Africa Guide

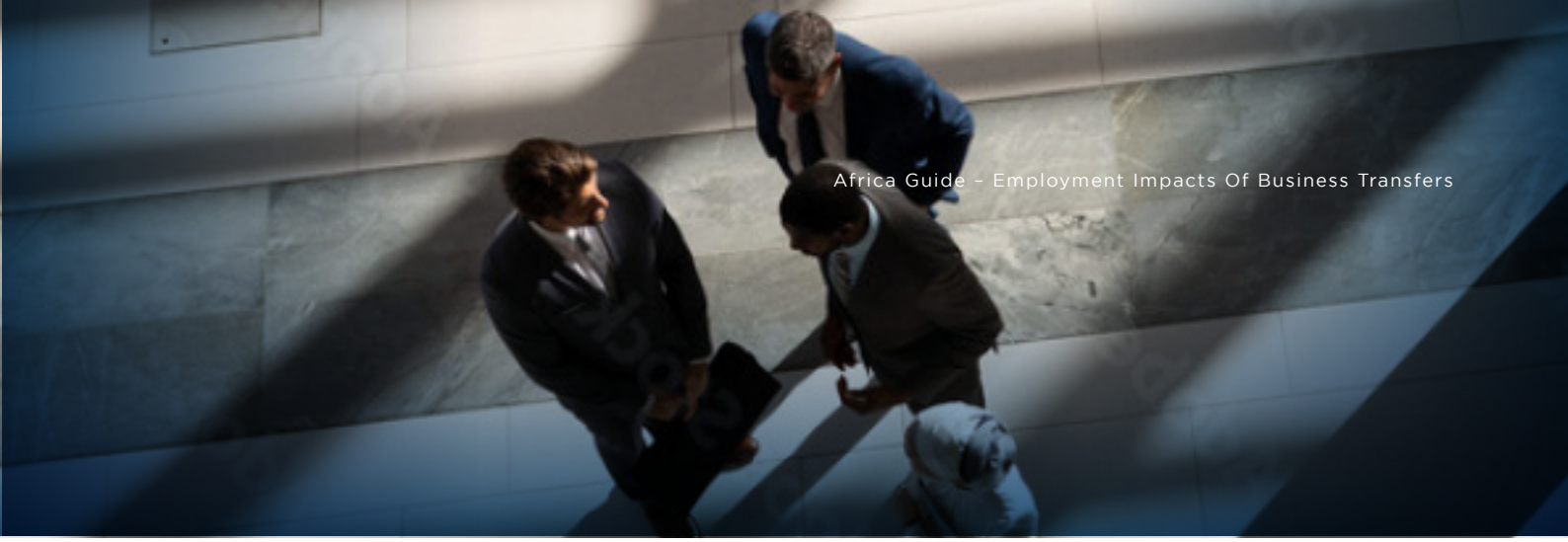
Employment Impacts

of Business Transfers

BOWMANS

THE VALUE OF KNOWING

Contents



Foreword

The various African countries regulate the impact of business transfers on employment differently. This guide provides an overview of the employment law consequences of business transfers in 16 African jurisdictions – Angola, Botswana, Cameroon, Ethiopia, Gabon, Ghana, Kenya, Mauritius, Mozambique, Namibia, Nigeria, Senegal, South Africa, Uganda, Tanzania and Zambia. It has been prepared with input from members of our Employment and Benefits Practice from all our offices in Africa, and in collaboration with our alliance, relationship and other firms across the continent.

A key distinguishing feature of regulation across jurisdictions concerns whether there is an automatic transfer of employment with a going concern transfer and, if there is, whether this also applies in outsourcing situations.

Automatic employee transfer provisions currently exist in the laws of Angola, Cameroon, Ethiopia, Gabon, Mozambique, Senegal, South Africa and Uganda. The position in Botswana is not entirely settled, but most commentators are of the view that the relevant provisions of the statute amount to an automatic transfer of employment contracts in the event of a business transfer.

In most of these jurisdictions, one of the consequences is that everything done by or on behalf of the old employer immediately before the business transfer is deemed to have been done by or in relation to the new employer. This means that, for the buyer, employment due diligence is critical, and risk must be mitigated by appropriate warranties and indemnities given by the seller. In addition, pension arrangements can be complicated and trade union and collective bargaining rights typically fall outside the scope of the regulation. In jurisdictions with no automatic transfer provisions (Ghana, Kenya, Mauritius, Namibia, Nigeria, Tanzania and Zambia), the situation is reversed, and the seller of a business is primarily at risk. For the seller, the commercial terms of the transaction may depend, to a material extent, on the likely cost and complexity of employment redundancies, and the transaction may be conditional on agreed transfers of employment or the regulatory approval of redundancies. Risk can be mitigated by the commercial terms of the transaction and the extent to which the buyer is willing to take on employee obligations voluntarily.

Knowing whether employment risks lie predominantly with the buyer or the seller will assist the parties to a transaction to mitigate risks successfully. Although, broadly speaking, there are two distinct approaches to the employment consequences of business transfers in different African countries, there are other nuances across each jurisdiction that may have a vital effect on the success of a commercial transaction. This guide provides insight for entities planning to buy or sell businesses operating in one or more of the 16 countries surveyed.

Please reach out to any of the key contacts in the respective country chapters if you would like to discuss the contents of this guide in more detail.

Helen Wilsenach
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The contents of this publication are accurate as at June 2024 and are for reference purposes only. This guide is not a substitute for detailed legal advice.

Angola

When a business is transferred from one employer to another as a going concern, does any law specifically protect employment rights?

Yes, the General Labor Law (**GLL**) protects employees' rights, as set forth in Article 108 and related articles.

The general effect is that the variation of the legal status of the employer does not constitute just cause for termination. The employees retain their seniority and positions and continue to carry out the activities assigned to them by the previous employer.

The employees retain their acquired rights and any rights that are in the process of being acquired under the previous employer.

Is business outsourcing or insourcing treated in the same way as the transfer of a business?

This is treated in a different way. Business outsourcing or insourcing are, under Angolan law, contractual arrangements entered into by a company for the provision of services to, or by, the company, and do not amount to a sale of business. Therefore, there are no specific rules on employment rights in these circumstances.

How are employment rights protected in a business transfer situation?

The GLL provides specific rules to protect employees' rights, namely (i) the right to be informed at least 22 business days in advance about the transfer, the reasons for it, the date on which it will take effect, and its consequence; (ii) the right to keep their job position with the same remuneration package and seniority; and (iii) the rights and obligations arising from an employment contract or employment relationship existing at the time of the transfer are transferred to the acquirer, even if the employment relationship ended before the transfer.

Is there any specific protection against the dismissal of employees the new owner of a business does not want to employ?

The new owner assumes the position of the previous owner as employer and therefore may only dismiss employees according to the rules set out in the GLL.

Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

The new owner may only change terms and conditions if such changes mean providing better working conditions to employees. The new owner may not reduce an employee's remuneration and benefits.

Can employees choose not to transfer to the new owner of a business?

Under the GLL, within 22 working days of the transfer of the business, employees have the right to terminate the employment contract with notice.

What information are employers obliged to give employees in a business transfer situation? Is consultation or any other engagement with employees required?

Employers must at least 22 business days in advance and in writing, inform the employees' representative bodies or the employees themselves about the transfer, the reasons for it, the date on which it will take effect and its consequences. The employees' representative body may ask for additional clarification about the transfer proceedings.

How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

The transfer process should be finalised within 22 business days. The GLL requires the new employer, in the 15 working days following the transfer, to communicate to the General Labor Inspectorate, with due justification, the employment destination of the employees.

Is there a penalty for breach of a statutory consultation or similar process requirement?

The new GLL does not provide for any penalty in the case of failure to comply with any process requirement. However, as a practical consequence, it seems that the employees may claim for any eventual damage suffered due to the failure to comply with any of the mandatory requirements.

Are any other external approvals or notifications required?

No other approvals are required.

Are there any proposals for reform?

No. The new GLL has already recently introduced some additional new rules to protect employees' rights.

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Botswana

When a business is transferred from one employer to another as a going concern, does any law specifically protect employment rights?

Employment rights in business transfer situations are protected by the provisions of section 28 of the Employment Act [CAP 47.01] (**Employment Act**).

Is business outsourcing or insourcing treated in the same way as the transfer of a business?

Business outsourcing or insourcing are deemed to be a contractual agreement entered into by the employer for the provision of services to, or by, the employer, not a sale of business.

How are employment rights protected in a business transfer situation?

When a business is transferred as a going concern, the transfer does not interrupt an employee's continuity of employment. Section 28 of the Employment Act provides as follows:

'If a trade, undertaking, business or enterprise (whether or not it be established by or under any written law) is transferred from one person to another and an employee in the trade, undertaking, business or enterprise continues to be employed therein, the period of continuous employment immediately preceding the transfer shall be deemed, for the purposes of this Act, to be part of the employee's continuous employment with the transferee immediately following the transfer.'

While most commentators are of the view that section 28 of the Employment Act amounts to an automatic transfer of employment contracts in the event of a business transfer, some commentators are of the view that this is not what is contemplated and, consequently, that there is no automatic transfer of employment contracts in Botswana. In practice, the majority of purchasers take on all employees involved in the transferring business on the basis that a business transfer does not constitute a valid reason for retrenchment. However, the courts are yet to adjudicate on this issue.

Is there any specific protection against the dismissal of employees the new owner of a business does not want to take on?

If, subsequent to a sale of business, a new owner does not wish to continue with certain contracts of employment, these contracts can only be terminated under certain circumstances and upon satisfying the stringent requirements of the Employment Act. This includes situations where the sale of business results in a restructuring process, and based on the operational requirements of the business, certain positions are made redundant. Note that the term 'redundancy' is not defined in the Employment Act. It has often been loosely understood to mean the same thing as 'retrenchment'. Redundancy is attributable wholly or mainly to the fact that the employer has ceased or intends to cease carrying on business, or that, as a result of some reorganisation, a particular post is no longer necessary.

The general rule is that when employers form the intention to terminate an employee's employment, employers are only entitled to do so if they have a valid reason. Terminations/ dismissals for any reason whatsoever, including as a result of a sale of business, are deemed unfair unless the substantive and procedural requirements are satisfied.

In the event of a sale of business, where the new employer's operational needs require a reduction in the workforce, the new employer must meet the equitable requirements for a fair redundancy exercise. The requirements are as follows:

- employers must give sufficient prior warning of the impending redundancy to a recognised or representative trade union and to employees likely to be affected by the redundancy;
- employers must consider ways to avoid or minimise redundancies;
- employers must consult with a trade union or other employee representative (if any) prior to the redundancy exercise;
- employers must consult with affected employees and consider any representations made on their behalf by the trade union or other employee representative (if any); and
- the decision to make posts redundant must be reasonable, made in good faith and there must be a commercial rationale for the exercise.

In terminating, the 'FILO' (first in last out) principle should be used unless this is not warranted in the circumstances. In addition, in the event a similar post becomes available within six months of the redundancy exercise, priority must be given to employees who were retrenched.

Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

The new owner can change the terms of employment contracts, provided that employees consent to the change in instances where such a change introduces terms that are less beneficial to employees or are more onerous.

Section 37 of the Employment Act provides that where a contract of employment provides for conditions of employment less favourable to employees than the conditions of employment prescribed by the Employment Act, the contract shall be null and void to the extent that it so provides.

Can employees choose not to transfer to the new owner of a business?

There is no statutory entitlement to object to a transfer under these circumstances. However, employees can elect not to continue under the employ of the new owner, in which event, they would need to resign and be paid their terminal benefits.

What information are employers obliged to give employees in a business transfer situation? Is consultation or any other engagement with employees required?

The Employment Act does not provide for consultation with employees prior to a sale of business. Presumably, the Industrial Court would deem consultation and engagement with employees necessary only under very rare circumstances and only to the extent that the sale of business might adversely affect the employees' terms of employment or where a collective labour agreement so stipulates.

Disclosure of information is an important aspect of procedural fairness, as no meaningful consultation can take place when one of the parties lacks the necessary information to meaningfully engage in the process. However, consultation should not be deemed a deterrent to employers when making a decision to sell their business. Consultation is meant to facilitate a process in terms of which employers consider representations from employees, prior to making such a decision, in instances where employees would be adversely affected.

How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

There is no statutorily prescribed process.

There is no requirement for approval of a transfer of employees by any labour or other statutory authority in a business transfer situation.

Is there a penalty for breach of a statutory consultation or similar process requirement?

There is no penalty for breach. However, if a contract of employment is terminated without meeting the substantive and procedural requirements, the new owner may be deemed to have terminated the employment contract unfairly. In such circumstances, compensation or reinstatement may be enforced.

Are any other approvals or notifications required?

No other approvals or notifications are needed.

Are there any proposals for reform?

There are no current proposals for reform.

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Cameroon

When a business is transferred from one employer to another as a going concern, does any law specifically protect employment rights?

Employment rights in business transfer situations are protected by Article 42 of the Labor Code (Law No. 92-007, of 14 August 1992) (**Labor Code**).

Is business outsourcing or insourcing treated in the same way as the transfer of a business?

Although Article 42 does not specifically address business outsourcing or insourcing, these situations are considered covered due to the principles of employment protection and stability guarantees.

This is confirmed by case law and doctrine, particularly since, in such cases, the modification has no impact on the nature of the activity.

How are employment rights protected in these situations?

Under Article 42 of the Labor Code, all employment contracts in effect on the day of the change remain valid between the new employer and the company's staff. The new employer is required to recognise accrued seniority and honour all acquired rights and benefits. The contract continues under its previous terms, ensuring that employees retain their job positions, salaries and contractual rights.

Is there any specific protection against the dismissal of employees the new owner of a business does not want to employ?

The new owner of a business must retain all existing employees and uphold their employment contracts during the business transfer process. Dismissals cannot result from the transfer itself. Any employee dismissals by the new owner must be based on legitimate grounds and adhere to legal procedures. Protections against unfair dismissal ensure employees are not arbitrarily dismissed during or after a business transfer. Employees have the right to contest unfair dismissals and seek appropriate remedies through legal channels.

Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

Upon transfer of the business, the new owner inherits the existing employment contracts in their entirety, including all rights, obligations and terms such as salary, benefits, working hours and seniority. The new owner cannot unilaterally impose changes to the existing contracts unless these changes are more favourable to the employees.

In practice, if the existing workforce benefits from more advantageous terms, the new owner must provide the same advantages to the transferred employees, adhering to the principle of non-discrimination. Otherwise, any changes to the terms of employment must be mutually agreed upon between the employer and the employee, which may require negotiations and consultations with employees or their representatives, such as labour unions.

Additionally, Article 42 of the Labor Code is clear: the employment contract can be subject to substantial modification at the employer's initiative. However, if the employee refuses the modification, the termination of the employment contract is the employer's responsibility. Consequently, the employer must pay the employee all entitlements due in the event of legitimate dismissal, excluding any gross misconduct by the employee. If the termination is not justified by the interests of the company, it may be deemed an unfair dismissal.

Can employees choose not to transfer to the new owner of a business?

The principle of transferring employment contracts does not apply when the employees express their desire to be dismissed in the presence of the relevant labour inspector. In this case, the employees must receive payment of their entitlements. However, this request must be made before the transfer. Since the form of this request and any resulting agreement is not specified, it should, in all cases, be documented in writing between the parties.

What information are employers obliged to give employees in a business transfer situation? Is consultation or any other engagement with employees required by law?

No formal procedure is necessary to establish the transfer. Additionally, employees are not required to enter into new employment contracts with the new employer, nor is prior consultation mandated between the employee and the new owner. However, an information notice can be sent to all employees.

How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

There is no formal process for engagement or consultation. However, according to Article 114 of the Labor Code, the transfer must be reported to the appropriate Labor Inspectorate. The Code does not specify any particular deadlines or procedural formalities for this notification.

Is there a penalty for breach of a statutory consultation or similar process requirement?

The Labor Code does not mandate a consultation process for transferring employees during a business transfer. Therefore, there are no specific penalties for failing to consult employees in such circumstances. However, violations of broader labour regulations, such as those concerning unfair dismissal or improper changes to employment terms, can lead to legal repercussions. Employees have the right to lodge complaints with the Labor Inspectorate and pursue compensation for breaches of labour laws.

Are any other external approvals or notifications required?

No other approvals or notifications are required.

Are there any proposals for reform?

A Labor Code reform project has been under discussion for several years, but as of yet, no revisions have been finalised.

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Ethiopia

When a business is transferred from one employer to another as a going concern, does any law specifically protect employment rights?

Employment rights in the case of a business transfer are protected by Labor Proclamation No. 1156/2019 (**Labor Proclamation**), specifically articles 16, 23(2) and 136.

Is business outsourcing or insourcing treated in the same way as the transfer of a business?

No, they are not treated in the same way as a business transfer.

How are employment rights protected in a business transfer situation?

The Labor Proclamation outlines that the transfer of a business will not have the effect of:

- modifying an employment contract; hence, the rights of the employees will not be affected or reduced; or
- terminating an employment contract.

Furthermore, in the case of a transfer of a business, where there is a trade union party to a collective agreement, the rights of the employees under the collective agreement will remain intact.

Is there any specific protection against the dismissal of employees the new owner of a business does not want to take on?

Employment contracts of employees are protected from being terminated on grounds of the transfer of the business. Therefore, termination of a contract of employment due to a business transfer will be treated as an illegal termination of the employment contract, against which the court may award reinstatement of the worker to their prior position or award severance pay and compensation. The new owner of the business may only terminate the employment contract of employees post-transfer of the business based on the grounds clearly listed under the Labor Proclamation. The grounds for termination may relate to organisational needs of the company and/ or the performance or behaviour of the worker.

Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

The terms of the employment contract cannot be modified by the new owner unless the proposed changes are to provide better rights to employees.

However, in cases where there is a collective agreement that applies to the existing workforce of the new owner and/ or there is a different collective agreement that applies to the employees of the acquired company, either of the following will be applicable:

- the collective agreement of the company with more employees will be applied to the employees of both companies; or
- if both companies have an equal number of employees, the collective agreement with more benefits to employees will be applied.

If it is only one company that has a collective agreement, such collective agreement will be applied to both companies.

Can employees choose not to transfer to the new owner of a business?

Employees cannot choose not to transfer. However, they can choose to resign.

What information are employers obliged to give employees in a business transfer situation? Is consultation or any other engagement with employees required?

There is no legal obligation on employers to hold consultations with employees, unless such right to be consulted is provided for in the collective agreement.

How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

If consultation is a requirement under the collective agreement, the period of the consultation will also depend on the terms of the collective agreement, if any.

Are any other approvals or notifications required?

There are no other approvals or notifications required pertaining to information to be provided to employees upon a business transfer.

Are there any proposals for reform?

No, there are no current proposals for reform.

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Gabon

When a business is transferred from one employer to another as a going concern, does any law specifically protect employment rights?

Yes, employment rights are protected by Article 95 of the Labor Code (Law 022/2021, of 19 November 2021) (**Labor Code**).

Is business outsourcing or insourcing treated in the same way as the transfer of a business?

The provisions of Article 95 of the Labor Code aim very broadly at guaranteeing job stability for all workers, regardless of legal events affecting their employing company. It underscores the concept that employees work for an economic unit, rather than a specific individual or legal entity, and that any change in the employer's legal form should not affect employment contracts. As the underlying legal concept and the objectives of Article 95 of the Labor Code are quite general, wide and far reaching, the provision should be, and in practice is, interpreted broadly. Accordingly, it is understood that if an economic unit is transferred to another employer, this would be covered by Article 95 of the Labor Code and there would be special protection of employment rights.

How are employment rights protected in these situations?

Under Article 95 of the Labor Code, in the event of a business transfer, all existing employment contracts will remain in force between the new employer and the employees. The employment contract is transferred in its entirety to the new employer, obligating the new employer to recognise accrued seniority for purposes such as calculating paid leave, seniority bonuses and severance pay. The contract continues under its previous terms, meaning employees retain their positions, salaries and all other contractual rights. Any unpaid salaries, bonuses or damages at the time of transfer are the responsibility of the new employer. Additionally, employee representatives retain their mandates.

Is there any specific protection against the dismissal of employees the new owner of a business does not want to take on?

The new owner of a business is required to take on all existing employees and honour their employment contracts as part of the business transfer process. An employee cannot be dismissed as a result of the business transfer. Any dismissal of employees by the new owner must be justified by legitimate grounds and follow proper legal procedures. Protections against unfair dismissal ensure that employees are not arbitrarily dismissed during or after a business transfer. Employees have the right to challenge unfair dismissals and seek appropriate remedies through legal channels.

Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

Upon transfer of the business, the new owner inherits the existing employment contracts in their entirety. This includes all rights, obligations and terms such as salary, benefits, working hours and seniority. The new owner cannot unilaterally impose changes to the existing contracts unless these changes are more favourable for the employees.

In practice, if the existing workforce benefits from more advantageous terms, the new owner, adhering to the principle of non-discrimination, must provide the same advantages to the transferred employees. Otherwise, any changes to the terms of employment must be mutually agreed upon between the employer and the employee. This may necessitate negotiations and consultations with employees or their representatives, such as labour unions.

Can employees choose not to transfer to the new owner of a business?

Since the employment contract is maintained in all its essential elements, the only option available to an employee who does not wish to keep their employment with the new employer or who refuses to work with the new employer is to resign. However, as resignation is not presumed, if the employees fail to report to the new employer, this behaviour may be considered as job abandonment, which could be grounds for dismissal by the new employer.

What information are employers obliged to give employees in a business transfer situation? Is consultation or any other engagement with employees required?

The Labor Code does not contain any provisions regarding the procedure to be followed in the event of a business transfer. In practice, however, an information notice is sent to all staff, but the latter's opinion is not sought.

How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

There is no statutorily prescribed process for the transfer of employees. Additionally, there is no requirement for approval of a transfer of employees by any labour or other statutory authority in a business transfer situation.

Is there a penalty for breach of a statutory consultation or similar process requirement?

The Labor Code does not provide any statutory consultation process for the transfer of employees in the event of a business transfer. Accordingly, there are no penalties for failing to consult employees during a business transfer. However, breaches of broader labour regulations, such as those related to unfair dismissal or changes to employment conditions without proper procedure, can result in legal consequences. Employees may file complaints with the Labor Inspectorate and seek compensation for the failure to comply with the labour laws.

Are any other approvals or notifications required?

It is advisable to notify both the relevant Labor Inspectorate and any specific regulatory authority to which the employer is accountable.

Are there any proposals for reform?

As part of the ongoing social dialogue in Gabon, particularly in the oil sector, there have been continual exchanges and negotiations between unions and employers, aimed at maintaining a peaceful labour climate post the political events of 30 August 2023. However, there have been no specific discussions regarding potential reforms concerning the transfer of business.

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Ghana

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When a business is transferred from one employer to another as a going concern, does any law specifically protect employment rights?

Employment rights in business transfer situations are protected under the Labour Act, 2003 (Act 651) (**Labour Act**) and the Labour Regulations, 2007 (L.I 1833). Under Ghanaian law, there is no automatic transfer of employment contracts upon a transfer of a business. A contract of employment is a contract of personal service and cannot be transferred from one employer to another without the consent of the employee and the approval of the Chief Labour Officer.

Is business outsourcing or insourcing treated in the same way as the transfer of business?

Under Ghanaian law, business outsourcing or insourcing are regarded as contractual arrangements entered into between the employer and another party. However, where such outsourcing or insourcing results in terminations of employees, it may qualify as a redundancy under Ghana's labour laws and in such a case, an employer will be required to comply with the provisions on redundancy under section 65 of the Labour Act.

How are employment rights protected in a business transfer situation?

A contract of employment cannot be transferred without the consent of the employee and the Chief Labour Officer. The approval is granted after an assessment by the Chief Labour Officer that the employee's consent was freely obtained, before the transfer, without undue influence, coercion, misrepresentation or mistake.

If the Chief Labour Officer determines that the relevant requirements for consent have not been complied with by the employer, it can refuse to endorse the transfer of the affected employees, and this will render the transfer of employees void.

Where a business transfer results in the termination of contracts of employment, such terminations may give rise to redundancy and require the parties to comply with the relevant provisions of the Labour Act.

The Labour Act envisages two situations of redundancy. The first is where an employer contemplates the introduction of major changes in production, programme, organisation, structure or technology of an undertaking that are likely to entail terminations of employment of workers in the undertaking. In this regard the employer is required to:

- inform the Chief Labour Officer and the trade union concerned at least three months before the contemplated changes of all relevant information, including the reasons for any termination, the number and categories of workers likely to be affected and the period within which any termination is to be carried out; and
- consult the trade union concerned on measures to be taken to avert or minimise the termination, as well as measures to mitigate the adverse effects of any terminations on the workers concerned, such as finding alternative employment. In practice, where there is no trade union, employees are usually notified of their terminations in accordance with their employment contracts.

The second situation of redundancy occurs where the business is closed down or undergoes an arrangement or amalgamation that results in a severance of the employer-employee relationship; and as a result of and in addition to the severance, that worker becomes unemployed or suffers any diminution in the terms and conditions of employment. In this regard, the worker is entitled to be paid compensation by the employer, referred to as redundancy pay.

The amount of redundancy pay and the terms and conditions of payment are subject to negotiation between the employer and worker or the trade union if the worker is a member of a trade union.

Past services and accumulated benefits of the employee must be considered in determining whether a worker has suffered any diminution in their terms and conditions of employment.

When a business is transferred as a going concern, it typically does not affect an employee's continuity of employment. If the employees are transferred on the same terms as their current employment and do not suffer any diminution in their conditions of service, no redundancy pay will be made by the employer upon the transfer.

Any dispute concerning the redundancy pay and the terms and conditions of payment must be referred to the National Labour Commission for settlement. The National Labour Commission's decision on matters concerning redundancy pay is final, subject to the right of the aggrieved party to appeal the decision at the Court of Appeal.

It should be noted that the redundancy provisions under the Labour Act do not apply to fixed-term contract workers, workers on probation and casual workers.

Is there any specific protection against the dismissal of employees the new owner of a business does not want to take on?

The Ghanaian courts have held that an employer is legally entitled to terminate an employee's contract of employment, provided that this is in accordance with the terms of the contract and Ghanaian labour laws. However, any termination in these circumstances will be considered a redundancy. The new owner will be required to comply with the Labour Act's redundancy provisions, including notification obligations and redundancy payments, as well as any relevant contractual terms in collective bargaining agreements or employment contracts.

Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

Ghana's laws do not allow the unilateral variation of the terms of employment of employees. All such variations must be consented to and mutually agreed by the employer and employee. In cases where variations to terms and conditions occur following a transfer of business, these should not result in a diminution of the terms and conditions as they existed prior to the transfer, otherwise it may be considered a redundancy exercise. The employer, after obtaining the employee's consent and the Chief Labour Officer's endorsement, must reach a mutual agreement with the affected employees if the conditions of service will be varied to harmonise with its existing workforce. In practice, the affected employees are re-engaged on the employer's new terms and conditions of service.

Can employees choose not to transfer to the new owner of a business?

Employees are free to reject an offer to transfer, which will bring the employment relationship to an end. Under section 30 of the Labour Regulations, 2007 (L.I. 1833), an employer cannot assign an employee's contract of employment without the consent of the worker and the endorsement by the Chief Labour Officer or a Labour Officer.

In such a case, the employees can terminate the employment contract in accordance with its terms and receive their benefits and redundancy pay, once applicable.

What information are employers obliged to give employees in a business transfer situation? Is consultation or any other engagement with employees required?

If the business transfer will result in termination of employment of workers, leading to redundancies, the employer is required to consult the affected employees and the trade union (if unionised), follow the redundancy procedure outlined in the Labour Act and give the required notifications. Except as required by employment contracts or collective bargaining agreements or employee manuals, employers are not obligated to provide employees with information during a business transfer. However, employee consultation may be required to obtain consent for the transfer of employees in a business transfer scenario.

How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

Under the Labour Act, employers are required to notify the Chief Labour Officer and consult with the trade union concerned if the employees are members of a trade union, at least three months ahead of the transfer if the transfer of the business is likely to result in any terminations of employment.

For the Chief Labour Officer to approve the transfer of employees as part of a business transfer process, a letter must be written to the Chief Labour Officer requesting endorsement of the transfer. The letter must explain the reason for the transfer of the employees, confirm that the employees have given their consent, and provide the employees' contact information for verification of their consent. The newly executed contracts with the transferred employees should be attached. The approval process from the Chief Labour Officer should generally be about 10 working days, provided all the information has been provided.

Is there a penalty for breach of a statutory consultation or similar process requirement?

While there is no statutory penalty for breach, non-compliance with the statutory consultation requirement will amount to the termination being deemed procedurally unfair, with consequences for the employer.

Section 63(4) of the Labour Act provides that a

termination may be unfair if the employer fails to prove that the reason for the termination is fair or the termination was made in accordance with a fair procedure of the Labour Act. An employee who successfully makes such a claim would be entitled to the following remedies upon making a complaint to the National Labour Commission under section 64 of the Labour Act:

- an order for the employer to reinstate the worker from the date of the termination of employment;
- an order for the employer to re-employ the worker, either in the work for which the worker was employed before the termination or in other reasonably suitable work, on the same terms and conditions enjoyed by the worker before the termination; or
- on order for the employer to pay compensation to the worker.

Are any other approvals or notifications required?

In addition to the requirement to consult the trade union (where applicable) and the Chief Labour Officer (in the case of redundancy and transfer of employees as part of a business transfer), the employer is required to notify the director of immigration where there are foreign employees on work permits affected by the redundancy exercise or the transfer of the business to a new owner.

In addition, certain notifications will also need to be made to the Ghana Revenue Authority and the Social Security and National Investment Trust.

In situations where employees of a company have formed or joined a trade union, the employer will have to comply with the provisions of the relevant collective bargaining agreement, which may contain a provision on notification.

Are there any proposals for reform?

The Revised Labour Bill, 2024 proposes some adjustments to the provisions relating to redundancy; however, there are no specific reforms relating to business transfers.

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Kenya

When a business is transferred from one employer to another as a going concern, does any law specifically protect employment rights?

There is no law that specifically protects employment rights in the event a business is transferred from one employer to another as a going concern. However, the current position emanating from various decisions in the Employment and Labour Relation Court is that:

- employees cannot be transferred as part of a business transfer transaction;
- any business transfer that comprises change of employment relationships must be with the employee's consent;
- employers must ensure that the employee's accrued benefits are not extinguished as a result of the change of employer. Usually such rights are either carried over or paid for if they are pecuniary such as accrued leave.

Additionally, where the transaction is subject to Competition Authority of Kenya (**CAK**) approval, the CAK may afford some protection by issuing an employment condition to its approval.

Is business outsourcing or insourcing treated in the same way as the transfer of a business?

No. There is no law that specifically governs this. As such, any outsourcing or insourcing would require employee consent.

How are employment rights protected in a business transfer situation?

There is no automatic transfer of employment in Kenya. In practice, on a transfer of a business, there are three options available to deal with employees:

- declaring the employees redundant, irrespective of whether the buyer is offering alternative employment. Thereafter the transferee (new employer) would offer fresh employment. Termination and signing the new contracts of employment would occur simultaneously. The seller would be required to comply with the redundancy provisions under the Employment Act; or
- the transferor (old employer), the new employer and each employee enter into a tripartite agreement pursuant to which the employment of the employee is terminated, and the new employer offers employment to such employee. In these circumstances, the employee would agree to a mutual termination or give their resignation and waive the right to receive redundancy payments in consideration of the new employer recognising accrued entitlements (including recognition of the original start date of the employee's initial employment). The agreement would also expressly confirm that the employee agrees to the transfer of their employment. This would have to be on terms no less favourable than the previous employment;
- the employees would resign in consideration of the buyer offering fresh employment and recognising accrued entitlements. The employees, in a letter addressed to the seller, would then waive rights to receive redundancy payments from the seller in consideration for their employment with the buyer recognising accrued entitlements.

Is there any specific protection against the dismissal of employees the new owner of a business does not want to take on?

Yes, the employees who the new owner does not wish to employ would have to be declared redundant by the previous employer/ transferor.

The Employment Act, 2007 (**Employment Act**) defines redundancy as the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous. The practice is commonly known as abolition of office, job or occupation and loss of employment.

Section 40 of the Employment Act provides that employers shall not terminate a contract of service on account of redundancy, unless employers comply with the following conditions:

- **Notification:** if an employee is a member of a trade union, the employer must notify both the union of which the employee is a member and the labour officer in charge of the area in which the employee is employed, not less than a month prior to the intended date of termination, of the reasons for, and the extent of, the intended redundancy. Where an employee is not a member of a trade union, the employer must notify the employee and the labour officer at least one month prior to the intended date of termination;
- **Consultations:** the employer must hold consultations with the affected employees to discuss the reasons for and the extent of the intended redundancy. The employer must consider any possible alternatives to a redundancy;

- **Selection criteria:** the employer must, in the selection of employees to be declared redundant, give due regard to the seniority in time and to skill, ability and reliability of each employee of the particular class of employees affected by redundancy;
- **Collective agreements:** where there is a collective bargaining agreement (**CBA**) between an employer and a trade union setting out terminal benefits payable upon redundancy, the employer should not place the employee at a disadvantage for being, or not being, a member of the trade union;
- **Notice and severance pay:** when an employee is being declared redundant, the employer must give the employee not less than one month's notice or one month's wages *in lieu* of notice (or such greater notice pursuant to a CBA or contract). The employer must provide severance pay as prescribed and pay the employee for any accrued leave.

All notifications should be in the form of a letter and ideally the letter should be in the English language. Kenyan courts have held that consultations must be held with employees upon the notification of intended redundancy being issued. However, there is little guidance on the frequency and length of such consultations. Generally, a minimum of one month's consultation is required.

Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

Yes, if the termination of existing employees is on account of redundancy, or termination by mutual consent, the terms can be changed as the employment by the new employer is deemed fresh employment.

Where employees are transferring via a tripartite agreement, the general rule is that the terms of employment of employees with the new employer are required to be no less favourable than their terms of employment with the old employer.

Can employees choose not to transfer to the new owner of a business?

Yes. Employee consent is required before employees can be employed by the new employer. Where an employee rejects the terms of the new contract, the employee's employment with the old employer is terminated on account of redundancy and the conditions in the Employment Act, related to redundancy, should be complied with. Even if redundancy dues are paid in the first instance, the employee can refuse to enter a new employment contract with the buyer.

What information are employers obliged to give to employees in a business transfer situation? Is consultation or any other engagement with employees required by law?

If employees are being declared redundant, then the old employer must follow the redundancy procedure outlined in the Employment Act and give the required notifications.

Although not a statutory requirement, if the parties go the tripartite agreement route, notification and consultation with employees is required.

How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

If employees are being declared redundant, the notification of intended redundancy should be given to the employee, labour officer and trade union (if the employee is unionised) at least one month prior to the intended date of redundancy.

It should be noted that the requirement is to notify the labour officer. There is no requirement for approval by the labour officer.

Consultations need to occur prior to termination on account of redundancy. After the expiry of the initial notice period and holding consultations, the employer can terminate on account of redundancy. This is a minimum period of one month but can be paid *in lieu*.

Generally speaking, the law would also require that the information provided to employees during the consultation period is adequate and gives them as much detail as possible about the process.

Is there a penalty for breach of a statutory consultation or similar process requirement?

When an employer breaches a statutory consultation or similar process requirement, it could lead to the termination being considered procedurally unfair. If an employee challenges the process on these grounds and the court agrees, the maximum penalty payable would be an amount equal to 12 months' salary. Additionally, the Employment and Labour Relations Court generally holds that if any of the legally required steps for terminating an employee's contract are not followed, the entire process may be set aside. For large-scale terminations, this could significantly impact the business both financially and operationally.

Are any other approvals or notifications required?

Other than the notification to a trade union (where applicable) and a labour officer (in the case of a redundancy), no other external approvals or notifications are required.

If the transaction meets antitrust thresholds, the parties would be required to notify or seek approval from CAK as appropriate. Additionally, if the parties to the transaction are regulated entities, it may trigger notifications as per the respective regulations.

Are there any proposals for reform?

There are currently no proposals for reform.

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Mauritius

BOWMANS

When a business is transferred from one employer to another as a going concern, does any law specifically protect employment rights?

The Mauritius Workers' Rights Act 2019 (**WRA**), section 67 (Employment following transfer of undertaking) contains the relevant provisions in relation to the rights of an employee where there is a transfer or taking over of a trade or business from one employer by a new employer.

Is business outsourcing or insourcing treated in the same way as the transfer of business?

In section 2 of the WRA, a 'trade' or 'business' is defined as any occupation, calling, trade, business, profession, industry, service or other commercial activity. This broad definition extends the application of the section to service provision changes that satisfy the 'going concern' requirement.

How are employment rights protected in these situations?

There is no automatic transfer of employment in Mauritius. In practice, on the transfer of a business, the new employer will make an offer of employment to each employee on terms and conditions that are not less favourable than those of their previous agreement with continuity of service.

If the employee refuses the offer, the employee will not be entitled to claim that their employment has been terminated without justification.

However, where the transfer or taking over of the trade or business involves a substantial change in the working conditions of an employee, the employee may claim that their contract of employment has been terminated by the new employer without justification.

Is there any specific protection against the dismissal of employees the new owner of a business does not want to take on?

A dismissal is deemed to be without justification if the reason for dismissal is, or is related to, a transfer or taking over of a trade or business. There is no qualifying period for protection against unjustified dismissal, and remedies for unjustified dismissal include reinstatement (the primary remedy, if requested) or compensation equivalent to three months' remuneration per year of service.

This protection does not preclude dismissal on the grounds of genuine operational requirements, that is, if the true reason for the dismissal is based on the economic, technological or structural needs of the new employer.

Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

There is flexibility in section 67 that facilitates harmonisation to a limited extent. The new employer can employ the employees on terms and conditions that are 'not less favourable' than those on which they were employed by the old employer. Harmonisation 'downwards', so that terms and conditions are on the whole less favourable, is not permitted, and may constitute an unjustified dismissal. Beyond this and any substantial change in the working conditions of the employee, harmonisation is permissible only by agreement.

Can employees choose not to transfer to the new owner of a business?

Yes, the employee can choose not to transfer; however, to the extent that the employee is offered employment by the new owner of the business on terms that are not less favourable than those of their previous agreement with no substantial change in their working conditions, the employee will not be able to claim that their employment has been terminated without justification.

What information are employers obliged to give employees in a business transfer situation? Is consultation or any other engagement with employees required?

The WRA does not require that information be given to employees unless notice or consultation is prescribed by a collective agreement binding on the employer.

Where there is a trade union involved, the Mauritius Employment Relations Act 2008 requires that when changes in management take place following a take-over, the new manager is required to make prompt contact with the trade unions concerned and take steps to explain any changes in policies affecting workers.

How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

There is no compulsory information and consultation process in Mauritius unless a process is required by a collective agreement.

There is further no such statutory requirement for approval by any labour or other statutory authority in Mauritius.

Is there a penalty for breach of a statutory consultation or similar process requirement?

There is no penalty for such breach since there is no statutory consultation required by law.

Are any other approvals or notifications required?

No other approvals or notifications are needed.

Are there any proposals for reform?

There are no current proposals for reform.

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Mozambique

When a business is transferred from one employer to another as a going concern, does any law specifically protect employment rights?

Employment rights in the case of business transfer situations are regulated and protected by the provisions of Article 83 of the Labour Law (Law No. 13/2023 of 25 August 2023) (**Labour Law**).

The section applies when a company or commercial establishment is transferred as a going concern.

Is business outsourcing or insourcing treated in the same way as the transfer of business?

Business outsourcing or insourcing is not treated in the same way as the transfer of a business.

How are employment rights protected in a business transfer situation?

In terms of the Labour Law, in the event of a transfer of an undertaking as a going concern, all rights and obligations (including the employee's seniority) between the old employer and each employee continue in force as if they had been rights and obligations between the new employer and each employee.

The new employer shall be jointly and severally liable for the obligations of the transferor due in the last year of activity prior to the transfer, even if they concerned employees whose employment contracts have already expired on the date of said transfer.

In addition, in certain circumstances, the employee is entitled to terminate the employment contract with cause.

Is there any specific protection against the dismissal of employees the new owner of a business does not want to take on?

If, subsequent to a sale of business, a new owner does not wish to continue with certain contracts of employment, these contracts can only be terminated under certain circumstances, namely where the termination of the employment contract is based on structural, technological or market reasons and proves to be essential to the competitiveness, economic restructuring, administrative or productive reorganisation of the new owner. It is extremely important to highlight that in the specific context of employment termination by redundancy (ie for structural, technological or market-related reasons) the legal concept of just cause entails that its occurrence is beyond the employer's will or control. This principle aims at preventing possible arbitrary dismissals disguised as redundancy. In terms of Article 145 of the Labour Law, the burden of proof regarding the existence of structural, technological or market-related reasons justifying the dismissal(s) falls upon the employer.

The steps that are required to implement a redundancy programme for represented/ non-represented employees are the same.

Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

The new employer cannot change the terms of the employment contract, unless the new terms are more favourable to the employees.

Can employees choose not to transfer to the new owner of a business?

There is no general statutory right to object to a transfer. Employees are entitled not to transfer or to terminate the contract of employment only where:

- the employee enters into an agreement with the transferor to remain in the service of the transferor/ original employer;
- the employee, at the time of the transfer, having reached retirement age, or having met the requirements to benefit from retirement, applies for retirement;
- the employee has a lack of confidence or a well-founded fear about the suitability of the new employer;
- the new employer intends to change or will change working conditions within the following 12 months, if such a change entails a substantial change in working conditions.

What information are employers obliged to give employees in a business transfer situation? Is consultation or any other engagement with employees required?

Both the former and the new owner must provide information on the date and the reason of the transfer. For this purpose, they may have a notice posted at the workplace informing the workers of the right to lodge their claims within 60 days, failing which the right to claim them will expire.

In addition, both the old and new employer must inform and consult the union body or the representative trade union on the date and grounds of transfer, including the projected consequences of such transfer.

How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

The Labour Law does not specify any time periods for any compulsory information exchange or consultation process. The Labour Law, however, obliges the employer to inform and consult with each employers' Union Body (old and new employer) or the representative trade union, regarding the date and grounds of business transfer, as well as the projected consequences of the transfer.

Once the transfer process is completed, the new owner should inform the Labour General Inspectorate.

Is there a penalty for breach of a statutory consultation or similar process requirement?

Failure to comply with the legal formalities/ procedures may trigger the imposition of fines by the General Labour Inspectorate of between five and 10 times the minimum salaries of employees.

Are any other approvals or notifications required?

In the case of a redundancy/ retrenchment, the new owner must also notify the Ministry of Labour (in addition to the relevant employees and the representative trade union or the union body).

Are there any proposals for reform?

The anticipated new Labour Law will undergo further consideration by the Council of Ministers to address some inaccuracies. However, we do not expect many (if any) amendments to the transfer of business regime.

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Namibia

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When a business is transferred from one employer to another as a going concern, does any law specifically protect employment rights?

The Labour Act 11 of 2007 (**Labour Act**) does not expressly regulate or permit the transfer of employment from one employer to another where a business is sold as a going concern.

Where a business is transferred, the employment relationship with the current employer is terminated in terms of section 34 of the Labour Act, and a new employment relationship is concluded with the new employer.

Is business outsourcing or insourcing treated in the same way as the transfer of business?

The insourcing and outsourcing of business constitutes a contractual relationship between a business and a third party for the provision of services and is not regulated by the Labour Act.

How are employment rights protected in these situations?

Where an employment relationship is terminated on a no-fault basis due to restructuring or a transfer of business, the Labour Act terms such termination as a dismissal at the behest of the employer (ie a retrenchment).

In terms of section 34 of the Labour Act, an employer must, at least four weeks prior to the date of the intended dismissal, give notice to the Office of the Labour Commissioner and any trade union recognised by the employer as the exclusive bargaining agent, and/ or the affected employees, of the following:

- the intended dismissals;
- the reasons for the reduction in the workforce;
- the number and categories of employees affected; and
- the date of the intended dismissals.

Where a collective agreement or employment agreement provides for a longer notice period, such notice period shall apply.

The employer may inform the trade union or workplace representative of the intended dismissals in less than four weeks if it is not practicable to do so within the four-week period.

Where no trade union is recognised as the exclusive bargaining agent, the employer must give such notice to the workplace representative and the employees.

An employer is obligated to negotiate in good faith with the relevant parties on the following:

- any alternatives to the dismissals;
- the criteria for selecting the employees to be dismissed;
- how to minimise the dismissals;
- the conditions on which the dismissals are to take place; and
- how to avoid the adverse effects of the dismissals.

Negotiating in good faith entails meeting, discussing and negotiating with an honest intention of reaching an agreement, if this is feasible. An employer is required to demonstrate a genuine willingness to compromise.

The affected employees ought to be selected according to selection criteria that may be set out in a Recognition and Procedural Agreement with the exclusive bargaining agent, and ought to be fair and objective.

The primary purpose of negotiations is aimed at a genuine and diligent effort to find alternatives to the dismissals. Where the intended dismissals are premised on the restructuring and/ or discontinuation of the business, it may be that the intended dismissals are not open for negotiations, in which case the parties are to negotiate over ways in which to avoid the adverse effect of the intended dismissals.

Where the parties are unable to reach an agreement during the negotiations, and a deadlock is reached, the termination shall be based on the most favourable offer made by the employer to the employees during the negotiations. Alternatively, either party may refer the matter to the Office of the Labour Commissioner for conciliation and assistance in resolving the dispute.

Conciliation proceedings are limited to a maximum of four weeks from the date that the dispute was referred to the Office of the Labour Commissioner. During this period, the employer is not permitted to finalise the intended dismissal until such time as the dispute before the Labour Commissioner has been settled or otherwise disposed of.

The Labour Act further protects employees against a disguised transfer or continuance of the employer's operation. This would be any practice whereby an employer purports to have discontinued its operations, in part or entirely, while those business operations are

continued under another name or form or are carried out at another location, without the employer disclosing all the facts to the affected employees or their collective bargaining agent.

In these instances, the affected employee or the collective bargaining agent may apply to the Office of the Labour Commissioner for the following relief:

- directing the restoration of the operation;
- directing the reinstatement of the employees; or
- awarding lost and future earnings to the employees.

Upon dismissal, the employer must pay the employees all remuneration due in respect of:

- work done before the termination;
- any paid time off that the employees are entitled to or that they have not taken;
- any period of annual leave due for any completed annual leave cycle;
- any annual leave pay to which the employees are entitled in respect of any incomplete annual leave cycle;
- severance pay equal to one week's remuneration for every year of continuous service with the employer;
- any notice pay if the employees are paid instead of being given notice of termination of their employment; and
- any transport allowance due to the employees.

The employer is furthermore obliged to provide an employee with a certificate of service containing prescribed information.

In terms of the Labour Act, all dismissals ought to be in accordance with a valid and fair reason and in accordance with a fair procedure. Where an employee is of the view that the dismissal (ie retrenchment) was not done in accordance with a valid and fair reason and/ or a fair procedure, an employee may refer a dispute to the Office of the Labour Commissioner within six months of the dismissal.

Remedies for an unfair dismissal include reinstatement, compensation and/ or an order directing the performance of any act that will remedy the wrong. The capital amount ordered to be paid to an employee accrues interest at the rate prescribed from time to time, as from the date of the award by the Labour Commissioner. There is no statutory limitation on the amount of compensation that may be awarded to an employee.

We note that in practice a transfer of a business as a going concern is contractually regulated, in which case the employee's employment history is transferred from the old owner to the new owner without any interruption of employment.

Is there any specific protection against the dismissal of employees the new owner of a business does not want to take on?

All employment relationships with the old owner are terminated upon the sale of the business. It is accordingly the prerogative of the new employer whether any employees are to be employed.

Where the transfer of a business is contractually regulated and transferred from the old owner to the new owner, the new owner shall be obliged to take over the entire workforce. The new owner would however be permitted to terminate employment where positions are made redundant due to restructuring of the business. Such termination of employment shall be regulated by section 34 of the Labour Act.

Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

Section 50 of the Labour Act provides that it is unlawful for an employer to unilaterally amend an employee's terms and conditions of employment.

The only lawful manner in which an employee's terms and conditions of employment can be amended is by way of consultation and consent by the employee. All terms and conditions of employment ought to comply with the basic conditions of employment as regulated by Chapter 3 of the Labour Act. Where the terms and conditions of employment offered by the new owner are more favourable, such terms and conditions shall apply to the employment relationship.

Can employees choose not to transfer to the new owner of a business?

Employees do not have a common law or statutory right to object to the sale of a business and any dismissal that may ultimately result from it.

Where a transfer is contractually regulated, and an employee resigns from their employment to avoid the consequences of the transfer, such employee will not be entitled to severance pay. Alternatively, employees may enter into a separation agreement with the old and/ or new employer.

If the new employer alters the employment conditions to be less favourable than those provided by the old employer, and the employee resigns as a result, it could constitute a dismissal.

What information are employers obliged to give employees in a business transfer situation? Is consultation or any other engagement with employees required?

Section 34 of the Labour Act requires the employer to disclose all relevant information unless it is legally privileged; prohibited from being disclosed by any law or court order; or if it is confidential and, if disclosed, might cause substantial harm to the employer.

Apart from section 34 of the Labour Act, there is no other statutory duty on employers to disclose information to or consult with the employees regarding the transfer.

If the employer entered into a collective agreement with a trade union which requires certain notice and consultation to take place and/ or information to be disclosed pertaining to a transfer of business, the employer must comply with the terms of such collective agreement.

How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

Section 34 of the Labour Act requires the employer to give notice, to the Labour Commissioner and any trade union recognised as the exclusive bargaining agent, at least four weeks before the intended dismissals are to take place.

Where a collective agreement or employment agreement provides for a notice period of more than four weeks, such notice period shall apply.

The employer may inform the trade union or workplace representative of the intended dismissals in less than four weeks if it is not practicable to do so within the four-week period.

If a dispute is referred to the Office of the Labour Commissioner under section 34 of the Labour Act, the conciliator must convene meetings with the parties as may be necessary to resolve the dispute, up to a maximum period of four weeks from the date that the dispute was referred to the Office of the Labour Commissioner.

There are no prescribed time periods within which any consultation or negotiations must be finalised; however, the intended terminations cannot be effected until the negotiations are finalised.

At present there are no requirements for approval by any labour or other statutory authority in Namibia.

Is there a penalty for breach of a statutory consultation or similar process requirement?

An employer who contravenes or fails to comply with section 34 of the Labour Act commits an offence and is liable, upon conviction, to a fine not exceeding NAD 10 000 or to imprisonment for a period not exceeding two years, or to both a fine and imprisonment.

Are any other approvals or notifications required?

Subsequent to the finalisation of negotiations, an employer is required to submit a completed Form LC 52 to the Office of the Labour Commissioner, as proof of procedural compliance with the Labour Act.

There are additional notification requirements where a business is transferred as a going concern; however, these do not have a direct bearing on employment and labour law rights.

Are there any proposals for reform?

Namibia does not currently have any reform proposals.

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Nigeria

UDO UDOMA & BELO-OSAGIE

When a business is transferred from one employer to another as a going concern does any law specifically protect employment rights?

The Labour Act, Chapter L1, Laws of Federation of Nigeria 2004 (**Labour Act**) is the principal legislation that governs the employment of persons in Nigeria. The scope of the Labour Act is fairly limited as it governs only the employment of 'Workers', defined as employees who perform manual labour or clerical functions. The Labour Act excludes other employees who exercise administrative, executive, technical or professional functions (referred to as 'Non-workers'). The Labour Act prescribes the minimum standards and conditions of employment for Workers. However, it is not unusual for employers to use the Labour Act as a benchmark for determining the minimum terms of employment for Non-workers. The terms of employment of all Non-workers are governed primarily by their respective contracts of employment and the principles of labour law as decided by Nigerian courts.

A contract of employment is a contract of personal service and cannot be transferred from one employer to another without the consent of the employee. Where employees to be transferred are Workers, in addition to obtaining the individual consent of each employee, an authorised labour officer must endorse the transfer on the contract of employment of each transferred employee.

Where the transfer is carried out by way of a share sale, there is no impact on employment rights.

Is business outsourcing or insourcing treated in the same way as the transfer of business?

Business outsourcing or insourcing are, under Nigerian law, contractual arrangements entered into by a company for the provision of services to, or by the company, and do not amount to a sale or transfer of business.

How are employment rights protected in a business transfer situation?

In a business transfer, the parties are required to comply with the employees' contracts of employment, any general conditions of employment set out in an employee handbook or any collective agreements with trade unions. We should mention that there is no automatic transfer of employment contracts upon a transfer of a business. Where the transfer is implemented by way of an asset sale, for the employees to transfer to the new owner, each employee's consent must be obtained to novate their contracts of employment in favour of the new owner. A novation will have the effect of transferring all the rights and liabilities of employees from the old employer to the new employer. Where employees to be transferred are Workers, an authorised labour officer must endorse the transfer on the contract of employment of each transferred employee.

In addition, where such a transfer results in the termination of contracts of employment, such terminations may give rise to a redundancy and require the parties to comply with the relevant provisions of the Labour Act and any contractual redundancy policy. Section 20(3) of the Labour Act defines the term 'redundancy' as an 'involuntary and permanent loss of employment due to an excess of manpower'. The provisions of section 20 of the Labour Act obligate the employer to notify employees or their trade union representatives of the reasons for and the anticipated extent of the redundancy, negotiate redundancy payment for the Workers and implement the principle of 'last in, first out' (subject to other factors of relative merit including skill, ability and reliability) in determining the persons to be declared redundant. With respect to Non-workers, the terms of their respective employment contracts will apply.

Is there any specific protection against the dismissal of employees the new owner of a business does not want to take on?

There is no specific protection for employees in such a scenario. However, if a new business owner does not want to take on some employees in a business transfer transaction, a redundancy is triggered, and the business would be required to comply with the terms of the Labour Act or any contractual redundancy policy in terminating the employees' contracts of employment.

Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

A new owner of a business cannot unilaterally change the terms of employment of its existing workforce without their consent. Each individual employee is entitled to accept or reject the new terms of employment. Where the existing employees are members of a trade union, the new owner may be required to negotiate with and agree the proposed changes with the representatives of the trade union.

Can employees choose not to transfer to the new owner of a business?

A contract of employment is a contract of personal service and cannot be transferred from one employer to another without the consent of the employee. An

employee can, therefore, choose not to transfer to the new owner of a business.

What information are employers obliged to give employees to in a business transfer situation? Is consultation or any other engagement with employees required?

Subject to the provisions of the relevant contracts of employment, any general conditions of employment set out in an employees' handbook or any collective agreements with trade unions, there is generally no legal requirement that provides for a mandatory consultation with employees in a business transfer transaction. In practice, however, employers usually inform employees of a business transfer. Where the business transfer may lead to the redundancy of employees, the Labour Act provides that the employer shall inform the trade union or Workers' representative of the reasons for and the extent of the anticipated redundancy.

Note that section 122(7) of the Investment and Securities Act 2007 empowers a Nigerian court, before sanctioning a merger and granting an order for dissolution without winding up of any transferor company, to be satisfied that 'adequate provision by way of compensation or otherwise has been made with respect to the employees of the company to be dissolved'.

How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

There is no statutory requirement for an employee information and consultation process in a business transfer, and as such, there is no statutory timeline for this process.

The Labour Act provides that the transfer of any contract from one employer to another shall be subject to the consent of the Worker and the endorsement of the transfer on the contract document by an authorised labour officer. Before endorsing the transfer, the labour officer is required to ensure that the Worker has freely consented to the transfer and that their consent has not been obtained by coercion or undue influence or as a result of misrepresentation or mistake. For any investor in Nigeria's oil and gas industry, it is essential to note that a transferor-employer must also obtain the approval of the Nigerian Upstream Petroleum Regulatory Commission (**NUPRC**) if it intends to terminate contracts of any of its employees as a result of a business transfer.

Is there a penalty for breach of a statutory consultation or similar process requirement?

Section 21 of the Labour Act provides that any employer who enters into any agreement or contract contrary to any provisions of the Labour Act shall be guilty of an offence and liable on conviction to a fine not exceeding NGN 800 or, for a second or subsequent offence, to a fine not exceeding NGN 1 500.

In our view, any employer who purports to transfer the contract of employment of any Worker without their consent and the endorsement of the transfer by an authorised labour officer, may be indicted for a criminal offence under the Labour Act. A court of law in Nigeria could, in addition, invalidate such transfer for being a breach of the provisions of section 34 of the Constitution of the Federal Republic of Nigeria (Promulgation Act), Chapter C23, Laws of the Federation of Nigeria 2004 as amended (**1999 Constitution**), on the prohibition of forced or compulsory labour, and could award damages against any such employers.

Where the transferor-company fails to obtain the NUPRC's consent prior to a transfer which may lead to the termination of some employees in the oil and gas industry, the old employer will be liable to pay a penalty in the sum of USD 250 000 and also runs the risk that its leases, licences or permits may be withdrawn or cancelled.

Are any other external approvals or notifications required?

Where a business transfer qualifies as a large merger as defined under the Federal Competition and Consumer Protection Act, the approval of the Federal Competition and Consumer Protection Commission will be required for the merger.

Are there any proposals for reform?

There are no known proposals for reform in this area of labour and employment law.

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Senegal

When a business is transferred from one employer to another as a going concern does any law specifically protect employment rights?

Employment rights in business transfer situations are protected by Article L66 of the Senegalese Labor Code (Law 1997-17 of 1 December 1997) (**Labor Code**). This provision applies in the case of a 'modification of the legal situation of the employer' (ie inheritance, purchase under a new corporate name, sale or merger of a business, transformation of assets or transformation of an individual establishment into a commercial company).

This provision does not apply to share sales or change of control in a company.

Is business outsourcing or insourcing treated in the same way as the transfer of a business?

Yes. The underlying rationale of Article L66 is to ensure job protection for all workers regardless of any change affecting the legal situation of their employer. This provision is interpreted broadly, and it is acknowledged that Senegalese case law and doctrine consider a transfer of business, in full or in part, to be subject to Article L66.

It is important to note that employees' rights are exclusively protected when the transferee (new employer) carries out the same activity as the transferor (old employee) following the transfer of business. The continuation of the activity allows the new employer materially to be able to retain the existing jobs.

How are employment rights protected in these situations?

In the case of the modification of the employer's legal situation, Article L66 of the Senegalese Labor Code sets forth that:

- all existing employment contracts remain automatically in force under the previous terms between the transferee (new employer) and the employees;
- employees keep their accrued seniority and acquired rights.

Is there any specific protection against dismissal of employees the new owner of a business does not want to employ?

The aim of Article L66 is to guarantee that the business transfer does not lead to the termination of any existing employment contracts. The new employer is required to accept the responsibility for the existing employees as part of the business transfer.

If the new employer seeks to dismiss a transferred employee, the reason for dismissal must not be motivated by the transfer of business itself. Otherwise, there is a risk that the dismissal be deemed abusive/ unfair, which can lead to legal proceedings before the Labor Courts.

Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

Yes, the new owner of a business can change the terms of employment of an existing employment contract, but only if the modification is minor (ie 'non-essential').

The new employer retains its 'power of direction' and is authorised to proceed with any non-essential modification to workers' employment contracts (ie minor modification that does not affect the contractual foundations of the employment contract). For instance, the new employer can assign an employee to a different task corresponding to their professional category to adapt their job to the new organisation.

Any essential modification of the terms of employment (eg remuneration, professional category, work schedule, place of work, etc) requires the consent of the employee.

Can employees choose not to transfer to the new owner of a business?

Considering that there is an automatic transfer of all existing employment contracts to the transferee/ new employer, an employee who chooses not to transfer to the new employer's workforce would have to present their resignation to the new employer. Failure to resign coupled with a failure to report to the new employer can be interpreted as an abandonment of their position, which can lead to the termination of the employment contract by the new employer.

What information are employers obliged to give to employees in a business transfer situation? Is consultation or any other engagement with employees required?

Considering that the transfer of existing employment contracts is automatic, the Labor Code does not provide for any procedure to be followed in the event of a business transfer.

In practice, even though it is not mandatory for employers to provide details of a business transfer to the employees, a communication is usually addressed to all employees informing them of the change in the legal situation of their employer. However, no consultation or engagement with the employees is usually carried out.

How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

There is no process set forth in the law for a business transfer and, in practice, no consultation is usually carried out with employees.

Also, the employer is not required to engage with the labor authorities or any other statutory authority.

Is there a penalty for breach of a statutory consultation or similar process requirement?

As there is no statutory requirement for consultation, this scenario would not arise.

Are any other external approvals or notifications required?

No external approval or notification of the change of employer is required *per se*. However, it is advisable to notify the Labor Inspectorate of the transfer of business. Additionally, approvals and/ or notifications might be required from non-labour authorities (tax, Trade Registry, Central Bank of the West African States, etc) depending on the details of the transfer of business (eg value of the transaction, status of transferor/ transferee, change of control, etc).

Are there any proposals for reform?

There are no current proposals for reform.

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South Africa

When a business is transferred from one employer to another as a going concern does any law specifically protect employment rights?

Employment rights in business transfer situations are regulated by the provisions of section 197 of the Labour Relations Act, 1995 (**LRA**). The provisions are very broadly modelled on the EU Acquired Rights Directive, but this section of the LRA establishes its own specific employment transfer regime. The section applies when a business is transferred as a going concern. The section does not apply to share sales.

Is business outsourcing or insourcing treated in the same way as the transfer of a business?

In section 197 of the LRA, a 'business' includes the whole or a part of any business, trade, undertaking or service. This broad definition extends the application of the section to service provision changes that satisfy the 'going concern' requirement.

How are employment rights protected?

If a going concern is transferred, the transferee (new employer) is automatically substituted in the place of the transferor (old employer) in all contracts of employment in existence immediately before the date of transfer. Accordingly:

- all rights and obligations between employer and employee continue in force as if they had been rights and obligations between the new employer and each employee;
- anything done before the transfer by, or in relation to, the old employer, including dismissal or commission of an unfair labour practice or act of discrimination, is considered to have been done by, or in relation to, the new employer; and
- the transfer does not interrupt an employee's continuity of employment.

Employees may be transferred to a new or different pension, provident, retirement or similar fund, provided that their accrued pension rights are adequately protected.

The new employer is bound by collective agreements and arbitration awards that were binding on the old employer in respect of the employees who were transferred.

All of these employment consequences of a business transfer can be varied, but only by a written agreement concluded between one or both employers (old and new) on the one hand and qualifying employee representatives on the other.

Separate provisions regulate the transfer of a business in insolvent circumstances (sections 197A and 197B). The primary difference in circumstances of insolvency is that accrued liabilities to employees will not be passed on to the new employer.

Is there any specific protection against dismissal of employees the new owner of a business does not want to employ?

A dismissal is characterised as 'automatically unfair' if the reason for the dismissal is a transfer, or a reason related to, a transfer contemplated in section 197. There is no qualifying period for protection against unfair dismissal, and remedies for unfair dismissal include reinstatement (the primary remedy, if requested) or compensation capped (in the case of automatically unfair dismissals) at two years' remuneration.

This protection does not preclude dismissal on the grounds of genuine operational requirements, that is, if the true reason for the dismissal is based on the economic, technological, structural or similar needs of the new employer.

Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

There is flexibility in section 197 that facilitates harmonisation to a limited extent. The new employer complies with its obligations under the inherited contracts of employment if it employs employees on terms and conditions that are 'on the whole not less favourable' than those on which they were employed by the old employer. Harmonisation 'downwards', so that terms and conditions are on the whole less favourable, is not permitted, and may constitute a dismissal. Beyond this, harmonisation is permissible only by agreement.

Can employees choose not to transfer to the new owner of a business?

There is no statutory right to object to a transfer. The substitution of the new employer for the old takes place automatically as a matter of law. Employees may choose to resign to avoid the consequences of the transfer, but in that event would not be entitled to severance benefits. If a resignation is prompted by repudiatory conduct by the new employer (such as providing conditions of employment substantially less favourable

than those provided by the old employer), this may constitute a dismissal. Otherwise, employees may opt out only by agreement between one or both employers and qualifying employee representatives.

What information are employers obliged to give to employees in a business transfer situation? Is consultation or any other engagement with employees required?

Apart from what is stated below, section 197 prescribes no separate information sharing or consultation process. This means that a transfer may lawfully take place without prior notice or consultation unless notice or consultation is prescribed by a collective agreement binding on the employer or the parties seek to conclude an agreement that varies the consequences of the section. In the latter event, an employer seeking to conclude the agreement is required to disclose relevant information to employee representatives.

In terms of section 197(7), the old and the new employer should conclude an agreement on the value of amounts that have accrued to the transferring employees, such as their accrued annual leave pay, the severance pay to which they would have been entitled had they been retrenched by the old employer on the transfer date, and any other accrued amounts. The old and new employers must, in addition, specify which of them would be liable for the payment of these accrued amounts as and when they fall due and in the case of an apportionment, should set out the terms of apportionment. The old employer must disclose the terms of this agreement to the transferring employees.

Should the old employer fail to conclude the agreement contemplated in section 197(7) with the new employer, the old employer remains liable, jointly and severally with the new employer, for a period of 12 months after the transfer date for payment of these amounts to any employee who becomes entitled to receive a payment as a result of their retrenchment or as a result of the liquidation or sequestration of the employer.

How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

There is no prescribed statutory process, but where a process is required by collective agreement or is voluntarily entered into, this would typically take between one or three months, depending on the complexity of the transfer and its implications for employees.

There is no requirement for approval of a transfer of employees by any labour or other statutory authority in a business transfer situation.

Is there a penalty for breach of a statutory consultation or similar process requirement?

There being no statutory consultation requirement, there is no penalty for breach. However, a failure to disclose (after the transfer) the consequences of the transfer for employees, including any written agreement that determines which employer (old or new), is liable for the payment of accrued leave pay, severance pay and other payments accrued but not yet paid at the date of transfer, will result in the old employer remaining jointly and severally liable for any such payment for a period of 12 months following transfer.

Are any other external approvals or notifications required?

No other approvals or notifications relating to the transfer of employees are required.

Are there any proposals for reform?

There are no current proposals for reform.

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Tanzania

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When a business is transferred from one employer to another as a going concern does any law specifically protect employment rights?

Employment in Tanzania is governed by the Employment and Labour Relations Act [Cap. 366, R.E. 2019] (**ELRA**). This Act does not specifically provide for rights of employees when a business is transferred as a going concern. The ELRA, read together with the Employment and Labour Relations (Code of Good Practice) Rules 2007, GN 42 of 2007 (**Code of Good Practice**), recognises different types of termination of employment, including termination of employment on operational grounds. Terminations resulting from the transfer of a business are considered terminations on operational grounds or retrenchments.

The courts have interpreted the provisions of both the ELRA and the Code of Good Practice such that where a company makes a legitimate decision to transfer a business as a going concern, the issue of whether the purchaser is obliged to take over employees of the former employer will depend on the existence of a clause in the agreement to that effect. This issue was raised in the unreported matter heard in the High Court of Tanzania (Labour Division) at Dar es Salaam, *Emmanuel Urassa and 20 Others v. Shared Networks Tanzania Limited*, Labour Revision No. 467 of 2019. In this case, Vodacom Tanzania had bought the licence and technology of the respondent company and employees were retrenched. The Court considered whether there was an agreement that Vodacom would also take over employees. As no agreement to that effect was tendered as evidence in court, the Court held that the respondent company took a legitimate decision to retrench the applicants after the restructuring process.

On payment of a retrenchment package above what the law provides, the Court held that an additional package is only payable if the parties agreed on that additional pay during consultations.

The ELRA provides that any termination of employment must be for a lawful reason and must follow a fair procedure. Accordingly, and to protect the rights of employees, the ELRA provides for specific procedures to be followed during retrenchment.

Is business outsourcing or insourcing treated in the same way as the sale of a business?

The provisions of the ELRA, particularly section 38, and rule 23 of the Code of Good Practice, have been interpreted by the courts in Tanzania as permitting an employer to restructure its business so long as this is not a pretext to retrench employees. An example is the judgment delivered on 11 May 2021, in *Husna Abdul Muro and 66 Others*, Revision No. 836 of 2018, High Court of Tanzania at Dar es Salaam (unreported). The respondent company had entered into an agreement with Huawei Technologies Co. Ltd to outsource network operations from the company. Following this agreement, the respondent retrenched the applicants who were working in the technical department and transferred them to Huawei. They were unhappy with their retrenchment and challenged it. The Court declined to interfere with the legitimate decision of the employer to retrench following outsourcing.

The Court treated retrenchment due to outsourcing in the same way it treated retrenchment due to the transfer of a business. What the court looks at is whether that was a legitimate decision, or if it was done for purposes of retrenching employees.

How are employment rights protected in these situations?

The law prohibits an employer from proceeding with a retrenchment unless the parties have agreed on the basic terms and conditions for the retrenchment. In the event that the parties do not agree on such terms, the matter must be referred to the Commission for Mediation and Arbitration (**CMA**). Before the retrenchment is concluded, if the matter is not settled through mediation, it will proceed to arbitration. This process protects employees.

In determining whether reasons for retrenchment were valid, the court asks itself whether there was a legitimate decision to retrench or whether the transaction (being either the transfer of a business as a going concern or outsourcing) was done on the pretext to retrench employees.

Is there any specific protection against the dismissal of employees the new owner of a business does not want to employ?

There is no provision that compels the new owner of the business to take on the employees of the old owner of the business. The taking on of employees can be one of the conditions set by the relevant authority during an acquisition merger, or by agreement between the parties involved. It is the responsibility of the old employer to ensure that if employees are not taken on by the new owner, a retrenchment process is followed.

Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

This will depend on how the new owner took over the employees. If they were retrenched first by the former employer, the new employer can introduce new terms in the contracts of employment. However, the position is different if the new owner took over the employees on the same terms and conditions as with the former employer and later wants to change the terms and conditions. That cannot be done unilaterally. The employees concerned will have to give consent to the new terms that the new owner wants to introduce. The law requires that terms of employment be changed only when the parties to the contract of employment have agreed to those changes.

Can employees choose not to transfer to the new owner of a business?

Employees can choose not to transfer to the new owner of the business. However, if the transfer of employees to the new owner is one of the methods adopted to minimise the number of employees to be retrenched, and employees refuse to transfer, the position of law as stated in *DAWASCO v. Abdul Swamadu M. Rwegoshora*, Revision No. 289 of 2008, High Court of Tanzania (Labour Division) at Dar es Salaam is that such employee can be retrenched.

What information are employers obliged to give employees in a business transfer situation? Is consultation or any other engagement with employees required by law?

Business transfers will ordinarily affect the terms of employees' contracts and may even lead to retrenchments. Terms of employment cannot be changed unilaterally without the consent of employees concerned, and, if it results in retrenchment, then procedures for retrenchment must be followed. In terms of section 38(1)(c) of the ELRA, consultation with employees is required before any retrenchment. Furthermore, in terms of section 38(1)(b) of the ELRA, employers are obliged to disclose all relevant information for the purposes of proper consultation.

How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

There is no time fixed for the whole process of consultation. However, section 38(1) of ELRA requires that notice of intention to retrench be given as soon as retrenchment is contemplated. The notice period is not stated. This was tested in *Tanzania Building Works Ltd v. Ally Mgomba and Four Others*, Revision No. 305 of 2010, High Court of Tanzania (Labour Division) at Dar es Salaam (unreported). The Court held that, once notice of intention to retrench is issued, the duty shifts to employee(s) who are required to respond within the period stated in the notice. If the notice period is short, employee(s) can ask for more time.

Where consultation is conducted in terms of section 38(2) of the ELRA and no agreement is reached, the matter shall be referred for mediation under part VIII of the ELRA. The duration of consultation is not stated.

Where mediation fails, the dispute is referred for arbitration, which is required to be completed within 30 days. During this 30-day period, no retrenchment shall take effect. Where employees are dissatisfied with the award and are desirous to proceed with revision in the Labour Court, under section 91(2) of the ELRA, the employer may proceed with retrenchment. Revision under that section is filed within six weeks from the date of the award.

Is there a penalty for breach of a statutory consultation or similar process requirement?

If a contract of employment is terminated without meeting the substantive and procedural requirements, the retrenchment will be considered wrongful.

Are any other external approvals or notifications required?

For purposes of retrenchment, no external approval is required, except where parties fail to agree on the process, in which case, the matter has to be referred to the CMA.

Are there any proposals for reform?

No, there are no proposals at present.

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Uganda

AF MPANGA ADVOCATES

When a business is transferred from one employer to another as a going concern does any law specifically protect employment rights?

Section 28 of the Employment Act 2006 (**Employment Act**) and Regulation 29 of the Employment Regulations (**Employment Regulations**) protect employment rights when a business is transferred from one employer to another as a going concern. This includes the transfer of the business or trade in part or in whole.

The protection accorded is principally that all rights and obligations between the employee and the transferor (**old employer**) are automatically transferred and apply between the employee and the transferee (**new employer**).

Is business outsourcing or insourcing treated in the same way as the transfer of business?

The Employment Act defines business to include any trade, profession, undertaking, operation or establishment whether public, co-operative or private. To the extent therefore that an undertaking may be outsourced and may accordingly be affected by a transfer 'in part', the rules would remain the same as regards pre-existing arrangements, rights and liabilities.

How are employment rights protected in these situations?

The Employment Act applies to all employees employed by an employer under a contract of service. As a result of the automatic substitution of the employers, all rights and obligations previously existing are preserved and become applicable between the transferring employees and the new employer. The rights relate to, and cover, terms of service, processes and procedures, as well as continuity of employment.

Any variation of rights or obligations ought to be consensual between employees and the new employers.

Is there any specific protection against the dismissal of employees the new owner of a business does not want to take on?

There is no such specific protection. The new owner is entitled to dismiss or terminate the services of those employees they do not wish to take on. The Court of Appeal has recently reaffirmed the general right of an employer to terminate a contract of employment without reason if the employment contract provides for such right.

Further, termination of employment can also be occasioned by economic or structural reasons. Redundancy as a result of a transfer of business is one such reason.

Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

Regulation 30 of the Employment Regulations permits portability of earnings and benefits. It is also specifically provided that where employees give consent to the transfer of their contracts, employees shall not suffer lower benefits and other conditions of service than they were enjoying. Their past service, earnings and benefits with the old employer are required to be ascertained and guaranteed in the new contract.

As such, changes to the terms of employment should be consented to. Any positive changes for purposes of harmonisation do not present a problem. Negative changes for purposes of harmonisation may, however, be problematic.

Can employees choose not to transfer to the new owner of a business?

Generally, there is no statutory right to refuse a transfer of contract. Transfers are achieved in two ways – either with the consent of the employee or automatically by law where there is a transfer of the trade or business in whole or in part.

In the case of the former, consent is required. The implication is that employees can reject a transfer and refuse to give consent. In such case, the ultimate conclusion might be that the relationship is terminated and the employee is entitled to be paid their terminal benefits, unpaid wages, accrued leave and outstanding allowances in accordance with the existing terms of service.

In the case of the latter, the transfer is achieved automatically as provided for in the Employment Act.

What information are employers obliged to give to employees in a business transfer situation? Is consultation or any other engagement with employees required?

Neither the Employment Act nor the Employment Regulations specify the information that employers are required to give employees in a business transfer situation. In instances where an employee's consent is being sought, the employer is required to consult with employees. The extent and manner of consultation is unclear. However, in practice, it is always advisable that employees are made aware of anticipated changes to ensure an orderly transition and harmony.

Where there is an intention to transfer ownership of a business trade, the Commissioner of Labour should be informed at least 30 days before the transfer is effected.

How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

Neither the Employment Act nor the Employment Regulations specify any time periods for any compulsory information exchange or consultation process. The Employment Regulations, however, oblige employers, where consent is being sought, to consult with employees to obtain employee consent for the transfer at least 30 days before the transfer.

The law does not provide for any approval by any labour or statutory authority. Instead, the Employment Regulations require employers that intend to transfer ownership of a business or trade, to inform the office of the Commission of Labour at least 30 days before the transfer is effected.

Is there a penalty for breach of a statutory consultation or similar process requirement?

The Employment Act contains a general penalty provision. No specific penalty is provided for in this provision, but penalties range from a small fine to a caution and, in extreme circumstances, and with repeat contraventions, a term of imprisonment.

Are any other external approvals or notifications required?

No other approvals or notifications are required.

Are there any proposals for reform?

The Employment (Amendment) Act 2022 (which was passed by Parliament but has not been assented to by the President) proposes to make it mandatory to pay severance pay where an employee is made redundant. Thus, where an employee's services are not required by the new employer, the employee would be entitled to severance pay calculated at one month's salary for each year worked.

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Zambia

When a business is transferred from one employer to another as a going concern does any law specifically protect employment rights?

Yes. Section 28 of the Employment Code, Act No. 3 of 2019 (**ECA**) prohibits the transfer of rights arising under a written contract of service from one employer to another without:

- the written consent of the employee;
- notifying the employee's representative of the proposed transfer (for unionised employees); and
- the endorsement by an authorised officer of the particulars of the transfer on the contract.

Employment rights are protected in that a transfer not done in accordance with the law is considered void. Further, before endorsing the particulars of the transfer, a labour officer must ensure and be satisfied that the employer and employee have entered into an agreement to carry forward the liabilities of the employee to an undertaking, or to pay any outstanding liabilities due to the employee before the transfer of the employee.

Is business outsourcing or insourcing treated in the same way as the transfer of business?

Business outsourcing or insourcing is not treated in the same way as a transfer of business as these are contractual arrangements entered into by a company for the provision of services and do not amount to a sale of business.

How are employment rights protected in these situations?

Pursuant to section 28 of the ECA, the employees' rights are only transferrable when each of the employees consent in writing. As such, consent is fundamental. Therefore, employment rights are protected in that the contracts are only transferable with the consent of the employees.

Further, the protection accorded is that all rights and obligations between the employees and the old employer are transferred and apply between the employees and new employer.

Is there any specific protection against the dismissal of employees the new owner of a business does not want to take on?

No, there is no specific protection against the dismissal of employees in such cases.

However, the law has mechanisms to ensure that the employees are compensated for the loss of employment. This occurs by way of declaring the employees redundant and paying them severance pay (ie redundancy payment).

Can a new owner of a business change terms of employment to harmonise these with its existing workforce?

A new owner can change the terms of employment provided that the employees consent to the change.

Under Zambian law, any variation to the terms and conditions of employment must be agreed between the employer and the employee. It is considered a breach of contract where the employer unilaterally varies the contract.

Can employees choose not to transfer to the new owner of a business?

Yes. Employees can choose not to transfer to the new owner. Such employees are declared redundant and there is an obligation to pay them a redundancy payment.

What information are employers obliged to give to employees in a business transfer situation? Is consultation or any other engagement with employees required?

The law does not explicitly provide for the employers to consult with the employees or furnish them with information.

However, in practice, employers typically outline the general reasons for the transfer, the implications of the transfer as well as options available to the employees (ie to consent or not). This is particularly important for two reasons. First, the consent of the employees is a legal requirement. Second, for a transfer to be legally effected, a labour officer must, among other things, ensure that the employee fully understands the nature of the transaction and freely consents to the transfer without coercion, undue influence or as the result of misrepresentation or mistake.

How long will any compulsory information and consultation process take? Is there a requirement of approval by any labour or other statutory authority?

There is no compulsory information and consultation process under Zambian Law.

Yes. Approval and endorsement of the office of the Labour Commissioner is a legal requirement.

Is there a penalty for breach of a statutory consultation or similar process requirement?

No. The ECA does not provide for compulsory consultation or similar processes.

However, if the transfer is not done in accordance with the law, the ECA provides for a general penalty which, upon conviction, leads to payment of a fine.

Further, the Labour Commissioner can impose an administrative penalty where a person has contravened a provision of the ECA that is not explicitly an offence.

Are any other external approvals or notifications required?

No. However, industry-specific approvals or notifications may be required.

Are there any proposals for reform?

The ECA is currently undergoing reform. However, there are no significant proposals for reform in respect of transfer of employment except to make it clear in the relevant provisions that the payment due to an employee who refuses/ does not consent to transfer is a redundancy payment in accordance with the ECA, contract of employment or collective agreement applicable to the employee.

We anticipate that this reform will take effect in the first quarter of 2025.

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