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The present publication includes reports presented during the Conference devoted to the 85<sup>th</sup> Anniversary of the Faculty of Law of the Yerevan State University. Articles relate to different fields of jurisprudence and represent the main line of legal thought in Armenia. Authors of the articles are the members of the Faculty of Law of the Yerevan State University. The present volume can be useful for legal scholars, legal professionals, Ph.D. students, as well as others who are interested in different legal issues relating to the legal system of Armenia.

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**GENERIC DESCRIPTION OF EMPLOYMENT  
PROTECTION IN TRANSFERS OF UNDERTAKINGS (TUPE)  
UNDER THE ENGLISH LAW: DEFINITION AND  
CLASSIFICATION**

**Tirayr Vardazaryan<sup>1</sup>**

Employment protection in transfers of undertakings (the TUPE) is essential, as employees may be adversely affected in its immediate aftermath. For this reason, every country needs to set rules which will protect employees from possible interruption of the employment continuation or any detrimental changes in the terms and conditions of their employment. Fortunately, there are countries which have passed a relevant piece of legislation, whereas there are some countries which lack for similar regulations. For instance, the UK law with regard to the TUPE can be a precious example for a country with insufficient legislation regarding the TUPE, such as Armenia. The only provision in the Armenian legislation regarding the regulation of the issues in relation to the TUPE is laid down in the Labor Code. According to it, there is a strict ban for the termination of employees in the event of restructuring and transfers of the rights from one legal entity to another unless the latter has entailed in either redundancy or the necessity to reduce the number of work staff. Hence, the examination of international best practice would be helpful for Armenia regarding improving its legislation in this regard. So, this was the main reason for this research to be conducted.

Meanwhile, no purpose has been set in this Article to discuss the collective level of protection for two reasons:

1) The individual level of employment protection has a priority for the employees in Armenia, as there are no strong trade unions. This means that making efforts for the employment protection at an

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individual level can be perceived as a primary goal.

2) The examination of the TUPE at the collective level *per se* should be a separate topic for research, as the legal aspect is advised to be traced alongside the psychological, economical and several other aspects in order to understand why the effectiveness of collective bargaining is so low and what should be done in order to improve the role of the trade unions. Otherwise, having guarantees on paper can be no help for protecting the employees.

Although after the Brexit vote it could have been assumed that the ECJ's case law and the so-called Acquired Rights Directive (the Directive) should be excluded from the scope of the analysis below, the latter have not been excluded for the following reasons:

a) The Directive was the starting point for the UK to build up its TUPE regulations;

b) In spite of the Brexit vote, the process of leaving the EU has not been duly completed yet, so the courts are currently obliged to follow the Directive. This means that according to the ECJ's case law the UK will be under a duty to interpret their laws in accordance with certain rules, including the Directives (Marleasing principle).

Although the TUPE Regulations have been passed by the UK parliament on its own and, in general terms, they cannot be repealed just because of leaving the EU, the courts may keep up using the ECJ's precedents. This means that any development in the ECJ's case law may be used for further interpretation of the TUPE Regulations in the UK.

Based on the independent research of available academic sources and the UK law, it can be inferred that this topic is quite intricate and complicated due to the existing amount of statutes and the enormous volume of precedents. What is more, both of them have changed quite frequently throughout the last four decades, not to mention the ECJ's case law which has vastly influenced the UK law.

The EU legislation with regard to the TUPE in general and the

case law of the European Court of Justice (ECJ) in particular have been adopted and interpreted with the view of providing a sufficient level of protection for employees in a wide range of countries with various traditions, economy and legal systems, including the UK. Furthermore, the UK statutes and common law have been mostly derived from both the EU directives and the ECJ's case law. This means that the UK's practice in employment protection can be a precious sample for the adoption of similar regulations for a country which uses the EU directives and legislation of some EU member states for elaborating its legislation. Consequently, the UK's practice can be a good example to follow and implement some of its rules into the Armenian law.

Also, an opinion has been expressed that the TUPE Regulations 2006 go beyond the Directive and empower the government to enact secondary legislation by setting out more favorable provisions than those imposed by EU law.<sup>1</sup> For this reason, there is a high probability that the UK law can serve as a useful sample for Armenia to borrow its rules regarding the matter in question.

The level of employment protection in various kinds of transfers is different. Consequently, the question arises how to distinguish the types of transfers from one another. For this reason, this Article aims to examine the issues regarding the definition of the TUPE transfers with an aim to give a generic description of the TUPE through the main terminology. The Article goes on to reveal the differences in the TUPE transfers from other types of transfers. The nub of the matter is that it is essential for the employers, as well for the courts and tribunals to clearly understand what kind of transfer is committed in every single case so that they can provide the necessary level of protection provided by the UK statutes.

Therefore, it is essential to figure out the main terminology used in the main pieces of legislation regarding the employment

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<sup>1</sup> Simon Deakin, Gillian S Morris, *Labour Law* (6th edn, Hart Publishing, 2012) 235.

protection. Consequently, this Article addresses issues regarding the definitions of the ‘transfer of an undertaking,’ ‘undertaking.’ Moreover, this research also answers the question why the Article does not use the ‘business transfer’ expression and, instead, it sticks to the ‘transfer of an undertaking’ expression.

Taking into account that the UK case law has elaborated an approach which forces the courts or tribunals to discuss a wide range of circumstances of the certain transfer before it can be either qualify as a TUPE transfer or just a change in ownership, this research has set an objective to discuss the landmark cases with regard to this issue. In this way, it can be shown how helpful the statutory definitions were for the courts to rule the cases while dealing with the immediate interpretation of these definitions in practice.

Moreover, this Article gives an overview of the differences between the asset transfers and TUPE transfers. In light of this, care has been taken to discuss the issues about transfers of so-called ‘assigned’ employees. This has been done with the purpose of understanding as to whether a physical transfer of assets, especially the part of it, may be deemed a TUPE transfer, when a part of the employees whose job is connected with the transferred asset, is also transferred. This Article also reviews a critical issue on the basis of which the outcome of any transfer is to be qualified as a TUPE transfer.

## 1. The definition of the TUPE transfers and its distinction from the asset transfers

### **1.1. Business transfer vs. transfer of an undertaking**

This Article will predominantly avoid using the ‘transfer of business’ expression unless it is used with the aim to describe specifically any type of commercial activity. The point is that the term ‘business’ has more meaning of a ‘commercial enterprise.’<sup>1</sup> So,

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<sup>1</sup> The Oxford English Dictionary <<https://en.oxforddictionaries.com/definition/undertaking>> accessed 01 September 2016.

this Article will mostly stick to the ‘transfer of an undertaking’ expression, since the term ‘business’ automatically excludes ‘public organizations’. Accordingly, the employees who work for the public sector can be ruled out in the case of consuming the ‘business’ term.<sup>1</sup>

As for the ‘undertaking’ term, it must be admitted that its plain meaning is also questionable. The nub of the matter is that the statutes do not define ‘undertaking’. Instead, different interpretations have been suggested in Employment law. What is more, sometimes they even contradict each other. However, as demonstrated below, it better describes all types of transfers of economic entities subject to a relevant transfer under the TUPE Regulations 2006.

Thus, an interesting fact is that the co-authors of research work on transfers on undertakings are in disagreement with regard to the definition of ‘undertaking’ in different chapters of the same book. To make things worse, they even disprove one another. Hence, in the first chapter Napier advocates the approach that ‘undertaking’ should be considered in wider terms than ‘business’, as the latter excludes ‘public servants. In contrast, Henderson claims that the terms ‘business, undertaking or part’ are sub-categories of an economic entity which, in its turn, is the same as an economic unit.<sup>2</sup> This means that Henderson disagrees with Napier, as he observes ‘business’ and ‘undertaking’ as equal sub-categories of an economic entity.

Napier’s approach seems more accurate from the perspectives of the Oxford dictionary, as the ‘business’ term is perceived as ‘commercial activity,’ whereas the ‘undertaking’ term equals to ‘enterprise.’<sup>3</sup> In brief, it should be concluded that possibly the first version could be more plausible because the only exclusion which is made in the TUPE Regulation concerns the public sector. This means

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<sup>1</sup> John Bowers, Simon Jeffreys, Brian Napier, Fraser Younson, Patrick Elias, *Transfer of Undertakings* (Sweet & Maxwell, 1998) A1/53.

<sup>2</sup> *ibid*, A2/15.

<sup>3</sup> The Oxford English Dictionary <<https://en.oxforddictionaries.com/definition/undertaking>> accessed 01 September 2017.

that the term ‘undertaking’ should not include public organizations.

Putting aside the debate over the linguistic explanation of the word ‘undertaking’, it becomes essential to clarify its nature. Fortunately, this has been already clarified through the case law. Hence, in conformity with the ECJ’s case law, the UK case law<sup>1</sup> has established that there can be two criteria for the answer to the question as to when a particular entity amounts to an undertaking;

the first question asks if there is a ‘stable and discrete economic entity’, and

The alternative version asks whether the entity is ‘sufficiently structured and autonomous’.<sup>2</sup>

Even so, there will always be a space for controversy regarding this issue, as there is no clear-cut answer either in the statutes or common law. Furthermore, in common law, this term is explained by some other keywords, such as ‘stable’, ‘discrete’, ‘sufficiently structured’ and ‘autonomous’ which, by themselves, can leave an ample space for interpretation.

In conclusion, the TUPE Regulations need to be amended on the part of the definition of the ‘undertaking’ term, as it has caused a controversial academic discussion, as well as uncertainty in common law. Thus, it is advised for the Armenian legislature to draft the relevant clauses in such a way, so they prevent any misunderstanding of the main terminology.

### **1.2. Can a single employee’s work be an ‘undertaking’?**

It is theoretically possible for the TUPE Regulations 2006 to apply if only one employee is subject to contracting-out or, say, outsourcing.<sup>3</sup> This approach appeared in the ECJ’s case law as well.<sup>4</sup>

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<sup>1</sup> *Whitewater Leisure management Ltd v Barnes* [2000] ICR 1049, EAT.

<sup>2</sup> Robert Upex, Nick Humphreys, *The Law of Termination of Employment* (7th edn, Jordans, 2006) 116.

<sup>3</sup> Oliver Hyams, *Employment Aspects of Business Reorganisations* (1st edn, Oxford University Press, 2006) 14.

<sup>4</sup> Case 392/92 *Schmidt v Spar-und Leihkasse* [1995] ECR I-1311.

However, this position was gradually subsided<sup>1</sup> before the TUPE Regulations 2006, s 2(1) came about to state that a reference to ‘organized grouping of employees’ shall include a single employee.<sup>2</sup> Therefore, a transfer of a single employee from one person to another can result in a TUPE transfer.

### **1.3. TUPE transfers vs. asset transfers**

To provide effective protection to the workforce in the case of a transfer, it is important to comprehend the detailed analysis of its statutory definition. This becomes crucial, as, in the event of a TUPE transfer, employees are granted a large number of rights. For instance, employees obtain the right to bring an action of unfair dismissal if the dismissal is connected to the transfer, or the changes in the contracts of services if because of the transfer, become more difficult even with the consent of the employees.<sup>3</sup> Conversely, the employees do not enjoy the same level of protection in the changes in ownership through take-overs. Consequently, it is vital to distinguish the TUPE transfers from other transfers of shares.

Although the TUPE Regulations 2006 defines the ‘transfer’ concept, the definition is formulated in a way which has forced both the courts and the academics to reveal additional criteria for its determination. Hence, with a reference to the case law,<sup>4</sup> McMullen states that a mere asset sale, without more, does not result in a transfer of an undertaking.<sup>5</sup> He also goes on to conclude that while examining a case of a transfer it is necessary to figure out whether:

- 1) items other than mere assets are sold,

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<sup>1</sup> See Case C-13/95 *Ayşe SŞzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice and Lefarth GmbH (Joined Party)* [1997] 1 C.M.L.R. 768.

<sup>2</sup> The Transfer of Undertakings (Protection of Employment) Regulations 2006, s 2(1).

<sup>3</sup> *Meade and Baxendale v British Fuels Ltd* [1996] I.R.L.R. 541.

<sup>4</sup> Case 24/85 *Spijkers v Gebroeders Benedik Abattoir CV and Another* [1986] 2 C.M.L.R. 296.

<sup>5</sup> John McMullen, *Business Transfers and Employee Rights* (4th edn, Butterworths, 2000), 5/3.

- 2) work in progress is transferred,
- 3) goodwill and/or the trade name are transferred,
- 4) customers are adopted by the transferee company.<sup>1</sup>

Sometimes it can be tricky to decide as to whether the protection is applicable for the employees when the transfer is limited to the assets solely. At this point, care has been taken to figure out as to whether the mere transfer of assets can end up in a transfer of an undertaking. A remarkable case which answers this question was held by the UK courts in 1972. It was ruled that an asset transfer not necessarily amount to a business transfer. This approach is still applicable under the new piece of legislation passed in 2006. It also must be remembered that while determining as to whether there is a legal transfer it should be noted that no nexus between the transferor and the transferee is required.<sup>2</sup>

For example, in *Woodhouse v Peter Brotherhood Ltd*,<sup>3</sup> Woodhouse's employer who made diesel engines sold its factory to another company. Because then Woodhouse was working on the completion of some engines, he was kept as an employee to finish his work. After being dismissed Woodhouse could not be reinstated, for the court held that there was a mere transfer of assets. Indeed, a mere transfer of assets cannot result in a transfer, as;

- 1) the transferor of the assets does not assume a sale or transfer goodwill or business,
- 2) the transferred asset can be integrated into the buyer's assets and may be used in a completely different manner.

For these reasons, it should be inferred that the TUPE could not be implied in similar cases.

When the question comes to deciding as to whether there is a

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<sup>1</sup> *ibid*; see also case C-13/95 *Ayşe SŞzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice and Lefarth GmbH (Joined Party)* [1997] 1 C.M.L.R. 768.

<sup>2</sup> See Case C-29/91 *The Dr Sophie Redmond Stichting v Hendrikus Bartol and others* [1992] 3 C.M.L.R. 265.

<sup>3</sup> [1972] ICR 186.

TUPE transfer when a company's assets on the whole or parts are transferred from one person to another, a logical question arises if a transfer of a part of an undertaking or business should be deemed a TUPE transfer. The nub of the matter is that a part of an undertaking or business can be transferable. Moreover, its transfer may be separately considered a TUPE transfer, since the TUPE Regulations 2006, s 3 expressly underpins the possibility of a transfer of a part of an undertaking or business.

Keeping this in mind, it should be answered whether a transfer of a part of an 'undertaking' can be perceived as an 'asset transfer' and, if so, how it should be distinguished from a TUPE transfer. At this point, it is of high importance to remember the statutory definition of the 'relevant transfer'. The TUPE Regulations 2006 require that the 'economic entity retain its identity'. Also given the fact that the same rule lays down the possibility of a 'part of an undertaking' as a 'relevant transfer', it can be summarized that the transferred 'part of an undertaking' can be regarded as an 'economic entity' on its own. This means that a part of an undertaking must be transferred with its structure alongside possible assets which are at its disposal and which are necessary for its operation. Nevertheless, the findings by the court in *Woodhouse v Peter Brotherhood Ltd*,<sup>1</sup> which may be tricky from the perspectives of this general rule, will still be applicable for the distinction of an asset transfer from a TUPE transfer.

In the event of a transfer of a discrete part of an undertaking, another question which may arise is the identification of the transferable employees. This becomes more challenging, when the potentially transferable employee's job responsibilities do not require him/her to perform the job immediately within the structure of the transferred part of an undertaking as a discrete structural division. To

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<sup>1</sup> [1972] ICR 186.

find out the answer to this, the case law<sup>1</sup> has established some practice when these employees are required to be considered ‘assigned’ to the transferring part is contingent.<sup>2</sup> However, before making a decision the court or tribunal must find answers to these questions: what is the proportion of the employee’s work to be done in the transferred section,<sup>3</sup> what is the value of that job, and what is the employee’s position?

Further to the ECJ’s precedents,<sup>4</sup> an opinion was expressed that an employee can be considered ‘assigned’ if s/he is ‘almost exclusively’ engaged on work for the transferred part of an undertaking. Nevertheless, at present, this opinion is modified. Thus, an employee may still be ‘assigned’ to the transferred undertaking even if s/he does not spend the substantial part of his/her work for it.<sup>5</sup>

In order to find out if there is an employee may have protection under the TUPE regulations, it is essential to comprehend what is the definition of the employment relationship. In *Botzen v Rotterdamsche Droogdok Maatschappij BV*,<sup>6</sup> the ECJ found that ‘an employment relationship is essentially characterized by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his/her duties’.<sup>7</sup> In the meantime, it was established that a key feature of employment is the relationship which is established between an employee and the business they are employed in rather than the person whom they

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<sup>1</sup> See *Duncan Web Offset (Maidstone) Ltd v Cooper* [1995] IRLR 633, EAT.

<sup>2</sup> John Bowers, *Employment Law* (8th edn, Oxford University Press, 2009) 455.

<sup>3</sup> See *Haulbridge Ltd v (1) Rayner and (2) The Secretary of State for Industry* EAT/477/97, 20 February 1998.

<sup>4</sup> Case 186/83 *Arie Botzen and others v Rotterdamsche Droogdok Maatschappij* [1986] 2 C.M.L.R. 50.

<sup>5</sup> *Buchanan-Smith v Schleicher & Co. International Ltd* [1996] I.C.R. 613.

<sup>6</sup> Case 186/83 *Botzen v Rotterdamsche Droogdok Maatschappij BV* [1986] 2 CMLR 50.

<sup>7</sup> *ibid.*

work for.<sup>1</sup>

## 2. Common types of the TUPE transfers

Before discussing any issue about the employment protection in the case of transfers of undertakings, the need arises to reveal its most common types, which assume a transfer of employees from one person to another. This will give a chance to distinguish the TUPE transfers from other types of transfers where the employees do not enjoy the same level of protection, as in the case of TUPE transfers.

Firstly, the Employment Rights Act 1996, Schedule 1 lays down a case of employees' transfer from one employer to another even if there is no formal transfer of business between the former and the new employers.

Secondly, there can be a sale of the share capital of an employing company. In this case, formally the company may remain the same since no change of corporate personality occurs.<sup>2</sup> However, this may change the governance policy in every aspect of the company's activity, which, in its turn, will influence employees.

There can be other kinds of disposition as well. An example of this can be the transfer of undertakings by contracting out of services.<sup>3</sup>

### **2.1. Take-overs by the acquisition of share capital**

As it is clear from the Employment Rights Act 1996 and the Transfer of Undertakings (Protection of Employment) Regulations 2006, as well as the Collective Redundancies and Transfer of Undertakings (Protection of Employment) Regulations 2014 (altogether the TUPE Regulations throughout the text), a mere take-over by acquisition of a company's share capital is not considered a transfer of an undertaking, business or part of an undertaking or

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<sup>1</sup> John Bowers, Simon Jeffreys, Brian Napier, Fraser Younson, Patrick Elias, *Transfer of Undertakings* (Sweet & Maxwell, 1998) A2/27.

<sup>2</sup> See *Salomon v Salomon & Co Ltd* [1897] AC 22.

<sup>3</sup> John McMullen, *Business Transfers and Employee Rights* (4th edn, Butterworths, 2000), Intro/1.

business. The nub of the matter is that in these cases the identity of the economic entity is retained.<sup>1</sup>

Meanwhile, it must be taken into account that the wording between Article 1.1(a) of the Directive and the TUPE Regulations 2006 is different. Chiefly, the latter does not state that a transfer must be ‘to another employer.’ It just envisages that a transfer must be ‘to another person.’ At this point, DTI’s (Department for Business Innovation & Skills) guidelines can be helpful to spread light on the issue. Thus, the DTI’s relevant guide<sup>2</sup> specifies that ‘the identity of the employer must change’ if a relevant transfer under s 3(1) (a) is to take place. With reference to ECJ’s case law,<sup>3</sup> sometimes it is also formulated that a transfer of undertaking occurs wherever there is a change in the legal ownership.<sup>4</sup> It is also added that a simple change in the shareholders of an organization is not a transfer.<sup>5</sup>

In conclusion, these Regulations do not contain any specific rules on employment protection related to the change in share ownership. This, however, needs to be conceived as a general rule, because the UK common law has modified this approach.<sup>6</sup> In greater detail, in *Milam v The Print Factory (London) 1991 Ltd*,<sup>7</sup> the tribunal found that the TUPE Regulations should have covered the share transfer of the employer. The point is that two companies entered into a share sale agreement and both of them went into separate

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<sup>1</sup> The Transfer of Undertakings (Protection of Employment) Regulations 2006, s 3(1).

<sup>2</sup> Department for Business Innovation & Skills, ‘Employment Rights on the Transfer of an Undertaking’ <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/275252/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/275252/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf)> accessed 04 August 2017.

<sup>3</sup> Case 144 and 145/87 *Berg and Busschers v Besselsen* [1990] ICR 396.

<sup>4</sup> Kathy Daniels, *Employment Law for HR and Business Students* (Chartered Institute of Personal and Development, 2004) 158.

<sup>5</sup> *ibid.*

<sup>6</sup> *Transfer of undertakings: Employment Law Handbook* (2nd edn, Incomes Data Services, 2011), 3.

<sup>7</sup> [2008] B.C.C. 169.

administrations. The purchaser, however, was saved, as it was taken over by a third company.

As it can be seen from this case, Milam who was employed by the seller was dismissed and made a claim. The tribunal concluded that the employee should have been protected under the TUPE Regulations, as after taking over the purchaser, the new buyer's management decisions have gone much further than 'a simple shareholder would have done following a simple sale or...a parent company of a subsidiary would have done in similar circumstances'.<sup>1</sup> Nevertheless, this reasoning was rejected by the House of Lords, but the outcome of the tribunal's decision remained the same. Particularly, Lord Justice Moses stated that the sale agreement had resulted in a TUPE transfer, although the mere fact of control by a parent company of its subsidiary is not a TUPE transfer.<sup>2</sup> Indeed, a number of evidential indications need to be identified, so that, in combination, the court or tribunal is able to establish that there was a 'relevant transfer'. This becomes especially important, because piercing the corporate veil is permissible in very limited circumstances.<sup>3</sup>

This means that even the first main question which should be established by the courts or tribunals requires a sound consideration of the facts of the case. In its turn, this comes to demonstrate that further improvement of the statutes is necessary on part of the definition of the 'relevant transfer' term. This will also help the courts and tribunals avoid lifting the corporate veil, which they sometimes have to do in these cases, although they are not eager to.<sup>4</sup>

Despite this, any change of the majority shareholder may affect employees. As a consequence, this kind of development is important for employees, as they will need to have proper knowledge on how to

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<sup>1</sup> *ibid*, para 4.

<sup>2</sup> [2008] B.C.C. 169, [13] (Lord Moses).

<sup>3</sup> *ibid*, [21]-[24].

<sup>4</sup> *ibid*, [6].

protect themselves in the event of dismissal due to such variations at the workplace.

It is no secret that the replaced shareholder may pursue a drastic change in the workforce. For this reason, it is necessary to understand the measures which employees may undertake for their protection. At this point, it is difficult to find any specific rules in statutes regarding the TUPE, which are directly related to unfair dismissal arising out of the change of the shareholder.<sup>1</sup> In spite of this, some reputable scholars are convinced that the rules of the TUPE Regulations<sup>2</sup> regarding unfair dismissals are still helpful.

On the other hand, case law regarding ‘a relevant transfer’<sup>3</sup> may still be useful for the cases attributable to the take-overs through a change in ownership. In particular, this case law will allow employees to be protected from unlimited discretion of the employer of the terms of employment through makings contracts with employees.<sup>4</sup>

The case law has revealed that sometimes two or more companies may try to avoid the TUPE obligations by entering into take-over agreements.<sup>5</sup> Consequently, it is always important to figure out the real intention of the take-overs; otherwise, take-overs with the real intention of the TUPE transfer may violate the employees’ rights.

However, in the *Brooks v Borough Care Services and CLS Care Services Ltd*<sup>6</sup> case, the court refused to pierce the corporate veil, as it

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<sup>1</sup> See also *Henry v London General Transport Services Ltd* EAT/960/97.

<sup>2</sup> See The Transfer of Undertakings (Protection of Employment) Regulations 2006, s 7, the Collective Redundancies and Transfer of Undertakings (Protection of Employment) Regulations 2014, s 8.

<sup>3</sup> The Transfer of Undertakings (Protection of Employment) Regulations 2006, s 3(1).

<sup>4</sup> See *Meade and Baxendale v British Fuels Ltd* [1996] I.R.L.R. 541.

<sup>5</sup> See *Brookes v Borough Care Services and CLS Care Services Ltd* [1998] I.C.R. 1198.

<sup>6</sup> *ibid.*

feared such an approach might result in a breach of a fundamental principle of Corporate law, where a company has a separate legal personality, distinct from its members.

So, in the event of a take-over, employees will not enjoy the protection under the TUPE Regulations. They will have to stand for their rights based on the general rules, such as the ones related to constructive dismissal, unfair dismissal, and redundancy. This means that individual employees will have weaker protection than in the case of a transfer. Neither are employees granted stronger protection of their collective rights because there is no obligation of consultation with trade unions or other representatives before the share purchase.<sup>1</sup>

In the cases of take-overs, the employees who were dismissed by the so-called 'transfer' will be eligible for a claim for unfair dismissal under the Employment Rights Act 1996, s 96 and 98. Particularly, this dismissal will be linked to the reasons which fall under the section 98(2) (c), like that of redundancy or, like some other 'substantial' reason<sup>2</sup> under s 98(1) (b). As a consequence, the employees will be granted a right to receive payments. However, if there was an unfair dismissal, the employees will be awarded the compensation under the Employment Relations Act 1999. Likewise, if the new employer decides to change terms of employment as a result of re-organization, which, in its turn, amounts to a serious breach of contract, the employee may bring an action of constructive dismissal.<sup>3</sup>

From time to time business sales are confronted with share-based transactions. The similarity between the two cases is that they both may do not end up being considered TUPE transfers. Moreover, if the previous may have a chance of qualifying as a TUPE transfer,

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<sup>1</sup> John McMullen, *Business Transfers and Employee Rights* (4th edn, Butterworths, 2000), 1/4.

<sup>2</sup> See, for example, *Hollister v NFU* [1979] ICR 542, *Catamaran Cruisers Ltd v Williams* [1994] IRLR 386.

<sup>3</sup> *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761.

the latter is consistent and cannot be a TUPE transfer at all. If these two cases are not TUPE transfers, then the status of employees, either way, will not be affected.<sup>1</sup>

An employee can turn down to the transfer to the new employer. This right does not prejudice the employee's right to resign and claim constructive dismissal. If the employee objects to the transfer and the deal continues, as well as the employee, does not resign, the contract will be treated as being frustrated.<sup>2</sup>

In general take-overs and mergers, irrespective of their legal form, involves a change in management structure and the introduction of a new management team to run the employing organization.<sup>3</sup> However, under the UK law, there has been a separation of the legal nature between a take-over and a transfer. There was an attempt, nevertheless, to extend the TUPE Regulations 2006 to the cases of take-overs. The parliament, however, did not approve that bill.<sup>4</sup> This separation on paper may better work for a country with codified law system.

## **2.2. Mergers**

Although it has been suggested that the identity of a company is not retained if it is integrated into another operation,<sup>5</sup> the case law has revealed an opposite outcome. Thus, in *Farmer v Danzas (UK) Ltd*,<sup>6</sup> it was established that Farmer was specialized in leasing lorries, ensuring and maintaining them, as well as employing drivers. According to the case, Farmer's business was to provide vehicles and

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<sup>1</sup> Charles Wynn-Evans, *Blackstone's Guide to The New Transfer of Undertakings Legislation* (Oxford University Press, 2007) 3.

<sup>2</sup> Kethy Daniels, *Employment Law: An Introduction for HR and Business Students* (2nd edn, Chartered Institute of Personnel and Development, 2008) 163.

<sup>3</sup> Steven D Anderman, *Labour Law: management decisions and worker's rights* (4th edn, Oxford University Press, 2006) 214.

<sup>4</sup> Henry Scrope, Daniel Barnett, *Employment Law Handbook* (4th edn, the Law Society, 2008) 251-2.

<sup>5</sup> John McMullen, *Business Transfers and Employee Rights* (4th edn, Butterworths, 2000) 5/6.

<sup>6</sup> EAT/858/93.

drivers to Danzas, so that the latter could serve its customers by providing transport services. Since Danzas decided to change its location, Farmer was offered a job as a terminal manager at Danzas's new premises. As after accepting the offer, not only was Farmer employed by Danzas, but also all Farmer's former employees were transferred to Danzas. In the meantime, Farmer's logo was erased from the vehicles as a consequence of a closedown of Farmer's business.

In such circumstances, the tribunal found out that after the integration of Farmer's business into a new enterprise, the identity of the former business was not retained. Consequently, the tribunal concluded there was no transfer under TUPE. However, the Employment Appeal Tribunal disagreed by stating that TUPE still applied. Mainly, it was discovered that there should be flexibility for the company to integrate into a new business. Moreover, since the employees kept up doing the same activity by serving Farmer's clients, there was no interruption of activities. Taking into account the abovementioned case, it is necessary to stipulate a definition of mergers and their distinctions from a TUPE transfer.

### 3. Retention of the identity of the employer

As the analysis shows, common law does not provide a precise answer to the question when there is a change in the identity of the employer.<sup>1</sup> Let alone *Woodhouse v Peter Brotherhood Ltd*; there was found no other case which explains the change of the identity of the employer. This means that the courts and tribunals must follow the regulations under the statutes and this case unless the circumstances would force them to depart from this ruling. Eventually, the issue of the modification of the employer should be decided on a case-by-case basis by the statutory definition and common law principles.

Another question which employees need to discuss before they

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<sup>1</sup> John McMullen, *Business Transfers and Employee Rights* (4th edn, Butterworths, 2000) Intro/3.

bring an action is the identification of the respondent where the employer operates through several interconnecting companies. Within this kind of structure, the decision-making power might have been vested in one specific company. The latter may own the power of resolving the disputes with the employees of all interconnecting companies. So, this company will not technically be the person who the action should be taken against.<sup>1</sup>

In summary, it can be concluded that the UK statutes have some uncertainty about the essential terminology. Although the common law has developed and further clarified the nature of the ‘undertaking’, it needs further clarification. Moreover, both the statutes and the common law have not established a clear difference between a TUPE transfer and, for instance, take-overs. So, the courts will have to examine many other circumstances of each case in order to be able to determine if the examined case results in a TUPE transfer. This may become more difficult due to the restrictions for the courts to pierce the corporate veil in limited circumstances. Therefore, any attempt for a potential legislature to borrow the UK’s practice must be conducted carefully, in particular for a country with a codified law system. The possible draft law should give a detailed description of differences of the main terminology, as well as implement the position elaborated by the common law into legal norms. In this way, the potential legislature may have the least statutory base.

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<sup>1</sup> See further in Charles Barrow, *Industrial Relations Law* (2nd edn, Cavendish Publishing Limited, 2002) 334.