

# Sale of Shares or Business: What Happens to the Seller's Employees?

| by Amardeep Singh Toor |

## Effect of sale of shares on employment

In the case of a transfer of shares where the buyer takes control of a company, the buyer would assume all the rights and liabilities of a company. A share sale will not alter the contractual relationship of the company with its employees. The employees would continue employment with the company on the same terms and conditions.

## Effect of sale of business on employment

Where, however, parties have opted to structure a transaction as a sale of business, it is common that a buyer would seek to have key employees transferred to its entity. Employees are not the lock and stock of an employer who can be transferred from one entity to another. An employment contract which is a contract of personal service is not assignable without the employee's consent.<sup>1</sup>

Employees have the right to choose their employer.<sup>2</sup> The practical effect of a sale of business is that when it is sold, the employees of the seller would remain under the employment of the seller and their employment would become redundant resulting from the cessation of the business. As there is no automatic continuation of their employment with the buyer,<sup>3</sup> the buyer may, on its own instance or upon agreement with the seller under the sale of business agreement, offer to employ the seller's employees.

If there are employees who fall within the scope of application of the Employment Act 1955 ("EA 1955") employed with the seller, the legal requirements under this Act and its subsidiary legislation, the Employment (Termination and Lay-Off Benefits) Regulations 1980 ("1980 Regulations") shall apply.

### (a) Termination notice

Should the seller terminate the services of the redundant employees to be followed by re-employment by the buyer, the seller would first need to issue a notice of termination. Employees who fall within the ambit of the EA 1955 ("EA Employees")<sup>4</sup> would be entitled to notice of termination, as stated in s 12(2) of the EA 1955, unless their employment contract provides a longer period of notice or payment in lieu of notice.

In *Barat Estates*,<sup>5</sup> following the sale of the business, employees were informed that the change of ownership would not affect their terms and conditions of employment and that their employment would continue as if there had been no change in the employer. The employees commenced an action for indemnity in lieu of notice under s 13(1) of the EA 1955. The Court of Appeal ruled that s 12(3) of the EA 1955 and the underlying purpose of the EA 1955 conferred upon an employer the duty to give his employees due notices of termination in the event of a sale of business.<sup>6</sup> The Court of Appeal held that s 12 does not recognise the automatic continuation of employment with the new owner of the business and that a failure to give notice deprives the employees of their constitutional right to choose their employer and to make a choice whether to continue to be employed by the seller in some other business the seller may have, to remain in the same business under a fresh employment contract with the buyer or to seek employment elsewhere altogether.<sup>7</sup>

1 *Affin Bank Bhd v Mohd Kasim Ibrahim* [2013] 1 CLJ 465, at para 148, citing *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] 3 All ER 549

2 *Ibid*, at para 41

3 *Barat Estates Sdn Bhd & Anor v Parawakan a/l Subramaniam & Ors* [2000] 3 CLJ 625, at 635g

4 EA Employees include:

- (a) any person irrespective of his occupation who has entered into a contract of service with an employer under which his monthly wages does not exceed RM2,000 a month; and
- (b) any employee who is engaged in manual labour and supervisors of such employees, engaged in the operation or maintenance of any vehicle used for transport of passengers or goods, or for reward or for commercial purposes, engaged in any capacity in any locally registered vessel but is not a certified officer or engaged as a domestic servant.

5 *Supra* n 3. The Court of Appeal in *Barat Estates* endorsed the appellate court's earlier decision in *Radtha d/o Raju & Ors v Dunlop Estates Bhd* [1996] 1 CLJ 755 that once a change in ownership of business has occurred, the provisions of s 12(3) of the EA 1955 are operative and the seller is duty bound to issue notices of termination.

6 *Supra* n 3, at 635f

7 *Supra* n 3, at 635g to 636a

For employees not within the ambit of the EA 1955 (“non-EA Employees”), they would be entitled to notice of termination or payment in lieu of notice in accordance with the notice period stipulated in their employment contract, employee handbook or collective agreement.

*(b) Termination benefits*

For EA Employees, there are strict provisions pertaining to the payment of termination benefits under the 1980 Regulations.<sup>8</sup> The 1980 Regulations state that where a change occurs in the ownership of a business, the employee shall not be entitled to any termination benefits<sup>9</sup> if, within seven days of the change, the buyer offers to continue to employ the employee under terms and conditions of employment that are not less favourable than those under which the employee was employed before the change occurred and the employee unreasonably refuses the offer. If an employee unreasonably rejects the buyer’s new offer of employment which is on the same terms and conditions, the seller may terminate the services of the employee without payment of termination benefits.

For non-EA Employees, there is no statutory obligation to pay termination benefits. However, industrial jurisprudence pertaining to redundancy benefits states that a retrenchment must be made in compliance with accepted standards of procedure. There are a number of Industrial Court cases pointing towards an obligation to pay retrenched employees termination benefits.

The Code<sup>10</sup> also states that if retrenchment is necessary, employers should introduce schemes for payment of redundancy benefits. Employers may be guided by principles developed and applied in industrial jurisprudence which state that employees who have to be discharged for which they cannot be faulted should

be paid termination benefits in acknowledgement of their services and security of tenure and also for the purpose of providing a safety net. Employers should, where possible, assume an obligation to make payments of a fair and adequate measure of retrenchment benefits.

*(c) Reporting obligations*

In the event termination of employment resulting from a sale of business cannot be avoided, the seller is obliged to give statutory notification to the Labour Department at least 30 days before the date of termination, setting out particulars of the exercise which has led to its employees being made redundant and whose services are to be terminated.<sup>11</sup> The seller is also obliged to notify the Inland Revenue Board of the employees’ impending cessation of employment.<sup>12</sup> These obligations apply to the seller in respect of both its EA Employees and non-EA Employees.

*(d) Alternative arrangements to effect transfer of employees*

As an alternative to termination of employment by the seller and the offer of fresh employment by the buyer, parties may consider the feasibility of a tripartite arrangement between the seller, the buyer and the employees for a transfer of the employees to the buyer. Parties could also consider an arrangement where the employee resigns from his employment with the seller followed by an offer of employment by the buyer. The underlying basis of both arrangements is that the employees must agree to the transfer of employment. Should the employees object, these modalities for the transfer of employment will not work. The documentation to effect these modalities would need to be carefully crafted to mitigate any risk and to ensure compliance with local laws.

8 1980 Regulations, reg 8

9 The entitlement provided by reg 6 of the 1980 Regulations is 10 days’ wages for every year of employment if the employee has served for less than two years, 15 days’ wages for every year of employment if the employee has served for two years or more but less than five years and 20 days’ wages for every year of employment if the employee has served for five years or more

10 The Code of Conduct for Industrial Harmony

11 Employment (Retrenchment) Notification 2004, reg 4

12 Income Tax Act 1967, s 83

## Conclusion

While selling a business can be a rewarding, it can lead to several employment issues and could be a challenging experience for the seller, buyer and the employees. Besides the aforesaid issues, issues could also arise from trade unions, collective agreements and harmonisation of employment conditions between the companies involved. There are many considerations that parties should be aware of and it is imperative to understand the rights of employees to avoid any unwanted legal concerns.

**LH-AG**

### About the author



**Amardeep Singh Toor** (ast@lh-ag.com) is an associate with the Employment Practice Group and is part of a team headed by **Lim Heng Seng**.



**Lim Heng Seng** (lhs@lh-ag.com), who heads the Employment Practice Group, also chairs the firm's Pro Bono Initiative Committee and actively litigates public interest cases.