to accept continued employment, especially in times of dwindling employment. It might also be argued that the constructive dismissal option as provided for in art. 4(2) and the legislation of member states as to termination of contracts of

[25] See *COM(75) 429 final*, Brussels, 25 July 1975, Amended Proposal for a COUNCIL DIRECTIVE on the harmonization of the legislation of Member States on the safeguarding of employees' rights and benefits in the event of mergers, takeovers and amalgamations. Explanatory memorandum, pp. 1 ff.

[26] According to a Council Note, see *Rapport fra udvalget til forberedelse af gennemførelseslovgivning af EF-direktiv om lønmodtagernes retsstilling ved virksomhedsoverdragelse*, May 1979, p. 63.

[27] *COM(75) 429 final, supra* note 25, p. 9.

[28] See Davies & Freedland, *op. cit.*, para. 2-2110.

[29] Critical comments in Ole Hasselbalch, *Ansættelsesændringer. Vilkårsændringer og ejerskifteproblemer i ansættelsesforhold*, Copenhagen 1979, pp. 41 f.

[30] *COM(75) 429 final, supra* note 25, p. 6.

© Stockholm Institute for Scandianvian Law 1957-2009

employment in general will be deemed as being the only means available of severing an employment relationship if the employee so desires.[31]

But it might well be the other way round. The safeguarding of employees' rights is the primary purpose of the Directive, as is made clear, *inter alia*, by the text of the preamble, where it is expressly held that "it is necessary to provide for the protection of employees in the event of a change of employers, in particular, to ensure that their rights are safeguarded". And should a member state in practice provide the employee with some freedom of action, for example, to object to a new employer, is that safeguard done away with according to the Directive? One may question: Is the aim of the Directive dispensed with if the employee is allowed to have his (or her) way?

Unfortunately, the Directive gives no guidance on this point. Only the practice of member states will furnish the appropriate answer. And interestingly enough, in the three EEC countries surveyed, three different answers seem to be provided for.

4.2 *German law*

Sec. 613 a of the BGB is applicable to transfer cases since 1972. It is provided, *inter alia*, that the new employer will be substituted for the old one, which means that all rights and obligations of contracts of employment in force at the time of a transfer will be retained. The transferor will be held liable to obligations acquired before and due within a year after the transfer. A dismissal due to a transfer as such has been prohibited since 1980.[32]

The requirements in sec. 613 a are strict. The transferee and the transferor may not opt for another solution,[33] they have no freedom of contract. However, the transferee may agree with a transferor's employee that his employment shall cease if the employee so wishes.[34] Moreover, they may agree upon other future terms and conditions of employment if the change is fair.[35]

But are employees under an obligation to continue working under a new

[31] This is the argument advanced in several papers by the English legal scholar Bob Hepple. See Hepple, *supra* note 7, p. 206, "Community Measures for the Protection of Workers Against Dismissal", *C.M.L. Rev.* 1977, p. 494, "European Economic Community", *I.L.J.* 1977, p. 107, "The Transfer of Undertakings (Protection of Employment) Regulations", *I.L.J.* 1982, p. 34. Hepple advocates an *automatic* transfer implying that the acquiring enterprise and the acquired enterprise employees are mutually bound. This might be true in English law after the coming into force of the 1981 Regulations, see *infra* at 4.4 Cf. P. Elias, "The Transfer of Undertakings: A Reluctantly Acquired Right", *The Company Lawyer* 1983, p. 151. Elias argues that the English 1981 Regulations go far beyond the requirement of the EEC Directive on this point.

[32] The German Employment Protection Act will then apply, see Horst Neumann-Deusberg, "Arbeitgeberkündigungen bei Betriebsübergang (§ 613 a BGB)", *NJW* 1972, pp. 665 ff.

[33] See BAG Urt. v. 29.10.1975 = *BB* 1976, p. 315, *NJW* 1976, p. 535.

[34] *Op. cit.*

[35] BAG Urt. v. 18.8.1976 = *NJW* 1977, p. 1168, and BAG Urt. v. 26.1.1977 = *BB* 1977, p. 897.

© Stockholm Institute for Scandianvian Law 1957-2009

employer? The answer is that they are not. The German Federal Labour Court has held, *inter alia*, that "no employee may be sold with the business contrary to his will".[36] In another case the Court ruled that any other solution would be a violation of human dignity, and is not provided for in sec. 613 a. As a matter of fact sec. 613 provided for the non-assignability of the claim for work.[37] It was also held to be clear beyond any doubt that the transferor's employee acquired a new debtor according to the BGB sec. 415, and such a change required the consent of the employee-creditor. It was, said the Court, the freedom of contract of the two employers that was circumscribed in sec. 613 a, while the employees' rights were left untouched.[38]

Consequently, if a business is sold the employee has a right to object (in German a *Widerspruchsrecht*), and is not obliged to work for a new employer. However, he may agree tacitly to the change of employer, for example, by continuing his work after having been given due notice.[39]

4.3 *Danish law*

A Danish statute of 1979 (*virksomhedsoverdragelsesloven*) mirrors the EEC Directive[40] in that its provisions state, *inter alia*, that the transferee is bound by rights and obligations existing at the time of a transfer where contracts of employment are concerned. However, the statute is silent on what is required from the employee. It is assumed that he may in some cases allege that he is under no duty to continue his employment when another employer has acquired the business, since that would be contrary to general principles of law of contracts, or to the basic assumptions of the contract of employment in question.[41] However, such an underlying assumptions model will be scrutinized in another section (*infra* at 5).

[36] BAG Urt. v. 17.11.1977 = *NJW* 1978, p. 1653, *BB* 1978, p. 812.
[37] Cf. *supra* note 18.
[38] BAG Urt. v. 2.10.1974 = *BB* 1975, p. 468, *NJW* 1975, p. 1378.
[39] *Supra* note 36.
[40] *Virksomhedsoverdragelsesloven* is widely debated in Danish legal writing, see Hasselbalch, *supra* note 29, pp. 25 ff., Povl Holm, "Om lønmodtageres retsstilling ved virksomhedsoverdragelse", *Juristen* 1979, pp. 272 ff., Jørn-Ulrik Kofoed-Hansen, "Virksomhedsoverdragelsesloven—nogle konsekvenser", *UfR* 1982 B, pp. 293 ff., Jørgen Nørgaard, "En dom om lønmodtageres retsstilling ved virksomhedsoverdragelse", *UfR* 1982 B, pp. 393 ff., P. Spleth, "Angående 'virksomhedsoverdragelsesloven", *UfR* 1982 B, pp. 443 ff., Ole Hasselbalch, "Virksomhedsoverdragelsesloven på ny", *UfR* 1982 B, pp. 448 f., Jørgen Nørgaard, "Angående loven om lønmodtageres retsstilling ved virksomhedsoverdragelse—hæftelsen over før lønmodtagerne", *UfR* 1983 B, pp. 202 ff., Jørgen Rønnow Bruun, "Funktionærers og lignende lønmodtageres forpligtelser ved virksomhedsoverdragelse", *Juristen* 1983, pp. 96 ff.
[41] See *Bemærkninger til Lovforslag nr. L. 151. Forslag til Lov om lønmodtageres retsstilling ved virksomhedsoverdragelse.* Folketinget 1978–1979. Blad nr 383, p. 5.

© Stockholm Institute for Scandianvian Law 1957-2009

4.4 *English law*

In the Transfer of Undertakings (Protection of Employment) Regulations 1981, which came into force in 1982, it is provided, *inter alia*, that a "transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking ... but any such contract ... shall have effect after the transfer as if originally made between the person so employed and the transferee". Put simply, this is a statutory novation of the contracts of employment. The Regulations also provide that all the transferor's rights, powers, duties and liabilities in connection with such contracts shall be transferred to the other employer. And it is expressly stated that the constructive dismissal proviso of the EEC Directive, art. 4 (2), is no proper defence to terminate a contract of employment without notice, if "the identity of /the employee's/ employer changes unless the employee shows that, in all circumstances, the change is a significant change and to his detriment".

Thus, the practical outcome of the 1981 Regulations has achieved a revolution in common law theory of the nature of the contract of employment.[42] The *Nokes* doctrine (see *supra* at 2) is almost completely overruled. The welfare right of an employee to continued employment in the business is given priority over the traditional, liberal right of the workforce to be free not to contract.

5. UNDERLYING ASSUMPTIONS MODEL

Denmark is the model country. Since 1979 there has been a separate statute concerning transfers of undertakings providing for the transfer of employment relationships (*supra* at 4.3), but at the same time the legislative history tells us that the previous case law as to some employees' right to regard themselves as wrongfully dismissed, if the business is sold, is assumed to be upheld.[43] In these cases one may speak of a failure of the underlying assumptions of the contract of employment when the business changes owners, the outcome being that the employee concerned is entitled to claim damages from his former employer for lost wages corresponding to a period of notice.

To express it clearly one could say that an underlying assumptions model presupposes another, more pervasive, and less legalistic basic model: that most employees are under a duty to accept a change of employer if a business is sold, mainly due to the fact that an employee in general does not pay very much attention to the identity of the employer.

The theory of a failure of underlying assumptions, long a feature of the

[42] Davies & Freedland, *op. cit.*, para. 2-2095.
[43] See *supra* note 41.

© Stockholm Institute for Scandianvian Law 1957-2009

Danish law of contracts, is supposed to apply to only some categories of employees such as agricultural workers, domestic servants and salaried employees, but is assumed not generally to apply to blue-collar workers.[44]

The employee is not entitled to reject a new employer in every case. Case law is fragmented,[45] but a couple of comments may be made. The employment relationship must have been a fairly close one, for example, if the old employer has been supervising the business personally, more or less daily. This is usually the case in a small business and it is then deemed that what is at stake is the attachment to the employer himself (not to the business). The employer's identity then becomes the crucial legal issue.

In 1983 the Danish Supreme Court settled the case law as to the validity of the theory of a failure of the underlying assumptions when a business is sold.[46] The theory was upheld. It may be illuminating to state the facts briefly. A dental practice changed hands and two of the previous owner's colleagues were dismissed. However, the three dental assistants were offered continued employment by the new owner on the same terms and conditions of employment as before. The assistants did not accept the change of employers. They claimed damages (lost wages during the period of notice) from the old employer. The Supreme Court held that the 1979 statute (*virksomhedsoverdragelsesloven*) had not changed the previous case law according to which the employee may allege that there is a failure of underlying assumptions in transfer cases. In its ruling the Court referred briefly to the nature and small size of the business concerned.

6. VOLUNTARY SUBSTITUTE MODEL

Finnish law has since 1970 provided a legal solution concerning transfers that is a variant of an otherwise mandatory substitute model.

The essence of the model is that the employment relationships in force at the time of the transfer of a business will be carried over to the new employer as if nothing had happened (Finnish Employment Contracts Act 1970, sec. 7),[47] unless the employees of the transferor or transferee terminate their contracts of

[44] See H. G. Carlsen, *Dansk Funktionærret*, 2nd ed. Copenhagen 1974, pp. 295 f., Knud Illum, "Om Virkningen af Virksomheds Overdragelse paa bestaaende Arbeidsaftaler", *UfR* 1942 B, p. 38, Ole Hasselbalch, *Ansættelsesret*, Copenhagen 1975, p. 180, Henry Ussing, *Enkelte kontrakter*, 2nd ed. Copenhagen 1946, p. 350, Per Jacobsen, "Denmark", *International Encyclopedia for Labour Law and Industrial Relations*—Suppl. 13 (December 1979). Prof. R. Blanpain, Ed. in Chief.

[45] See 1935 *UfR* 808, 1939 *UfR* 973, 1947 *UfR* 224, 1949 *UfR* 436, 1949 *UfR* 612, 1950 *UfR* 689, 1965 *UfR* 599, 1970 *UfR* 807, 1980 *UfR* 332, 1982 *UfR* 87.

[46] 1983 *UfR* 685. Cf. 1982 *UfR* 275 and critical comments, Nørgaard, *supra* note 40, Spleth, *supra* note 40, Rønnow Bruun, *supra* note 40.

[47] An exception is made for wages due to be paid at the time of the transfer of the business, see sec. 7 of the Act.

© Stockholm Institute for Scandianvian Law 1957-2009

employment. According to sec. 40 of the said Act the right to terminate a contract applies unconditionally to both parties. Hence, from the employer viewpoint a dismissal due to the transfer as such will be upheld.[48] On the other hand, it would seem that the transferor is not entitled to terminate the said contracts of employment if the business is sold.[49]

If the statutory right to terminate at will is opted for by either party, very short periods of notice are provided for in the Act. For example, if the transferee terminates the contract, that contract will expire within 14 days. It will then be incumbent upon both employers to pay wages during that period of notice, but the transferor will be held solely responsible for other loss of wages and benefits.

The transferee is not entitled to vary the future terms and conditions of employment with reference to sec. 40 of the Act. The provision is applicable only if a final severance of the employment relationship is supposed to come about.[50] Union representatives may not be dismissed at all with reference to sec. 40.[51]

Consequently, one might say of the Finnish contribution to labour law relating to transfers that it is a middle-of-the-road solution, where a substitute model is made the rule and an individual one may be opted for if either party so wishes. The two-tier framework seems to reflect the personal nature of the employment relationship in Finnish labour law.[52] What is certain is that both the employee concerned and the new employer may have legitimate reasons to sever an employment relationship if a business is sold.

7. ACQUIRED RIGHTS MODEL

Legal systems based upon a traditional individual model usually incorporate devices that ensure the protection of employees' accrued rights. What this model mainly provides for is that an employee may count time of employment with the previous employer in calculating some benefit due while in the employ

[48] See, for example, Antti Suviranta, "Den nya lagen om arbetsavtal", *Festskrift utgiven i anledning av Juristklubben Codex' 30-årsjubileum*, Helsinki 1970, p. 49, Kaarlo Saarko, *Arbetsrätt. Allmän del*, Helsinki 1981, p. 71.

[49] See Teuvo Kallio, "Mergers and Other Changes in Structure or Control of Enterprises and Their Effects upon Workers" (Finnish report), *Actes du VIIIème Congrès International de Droit du Travail et de la Sécurité Sociale*, Milan 1977, p. 851.

[50] Finnish Labour Court judgment 1976 no. 52.

[51] See Suviranta, *op. cit.*, pp. 48 f.

[52] See secs. 6 and 7 of the Act and the Finnish *prop.* 1969: 228, p. 10, Suviranta, *op. cit.*, p. 48, C. G. af Schultén, "Arbetsrättsliga problem vid företagskoncentration", *FJFT* 1972, pp. 150, 160. An amendment of the Act was submitted to the Finnish Parliament in 1982. See the Finnish *prop.* 1982: 89, p. 33, the meaning of which is that the transferee's right to terminate existing contracts of employment at will will be circumscribed if an employment relationship has lasted for 5 years.

© Stockholm Institute for Scandianvian Law 1957-2009

of the transferee. Therefore, an acquired rights model is concerned with the more limited, but no less relevant issue of the content of a contract of employment, if employment is to continue when a business is sold. It does not tell us anything about whether such a contract is legally entered into.

The acquired rights model is well known in England,[53] Denmark,[54] Finland,[55] and Sweden. In Sweden, for example, the principle was settled as early as 1938 in the first Vacation Pay Act. It was provided that vacation pay should not be forfeited in case the business was transferred. The 1938 provision has provided a model for more recent legislation, for example, in the Employment Protection Act 1974 (as amended 1982) in calculating seniority in connection with layoffs or recalls, or in determining the length of period of notice. Also company-based pensions schemes are in some respects treated the same way by statute.

8. PREFERENTIAL HIRING MODEL

Unlike the other legal systems surveyed here, the legal foundation of Swedish labour law in relation to transfers is still a mutual individual model. This gives rise to a muster of legal questions on various contractual levels, both as regards the law of contracts and obligations, but also compared with labour law provisions.

The Swedish Employment Protections Act approaches the transfer issue in the reverse manner. Except in merger cases there is no substitute provision or anything resembling it that corresponds to the EEC Directive.[56] On the other hand, there is in sec. 25 of the Act a preferential hiring provision protecting the transferor's employees. The transferee is obliged to re-employ the employees if he intends to employ any new employees at all.

Sec. 25 must be seen against the following background. Any dismissal according to the Act must be for "objective cause" as provided for in sec. 7. And it is dismissal for objective cause if an employer dismisses employees because of lack of work, or more specifically, if the transferor dismisses his employees when the business is sold.[57] The paradigm is the same and the legislator has made no distinction between the two factual situations. In both cases the dismissed employee is entitled to claim re-employment if new job-

[53] See, for example, about redundancy payments in EPCA secs. 81 (1), (4), 151 (1) and schedules 4 and 13.

[54] Accrued seniority is preserved for salaried employees, if continued employment is provided when a buisness is sold, see Funktionærlov, secs. 2 (8), 2 a and 2 b.

[55] For example, see the Finnish Vacation Pay Act 1973, sec. 6.

[56] *Supra* note 23.

[57] See *Prop.* 1974: 129, p. 235. See further AD 1977 no. 11.

© Stockholm Institute for Scandianvian Law 1957-2009

openings appear in the business within one year after the former employment ended. In a typical redundancy case this is not always so, but if a business is sold it usually is. However, exceptions occur, for example, if the transferee wants to transfer personnel of his own to the acquired business,[58] or when the work in question is subcontracted for legitimate reasons,[59] or the transferee purposely delays the hiring process for one year when the recall right expires, or if the business sold falls under the purview of another collective agreement after the sale.[60]

As a rule, the transferee will for quite obvious reasons be dependent upon the transferor's employees, and they will be re-employed, expressly or tacitly, even if in borderline cases this may not happen.

If the transferee re-employs the employees, he is under a duty to apply the seniority provisions as set forth in the Employment Protection Act. The seniority rules give priority to the date of employment ("last-out-first-in principle"). However, the seniority provisions are optional, which means that they may be deviated from by virtue of a collective agreement of a certain quality. A roster drawn up by the employer and the union must not be discriminatory, and, if it is, will be rejected by the court.[61] The recall right may also be totally done away with, as is the case in the building industry national agreement.

9. A PERSPECTIVE ON SWEDISH LABOUR LAW IN PARTICULAR IN THE CONTEXT OF TRANSFERS OF UNDERTAKINGS

A comparison with foreign legal systems will throw some light upon the Swedish one. It is distinctive that Swedish labour law relating to transfers is still legally tied to the individual model. In other legal systems this model has been done away with. This is true as regards the transferee employer's legally imposed obligation to accept the existing workforce as a fact, thus circumscribing his freedom of contract. However, there is some doubt as to the legal position of the transferor employees.

An inherent problem in a substitute model is the status quo provided for as regards future terms and conditions of employment. That the successor is obliged to take over the workforce is not usually a problem as long as there is an option to dismiss redundant employees.

In a Swedish draft statute of 1935 it was suggested that if nothing else had

[58] See AD 1978 no. 153 (dissent) and Eklund, *op. cit.*, pp. 249 ff.
[59] See AD 1980 no. 54.
[60] See AD 1977 no. 79
[61] See AD 1982 nos. 40 and 65, 1983 nos. 107 and 112.

© Stockholm Institute for Scandianvian Law 1957-2009

been agreed upon the transferee should enter as a new party into the existing contracts of employment if a business was sold.[62] The draft statute never materialized for reasons not relevant to the issue discussed here. However, the interesting aspect is that the draft statute made the identity of the employer less legally decisive in transfers. The employment relationship would have been less tied to general principles of the law of obligations, which are so pervasive in Swedish labour law. For example, in the past the Swedish Labour Court has consistently held that a collective agreement is not transferred if an entrepreneur transfers his business to a joint-stock company in which all the shares are controlled by him alone.[63] It required a special provision—sec. 28 of the Joint Regulation of Working Life Act 1976—to lift the veil and reverse this doctrine.

The sale of a business may entail minor or major changes in the running of the business, in its legal basis and where the employees involved are concerned. These changes are exacerbated in an individual model where the employer's freedom of action is not circumscribed. Conversely, a mutual substitute model may lead to legal stalemate when what is needed is flexibility.

The termination of a collective agreement in transfers, when a business is sold, is no problem according to Swedish law. This is specifically provided for in sec. 28 of the above-mentioned Joint Regulation of Working Life Act. But the variation of other terms and conditions governed by the contract of employment may present difficulties. There is no procedure provided for in such cases. The Labour Court has indicated, however, that such a variation will be treated, ultimately, as a dismissal for objective cause as provided for in sec. 7 of the Employment Protection Act.[64] But what is an objective cause, if, for example, the transferee intends to adjust the pay-rate of the transferor employees to those prevailing in his own business? There could be many examples of such cases.

The preferential hiring model, being the Swedish contribution to the protection afforded the transferor employees if the business is sold, is also an awkward legal device. If the Swedish labour law relating to transfers is considered in the light of other legal solutions, the Swedish model is unclear and counterproductive. I have, however, outlined an alternative.

Briefly, the transferee ought to be made a new employer by statute, and the contracts of employment in force at the time of the transfer should have effect as if originally made between the said employees and the transferee. This will make unnecessary acquired rights provisions, now found scattered among various labour statutes. Hence, the transferor will be relieved from contractual

[62] *SOU* 1935: 18, pp. 190 f.
[63] About the case law, see Eklund, *op. cit.*, pp. 20 f.
[64] AD 1978 no. 68

© Stockholm Institute for Scandianvian Law 1957-2009

undertakings at the time of a takeover and the transferor employees will also be obliged to accept the transferee as a new employer. However, it is acknowledged that some exceptional cases may occur where a duty to contract will be contrary to the general principles of the law of contracts, and the latter will then prevail.

Though a dismissal due to the transfer as such will be unlawful, redundancy cases will, if a business is sold, be taken care of in the usual way as provided for in the Employment Protection Act.

But where the disputed future terms and conditions of employment are outside the control of the pending collective agreement in question, a supplementary provision is needed. A legal innovation is necessary. It is suggested that the transferee be entitled to apply other terms and conditions of employment if a business is acquired, but this should be done within a certain period of time (2–3 months) after the legal transfer. However, employees may go to court to question the reasonableness of the proposed, future terms and conditions of employment. But these terms and conditions should be upheld if according to the standard used in the Employment Protection Act, sec. 27, they are deemed reasonable as far as loss of recall right is concerned (the employee loses his right to be recalled if he rejects an offer that is deemed reasonable).

The advantage here is that a good deal of freedom of contract is maintained, though the whole of the employment relationship—in questioning the future terms and conditions of employment—is not at stake. However, this is only a brief outline that requires more robust debate and critical scrutiny. For the time being, however, it would seem that no statutory amendments are contemplated that favour a new, and more comprehensive legal framework as to Swedish labour law relating to transfers of undertakings.

© Stockholm Institute for Scandianvian Law 1957-2009