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CHANGE OF EMPLOYER AND PRESERVATION OF EMPLOYMENT: SERBIAN EXPERIENCE IN LIGHT OF EUROPEAN LAW***

Protection of employees in the event of a change of employer in Serbia was first regulated by the Labour Act (2005). This was a result of the harmonization of Serbian legislation with Council Directive 2001/23/EC, while the effect of the European Court of Justice jurisprudence was negligible. Protection is guaranteed regardless of whether the company identity has been preserved or not, thereby making it more favourable than the European concept of transfer of undertaking. Nevertheless, the relevant provisions of the Labour Act have often been evaded in practice, especially when it comes to the application of the principle of preservation of employment. This was facilitated by the content of certain legal provisions. There is a notable need for their improvements, in order to enable employees to continue to work for the transferee under the same working conditions and be protected from dismissals exclusively or predominantly motivated by the change of employer.

Key words: *Change of employer. – Consent of employee. – Labour law harmonization. – Transfer of employment contracts. – Transfer-related dismissal.*

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1. INTRODUCTION

Certainty is the very essence of the law. This is especially true for labour law, which seeks to ensure the stability of employment relationships through the creation of instruments for the preservation of employment. The most powerful instruments for defending job security are the rules on termination of employment at the initiative of the employer. In spite of the hotly contested developments in the past several years (see especially Laulom 2014; Kovács 2016), still one of the objectives of labour law is, in fact, to guarantee the stability of open-ended employment contracts (Martinon 2005, 30; Weiss 2013, 278). Therefore, job security appears as an important segment of employee protection in case of change of employer.

In order to limit job insecurity, Council Directive 2001/23/EC¹ stated two basic rules in cases of transfer of undertakings: first, the rights and obligations of the transferor, arising from the employment relationship being in effect on the date of the transfer, are transferred to the transferee; and second, the transfer of the undertaking, in itself, cannot constitute a valid ground for termination of employment by the transferor or the transferee (Freedland, 507). Additionally, as suggested by Barnard (2012, 579), the “third pillar” of employee protection in the case of transfer of undertakings has emerged in the form of the obligation of the transferor and the transferee to inform and consult employees’ representatives regarding the planned change. All three pillars of protection have been included in Serbian legislation, modelled after Council Directive 2001/23/EC. More precisely, protection of employees in the event of transfer of undertakings was first directly regulated by the provisions of the Labour Act of 2005 which is still in force. Nevertheless, the impact of the decisions of the European Court of Justice (Court of Justice of the EU) on the Serbian labour legislation and case-law is almost negligible, if not entirely non-existent.

The Serbian Labour Act does not use the term “transfer of undertakings”, but contains provisions on this issue.² Transfer of undertakings is regulated as a “change of employer”, via the following rule: “in the event of a status change, and/or change of employer, in conformity with the act, the successor employer shall take over from the predecessor employer the general act and all employment contracts that are valid on

¹ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82 of 22/3/2001, 16.

² Zakon o radu [Labour Act – LA], 20 *Službeni glasnik RS*, 24/05, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017, 113/2017, and 95/2018, Article 147–152.

the day of the change of employer.”³ This type of succession applies to all cases of change of employer, regardless of whether the economic identity of the enterprise has been preserved or not, i.e. regardless of the changes introduced by the transferee. This solution is more favourable than the EU concept of transfer of undertakings and formally creates conditions for ensuring proper and full protection of employees. It does, however, lack precision, because it is difficult to identify cases that qualify as change of employer in a reliable manner. Also, this covers the absence of clear rules on the status of employees who do not wish to continue working for the transferee and who were not dismissed by the transferor. On the other hand, the Labour Act does not regulate the issue of liability for employees’ claims due before the change of employer, nor is there consistent and uniform case law regarding this issue. Finally, the rules on information and consultation of employees do not establish the moment of initiation of consultations and do not provide effective and deterring penalties for employers who violate the employees’ right to information and consultation (see Kovačević 2018).

In addition to the need to make relevant provisions clearer and more reliable, it is essential to directly regulate the issue of protection of employees against dismissal. Although guarantees of this protection can be derived from the provisions of the Labour Act regulating protection against unjustified dismissal, for the purpose of clarity it is required to restrict the rights of the transferor and the transferee to initiate termination of employment during the period immediately preceding and following the restructuring of companies or other subjects.

The frequent evasion of the mentioned rules represents a serious problem in a period when corporate restructuring has been promoted as one of the main pillars of transition in Serbia (due to the alleged better utilization of means of production, more efficient management, higher profitability, etc.). More precisely, we refer to the period that followed after the decision to replace the socialist system with a free market system. As suggested by Jovanović (1997, 46), this process ran in parallel with changes in other spheres of life, however, the changes were very slow and the results modest, especially in the case of transformation of ownership.

2. PROBLEMS WITH DEFINING THE TERM “CHANGE OF EMPLOYER”

2.1. The term “transfer of undertaking” in the EU law

In the EU and the law of its Member States, the greatest uncertainty in the implementation of the principle of preservation of employment

³ LA, Article 147 [translated by author].

in the event of change of employer concerns the legal qualification of “transfer of undertaking”. According to the case law of the European Court of Justice (ECJ) a transfer of undertaking presupposes the following two conditions: 1) change of employer, and 2) preservation of identity of an undertaking. The fulfilment of the first criterion assumes that there was a change in the legal or natural person who is responsible for carrying on the business and who by virtue of that fact incurs the obligations of an employer *vis-à-vis* the employees of the undertaking.⁴ On the other hand, the preservation of the identity of an undertaking requires that the transferee continues the same or similar activities. However, a temporary interruption for a period of several weeks or even months does not do any harm.⁵ The evaluation of these criteria has been left to the national courts (European Commission 2004, point 2.4.2).

However, the transferee retaining the same economic activities will not alone guarantee the preservation of the economic identity of an undertaking. Therefore, in addition to continued activities, for the preservation of the economic identity some elements of the so-called *Spijkers* criteria must be fulfilled. It is believed that the economic identity of the transferor has not been preserved if the transferee continues to carry out the economic activity in different premises, applying different methods and operating processes, using different materials and equipment, etc. The same applies to cases in which the identity of the undertaking has not been preserved, because the nature and objectives of the undertaking have changed.⁶ Nevertheless, the ECJ clarified in the *Klarenberg* case that the alteration in the organisational structure of the entity transferred was not such as to prevent the application of Directive 2001/23/EC.⁷ According to

⁴ See: ECJ, case 287/86 *Landsorganisationen i Danmark for Tjenerforbundet i Danmark v. Ny Mølle Kro*, ECLI:EU:C:1987:573, para. 12; ECJ, case 324/86, *Foreningen af Arbejdsledere i Danmark v. Daddy's Dance Hall A/S*, ECLI:EU:C:1988:72, para. 9; ECJ, case C-234/98, *Allen and Others v. Amalgamated Construction Co. Ltd*, ECLI:EU:C:1999:594, para. 16; ECJ, case 242/09, *Albron Catering BV v. FNV Bondgenoten and John Roest*, ECLI:EU:C:2010:625, para. 28.

⁵ ECJ, case 24/85, *Jozef Maria Antonius Spijkers v. Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV*, ECLI:EU:C:1986:127, para. 13.

⁶ For example, an association for adapting working conditions for persons with reduced working capacities in France terminated a service agreement on food preparation with a restaurant, in order to entrust these services to a workshop for professional rehabilitation of persons with disabilities. Although in this case all the materials needed for food preparation services have been retained, the French Court of Cassation rightly decided that there is no room to qualify this as transfer of undertaking, because the activities of the aforementioned workshop are not carried out with a sole objective of preparing food but also with the objective of providing training by professional trainers for persons with disabilities. *Chambre sociale de la Cour de cassation*, 12 July 2010, *Revue de jurisprudence sociale* (F. Lefebvre), 10/10, No. 723.

⁷ ECJ, case C-466/07, *Dietmar Klarenberg v. Ferrotron Technologies GmbH*, ECLI:EU:C:2009:85, para. 43–45.

this case it falls under the exception for organizational reasons, when the transferee breaks down part of the business that it acquired and integrates it into its own larger organizational structure. When, as a consequence of this organizational change, there is no existing position for the earlier head of the transferred unit, his dismissal can be justified.⁸

The maintenance of the economic identity of an undertaking, as a requirement for protection of the rights of employees, has been correctly criticized in literature as a solution that creates an obstacle for achieving full and proper protection of employees. As suggested by Kenner (2003, 34), the employer who continues or renews the activity of his predecessor is thus given an opportunity to evade his obligations. Obligations of the transferee from the Council Directive 2001/23/EC shall be considered fulfilled, if the activities of the transferor have been preserved at the moment of the transfer (and only at that particular date). If he was to decide to change the organization of activities after the transfer, his decision would not have any effect on the transfer of employment contracts and preservation of employment, but could have an effect on the termination of employment due to the needs of the employer.

Following Pélissier (1990, 154), we argue that appropriate protection of employees could be provided only if the scope of the employment preservation principle includes all variations of the transfer of undertakings, regardless of the changes introduced by the transferee and the date on which the changes took place. Exactly this solution has been included in Serbian legislation, as the guarantee is attached to all cases of change of employer, regardless of whether the economic identity of the undertaking has been preserved.

2.2. Definition of the term “employer” in Serbian law

The Serbian Labour Act does not define the expression “change of employer”, although we can conclude that this implies some kind of alterations of the stronger party (*potentior persona*) to the employment relationship. In practice, it is not always easy to identify these situations, especially if one takes into account a fairly broad legal definition of the term employer (“domestic or foreign legal or natural person who employs one person or more”)⁹ and the lack of a statutory definition of the notions an employment relationship and an employment contract. The elements of the definition of the term employer can be deduced indirectly from the legal provisions regulating essential rights and obligations of employers and employees. In relation thereto, one should bear in mind that employers, as persons organizing an activity, need to instruct other persons to carry

⁸ *Ibid.*

⁹ LA, Article 5 (2). Translated by author.

out those activities for their benefit. Therefore, this is the subject who organizes the work of employees, issues orders and instructions related to work performance, oversees their activities, controls the results of their work, and pays their salaries, as counter-prestation for the work performed. According to Peskine (2008, 87), here we can spot the dual roles of the employer – the organizer and the recipient (addressee) of work. Šunderić (2002, 41) thus defines an employer as “a person who organizes the work and hires other people for the purpose of working in an organizational unit” or as a person who “organizes the work, employs people, and manages the work and assets” (for a functional approach to the legal concept of an employer see Prassl, 2016). This is close to Radé’s (2011, 65) definition of an employer as the “owner of the equipment, who becomes the owner of objects and services generated as a product of employee’s activities and who has the prerogative to issue orders and take the necessary measures to ensure compliance with those orders.”¹⁰ In addition to having and executing certain prerogatives, an employer’s status is fundamentally determined by the fact that the employer is the sole bearer of the risk of doing business. Hence, the prerogative to issue orders to perform the work, control that performance and verify the results can be viewed as certain counter-benefit for bearing the risk, as demonstrated by Laroque (1992, 93).

Brajić (1974, 54) argues that in former Yugoslavian case law, subordination was not regarded as an element of the employment relationship, and other elements were qualified as such, primarily the exclusive, personal and full-time work for the employer. The almost unanimous view in recent Serbian literature states that in addition to voluntariness, personal performance of work, and pay, subordination is a basic element of an employment relationship (see Jašarević 2014; Kovačević 2015). The legal position of the employers is determined, to a large extent, by the fact that they are the owners of the resources, which makes the employees economically dependent on them. Ownership of the resources, together with the employment contract, represents the basis of employer’s (administrative, normative and disciplinary) prerogatives. This significantly limits the legislator, who recognizes the individual and collective rights of employees, but also takes into account the efforts of the employers to limit labour costs, as well as their need to validate their sovereignty in decision making.

2.3. Change of employer cases in Serbian law

The Labour Act of the Republic of Serbia associates the term change of employer to “the change of employer’s status, i.e. the change

¹⁰ Translated by author.

of employer, in conformity with the act.”¹¹ This means that, in terms of the provisions of the Labour Act, a change of employer occurs following the death of a natural person as the employer, if her/his heirs enter into all rights and obligations at the moment of her/his death, unless the personality of the employer is considered to be essential for the conclusion of the employment contract (e.g. if the employer is a person with disabilities and the employee is his assistant). On the other hand, a change of employer as a legal person occurs most commonly through status changes, i.e. in the event of status changes of companies or other legal entities.¹² Furthermore, the change of employer can occur in all other cases of change of employer, if they stipulated by an act. We believe that this provision should be interpreted more broadly, since the concept of change of employer is broader than the concept of status changes. Such an interpretation is in accordance with one of the basic principles of labour law, the favourability principle (*in favor laborem*) and enjoys support in the practice of the Ministry of Labour of the Republic of Serbia.¹³ On the other hand, Serbian labour legislation does not regulate the legal (contractual) transfer of specific business activities from the transferor to the transferee, if there is no status change or any other type of change of employer, as established by the act.¹⁴

Thus, if the employer is a company, operations such as merger by acquisition, merger by formation of a new companies and division are carried out by transfer of all the rights and obligations from the transferor to the transferee, where upon the merged company shall be dissolved without being liquidated.¹⁵ The Serbian Act on Companies also recognizes separation, where a company continues to exist, but transfers part of its assets and liabilities to one or more existing and/or newly established

¹¹ LA, Article 147. Translated by author.

¹² See: Zakon o udruženjima [Act on Associations – AA], *Službeni glasnik RS*, 51/2009, 99/2011 and 44/2018, Article 45–48; Zakon o zadužbinama i fondacijama [Act on Endowments and Funds – AEF], *Službeni glasnik RS*, 88/2010, 99/2011 and 44/2018, Article 54; Zakon o zadrugama [Act on Cooperatives], *Službeni glasnik RS*, 112/2015, Article 65; Zakon o sportu [Act on Sports – AS], *Službeni glasnik RS*, 10/2016, Articles 78–85; Zakon o naučnoistraživačkoj delatnosti [Act on Scientific Research Activities], *Službeni glasnik RS*, 110/2005, 50/2006, 18/2010 and 112/15, Article 37.

¹³ Opinion of the Ministry of Labour and Social Policy, 001-00–787/2010–02, 29 October 2010.

¹⁴ Such direct transfers of undertakings, i.e., an asset deal, are, however, allowed and possible under Serbian law. Liability of the transferee for obligations in relation to the transferred company is regulated under the Obligation Relations Act (Article 452) as assumption of debt (see Radović 2017).

¹⁵ Zakon o privrednim društvima [Act on Companies – AC], *Službeni glasnik RS*, 36/2011, 99/2011, 44/2018, and 95/2018, Article 485–488. These provisions apply to the status changes of public companies, Zakon o javnim preduzećima [Act on Public Companies], *Službeni glasnik RS*, 15/2016, Article 76.

companies.¹⁶ The principle of employment preservation applies to all of these forms of status change. On the other hand, Pélissier, Supiot, and Jeammaud (2002, 421) suggest there is a change of employer in the case of a separation, as one company with multiple organizational parts (plants, factories etc.) transfers one of its parts to another company, so the employer changes for those employees, while employees in other parts of the company remain with the same employer. Hence, the employees in the transferred part must be guaranteed job security, which means that all employment contracts remain in force. This interpretation is supported by the law of the EU and the laws of EU Member States, which, in terms of the protection of the rights of employees, equates the partial transfer of assets and liabilities with the transfer of all assets and liabilities from one company to another.

The recent separation of four technological and business units from one of the largest enterprises in Serbia, the Serbian Railways company, illustrates this case. Three companies were formed from these units (Infrastruktura železnice Srbije, Srbija Voz, and Srbija Kargo), while the existing enterprise Serbian Railways company retained the fourth unit. The employees in the fourth unit retained their employment with the enterprise, while the issue of responsibility for payment of outstanding remuneration for shift work before the status change was raised before the courts (see Gajić 2016).¹⁷ These rulings are interesting simply because they are among the rare court decisions in Serbia in which the judges, by teleologically interpreting the relevant regulations, directly referred to the provisions of the Council Directive 2001/23/EC, bearing in mind that this source of EU law served as a template for Serbian legislators in regulating the change of employer. The views expressed in these rulings are also important because the Labour Act does not explicitly establish joint and several liabilities of the transferor and the transferee. Pursuant to the provisions of the Council Directive 2001/23/EC, the transferor is, as a result of the transfer of undertaking, completely relieved of obligations towards his employees, although, as suggested by Blanpain (2012, 787), this consequence is not dependent on the consent of employees.¹⁸ However, there is a possibility for EU Member States to establish joint and several liability of the transferor and the transferee

¹⁶ AC, Article 489.

¹⁷ Osnovni sud u Nišu, 6P1.1539/15, 3 June 2016; Osnovni sud u Nišu, 4P1.654/15, 20 June 2016; Osnovni sud u Zaječaru, 17.P1. 142/15, 20 April 2016; Apelacioni sud u Nišu, 19Gžl. 2640/16, 7 October 2016; Apelacioni sud u Nišu, 19Gžl. 1763/16, 14 October 2016; Apelacioni sud u Nišu, 19Gžl. 3452/16, 10 November 2016; Apelacioni sud u Nišu, 19Gžl. 3436/16, 10 November 2016.

¹⁸ ECJ, joined cases 144 and 145/87, Harry Berg and Johannes Theodorus Maria Busschers v. Ivo Martin Besselsen, ECLI:EU:C:1988:236, para. 14.

for the aforementioned obligations,¹⁹ from the date of realization of the transfer of the undertaking,²⁰ and only for claims by persons who were employed at the moment of the change of employer and not for the claims by persons who had already left the company (e.g. holiday pay and compensation for termination of employment for persons whose employment ended before the change of employer).²¹

Due to the absence of rules on liability from the Labour Act, it can be concluded that the transferee is solely responsible for claims that were due prior to the transfer of the employment contracts to the transferee.²² However, the possibility of abuse in the case of status changes is restricted by special acts that provide limited and joint several liability.²³ As the implementation of rules on joint and several liability cannot be assumed, it follows that in other cases the general rule of law on contracts and torts will be applied for the obligations that occurred before the change of employer. In this regard, one can notice the need for the Serbian legislator

¹⁹ Following the report of the Commission (2007), Member States have regulated this issue differently. The labour legislation of the Czech Republic, Cyprus, Denmark, Ireland, Latvia, Lithuania, Malta, and Slovakia stipulate the exclusive liability of the transferee for contractual obligations that arose before a change in status occurred, while the legislation of Austria, Finland, Greece, Iceland, Italy, Liechtenstein, Luxembourg, and Sweden stipulate joint and several liability of the transferor and the transferee. Other European countries have rules on joint and several liability, but exclude them in certain cases, e.g. in the event of a change of employer in bankruptcy procedure in France. On the other hand, certain countries limit the application of the rules on joint and several liability only to certain cases of change of employer (transfer of a part of an undertaking in Poland), or only to certain employee claims (e.g. damages for violating the obligation to inform and consult employees in Great Britain), or only to a certain period of time (e.g. for a period of one year in Estonia, Germany, the Netherlands and Portugal, or three years in Spain, from the date of the change of employer, after which the rule on exclusive liability of the transferee applies).

²⁰ Council Directive 2001/23/EC, Article 3 (1).

²¹ ECJ, case 19/83, Knud Wendelboe and others v. L.J. Music ApS, in liquidation, ECLI:EU:C:1985:54, para 17. Blanpain (2012a, 787) argues that the Directive does not provide protection for employees who worked for the transferor on the day of the transfer of undertakings but did not continue their employment with the transferee.

²² It is therefore important to mention the legal obligation of the transferor to fully and truthfully inform the transferee about the rights and obligations stemming from the employment contract, the collective agreement, and the labour rulebook. The aforementioned provision of the Serbian Labour Act was inspired by Council Directive 2001/23/EC, Article 3 (2), although it would be more acceptable if the Labour Act required that this information be provided in writing, as well as if it regulated the issue of the consequences of the failure of the transferor to fulfil this obligation. Therefore, the most favourable solution seems to be the rule confirmed by the Council Directive 2001/23/EC, that the failure of the transferor to inform the transferee of due obligations does not affect the exercising of the rights of employees.

²³ AC, Article 505 (1–4); AEF, Article 54 (7); AA, Article 48 (5); AS, Article 84 (6).

to consider and “weigh” all the advantages and disadvantages of the rules on exclusive and (un)limited joint and several liability for claims that were due before the change of employer,²⁴ and, in the name of legal certainty, to regulate this issue within the Labour Act.

Finally, it should be noted that the Labour Act does not regulate transfer of employment contracts in bankruptcy proceedings. This is nonetheless in line with Article 5 of Directive 2001/23/EC, which allows the exclusion of transfers of undertakings in insolvency from its scope (see Barnard 2012, 619). The Act on Bankruptcy regulates bankruptcy proceedings by reorganisation if the measures for realisation of the bankruptcy debtor’s reorganisation plan envisage status changes or the transfer of part or the entire assets of one or more existing or newly formed entities.²⁵ Reorganization plans can, however, include measures such as dismissal of employees, whereby the mere fact of opening of bankruptcy proceedings represents grounds for dismissal. This ultimately means that the provisions of the Act on Bankruptcy derogate the provisions of *lex generalis* in the sense that taking over the employment contracts in the event of change of employer exists only as a possibility, if envisaged in the reorganisation plan.

2.4. Change of company capital ownership and privatization

The change of ownership of a company’s capital is not considered as a change of employer according to the Directive because it does not entail changing the subjectivity of the company. This further means that changes in the ownership of the capital of a legal entity appearing as an employer do not affect the continuity of employment, regardless of the possible change of the person authorized to represent the employer or to exercise the employer’s prerogatives. Nevertheless, in the Republic of Serbia, the Labour Act extended the scope of application of the rules on protection of employees, in the event of change of employer, to the “change of ownership of capital of a company or another legal entity”. We can assume that the legislator envisioned this solution with the intent to emphasize the protective function of the employment preservation principle, i.e. to ensure that the continuity of employment of an employee working for an employer whose owner has changed is not called into question. This was a significant decision, as a company restructuring plan from the majority owner can significantly affect the status of employees,

²⁴ Pursuant to Radović (2017a, 151), this creates the need to protect, through appropriate rules, both the claims of employees and the interests of employers, because rules that are too strict will make certain status changes, as a way of restructuring the company, less appealing.

²⁵ Zakon o stečaju [Act on Bankruptcy], *Službeni glasnik RS*, 104/2009, 99/2011, 71/2012, 83/2014, 113/2017, 44/2018, and 95/2018, Article 157 (1) (12–15).

as suggested by Dragičević (2017, 343), since the privatization process can be preceded by the restructuring of the subject of privatization.

This solution testifies to the peculiarities of the legal framework to protect the rights of employees in Serbia, many of which are related to the privatization process and the transition from a state-run economy to a market economy. The status of employees in the privatized companies was quite unique, due to the fact that during the period of socialist self-management, employees were granted certain prerogatives that traditionally belonged to the employers. The self-management political system encompassed affirmation of self-management rights of workers, which included the right to self-govern the undertaking (either directly or through bodies that they themselves elected and recalled), without owners or appointed managers. Thus, the employees were formally granted the right to decide all business matters, including the management of company assets and structural changes. Moreover, they were granted control of operations and working conditions as well as the right to decide on entering into or terminating employment relationships. According to Jovanović (2000, 31), the legal solutions from this period had a “reinforcing effect on the stability of employment which, in practice, almost created an employee monopoly over their jobs and employment relationships, which was at odds with the risk of losing a job.” This made it unnecessary to regulate the status of employees in cases of change of employers. On the other hand, one should bear in mind that this period featured employment policies that were not economically justified, which is why the workers remained employed even after the need for their services ended. As suggested by Šunderić (1993, 290), this can be explained by the fact that “employment was a means of achieving social peace that the politocracy needed for the sake of its own reign.”

The Amendments to the Labour Act of 2014 removed from the Act the provisions on protection of employees in cases of change in ownership of the capital. One reason for this is the fact that the 31 December 2015 deadline for mandatory privatization of socially-owned capital had passed. In the meantime, a new Act on Privatization was adopted and its provisions are now applicable only in the privatization of the capital owned by the Republic of Serbia, the autonomous provinces, and the local self-government units. The privatization of public capital and property of the entities operating this capital has still being carried out on the basis of the decision of the Government, or the competent authority of the autonomous province or the local self-government unit.²⁶ More precisely, the action plan of the Government of the Republic of Serbia for the restructuring of companies, dated 31 January 2015, allowed for

²⁶ Zakon o privatizaciji [Act on Privatization – AP], *Službeni glasnik RS*, 83/2014, 46/2015, 112/2015, and 20/2016, Article 6 (2, 5).

the initiation of bankruptcy proceedings against 188 enterprises with poor prospects of privatization, where the state is the majority owner, as well as the privatization of 512 enterprises. Additionally, it provided for the restructuring of some of the largest enterprises, such as the Electric Power Industry of Serbia company (reducing the number of sectors, in order to eliminate the need for state aid), the Srbijagas company (separation of the transport and transport system management, as well as distribution and distribution system management, to ensure secure natural gas supply), the Roads of Serbia company (merging the roads company with the Corridors of Serbia company into a single enterprise for road construction and maintenance), and the Serbian Railways company (which was mentioned above, in the context of forming separate companies for infrastructure, passenger transport, and cargo transport).

It should be noted that the change of ownership of capital due to the privatization of socially-owned or state-owned companies and other legal entities, as well as state-owned capital expressed in shares or stakes, brought about specific and complex legal consequences that affected the status of employees. Their status was regulated in a specific manner, because the privatization process could have been preceded by the restructuring of the subject of privatization, had the competent body estimated that their capital or assets could not be sold via public tender or a public auction. Given that the restructuring could have been carried out through status changes of the subject of privatization, labour law rules on the protection of employees in the event of change of employer would have applied to the employees. Moreover, their rights were further guaranteed by the obligation to enact a restructuring program, which includes a social program with employment-preservation measures (e.g. transfer to another job or to a different (geographic) place of work, part-time work, etc.), and measures for protection in the event of dismissal, assuming the dismissals are necessary (e.g. right to a notice period and right to severance pay).²⁷

There is a difference between a social program enacted as part of the restructuring ahead of the sale of the state-owned capital and a social program enacted in the process of the sale, as a part of the agreement on the sale of capital or assets. The latter social program is adopted in cases of privatization of entities that are well-positioned in the market. In the case of such enterprises, which have a competitive and profitable

²⁷ The state adopted programs for dealing with redundancies in the process of restructuring but also allocated funds from the budget for their implementation. Odluka o utvrđivanju programa za rešavanje viška zaposlenih u postupku privatizacije za 2015, 2016, 2017, 2018. i 2019. godinu [Decision on Establishing the Program for Dealing with Redundancies in the Process of Privatization for 2015, 2016, 2017, 2018, and 2019], *Službeni glasnik RS*, No. 9/15, 84/2015, 109/2015, 16/2016, 82/2016, 5/2017, 92/2017, 29/2018, 59/2018, and 3/2019.

business, the social program or rather the social agreements (individual acts or social clauses in contracts that represent the legal basis for the change of the owner) were aimed at preserving the working conditions and the rights of employees who will continue to work for the employer, and at providing certain rights in the event of termination of employment due to the reorganization of the business processes.²⁸

Finally we should note that the mechanism for termination of a contract on the sale of capital or assets ensured a type of guarantee of the agreed level of employee rights arising from the employment relationship with the entities that were to be privatized. Namely, a contract is deemed to be terminated, for failure to fulfil the contract, if, within the additional deadline, the buyer fails to fulfil their employees-related obligations, as well as if they fail to pay in full the minimum wage and corresponding mandatory social insurance contributions for employees of the enterprise to be privatized, for a period of no less than nine months during a calendar year.²⁹

Although these and other provisions formally provided a solid framework for protection of employees, in reality their position in the privatized companies was extremely unfavourable.³⁰ The new owners had much greater real power over the employees than entitled by law, which included not only mass dismissals, but also bypassing the rules on collective redundancies (today employees in privatized companies make up only 7% of the total number of employees in Serbia),³¹ as well as creating and maintaining intolerable working conditions, such as non-payment of salaries from the moment of privatization or, unjustifiably, paying only minimum wage (see Permanent Working Body of the Social

²⁸ This can be illustrated by the social program drafted in 2008 by the Government of the Republic of Serbia, the Oil Industry of Serbia company, and representative trade unions (at the level of the employer, the relevant sector (energy and petrochemicals), and the Republic of Serbia).

²⁹ Zakon o privatizaciji [Act on Privatization], *Službeni glasnik RS*, 38/2001, 18/2003, 45/2005, 123/2007, 123/2007, 30/2010, 93/2012, 119/2012, 51/2014, and 52/14, Article 41a.

³⁰ According to the research of the Permanent Working Body of the Social and Economic Council of the Republic of Serbia (2011, 83), it is estimated that in the process of privatization, nearly three quarters (74,41%) of employees in socially-owned enterprises lost their jobs, mainly due to closure of the production facilities.

³¹ According to Andrić (2017, 66), between 2001 and 2008, more than 400,000 workers were dismissed due to privatization, whereby some of them found employment again in the public sector, while a minority found work in private retail and artisan shops and other „small“ businesses. From 2008 to 2016, an additional 300,000 workers lost their jobs. This data confirms the conclusion that the privatization process in Serbia led to the impoverishment and marginalization of a very large number of workers, but also the conclusion that, despite some dissonant tones, has prevailed in international literature (see Pendelton 2016) stating that almost all changes in ownership lead to loss of employment.

and Economic Council of the Republic of Serbia, 2011). There are concerns that the privatization of public capital will be accompanied by abuses similar to those that occurred during previous period. This is in spite of the fact that the current regulations envisage specific measures to protect 93,000 employees at enterprises founded by the Republic of Serbia, and 69,000 employees at enterprises founded by local self-government units, such as the rule that the social program represents an integral part of the sale of assets of the entity to be privatized, i.e. that the assets sale contract may prohibit the reduction in the number of employees who were hired on the basis of an open-ended employment contract for the following two (exceptionally, three) years.³²

3. THE PRINCIPLE OF PRESERVATION OF EMPLOYMENT

3.1. *Ex lege* transfer of employment contracts

Following Vasiljević (1999, 42), every company represents an organisational unity of material (right of ownership, industrial property rights, copyright, claims, and other property rights) and personal elements (founders, employees, managers) that enable the performance of certain activities. Since employees represent an integral part of the company, the transfer of employment contracts represents an especial aspect of the transfer of the company to a third party. *Mutatis mutandis*, this is valid for legal entities. In the event of a change of employer, the person who assumed the rights and obligations becomes the new employer of the employees. This type of succession does not depend on the will of the respective entities, but assumes a certain state intervention – succession occurs automatically as a matter of law. This principle was adopted into the Serbian Labour Act via the previously cited rule that status change, and/or change of employer, in conformity with the act, includes transfer of the general act (i.e. collective agreement or labour rulebook) and of all employment contracts that are valid on the day of the change of employer.³³ Employment contracts, therefore, remain in effect between the employees and the new employer, which is why persons who were employed at the time of the change have the same contractual rights and obligations towards the transferee as before the change occurred. According to Lubarda (2004, 286), this further means that employees become *ex lege* creditors of the person being substituted to the employer,

³² AP, Articles 37, 50 and 52.

³³ LA, Article 147. The provisions of the AC take the same tone: „The employees of the transferring company who are assigned to the receiving company under the status change agreement or division plan shall continue working for the receiving company in accordance with labour legislation“, Article 505 (1) (6).

regardless of whether the employee has established a standard or flexible form of employment.³⁴

When a change of employer occurs, the content of the employment contract binds both the employee and the transferee in the same way that it obliges the employee and the transferor. The transferee is therefore able to exercise all the rights, such as the right to require employees to abide by the non-compete clause, if such a clause exists in the contract. Moreover, the transferee may impose a disciplinary sanction if an employee violated work discipline before the change of employer took place, provided that, in the meantime, the statute of limitations has not expired. On the other hand, employees can exercise all the rights and privileges derived from their employment contracts, including the ones whose exercise is dependent on the length of service. This is recognized under Serbian law in terms of the right to severance pay and the right to a notice period, which is in line with the jurisprudence of the Court of Justice of the EU.³⁵

Since the rights and obligations of employees are governed by collective agreements or unilateral general legal acts adopted by employer (labour rulebooks), the principle of preserving employment in the event of change of employer presumes the preservation of rights arising from these acts. Thus, the Labour Act establishes the obligation of the transferee to implement the collective agreement or labour rulebook of the transferor for no less than one year following the change of employer, unless the collective agreement, concluded with the transferor, expires beforehand or the transferee concludes a new collective agreement with a representative trade union(s).³⁶ This obligation represents a guarantee for

³⁴ This is *explicite* confirmed in the authentic interpretation of the Labour Act (*Službeni glasnik RS*, No. 95/18) regarding fixed-term employment contracts. On the other hand, the view of the French jurisprudence that the transfer includes the employment contracts of employees who the transferor temporarily allocated to another employer (which is why their employment relationship with the transferor is temporarily suspended) seems justified. Terminated employment contracts are also transferred if, at the moment of change of employer, the notice period to which the employee is entitled has not yet expired. The contract shall be terminated upon the expiration of this period. Cour de cassation, 14 May 1997, *Revue de jurisprudence sociale* (F. Lefebvre), 8–9/97, No. 951; Cour de cassation, 6 November 1991, *Revue de jurisprudence sociale* (F. Lefebvre), 1991, No. 1296.

³⁵ ECJ, case C-343/98, Renato Collino and Luisella Chiappero v. Telecom Italia SpA, ECLI:EU:C:2000:441, para. 51.

³⁶ LA, Article 150. According to the research of the Permanent Working Body of the Social and Economic Council of the Republic of Serbia (2011), the number of signed collective agreements after the conclusion of the privatization process decreased by 28%, which illustrates the reduction of the protection of rights of employees at the privatized enterprises. This is prompted by high unemployment rates and weakening of the trade unions, primarily due to falling rates of unionization (less than 30% of employees in Serbia are members of trade unions) and lack of agility on the part of the trade unions in terms of ensuring effective implementation of labour legislation. We also must take into

preservation of working conditions, which is why they cannot deteriorate during the said period of time.³⁷ Also, it should be noted that the obligation to apply the collective agreement concluded by the transferor exists even if the transferee is bound by a collective agreement entered into with the representative trade union from his company. According to Grgurev (2013, 106), in this case, there is a “competition” between collective agreements, which could jeopardize the protection of employees from discrimination. This is due to the fact that the application of two different agreements to two different categories of employees working for the transferee may result in the employees of the same employer having different working conditions, including different pay for the same work or different work of the same value. However, it seems that such varying treatment is justified by the legal obligation of the transferee to preserve the working conditions of the employees covered by the transfer. There is also the issue regarding the position of employees if the collective agreement entered into with the transferee includes more rights and better working conditions than the rights and working conditions included in the collective agreement entered into with the transferor. Following Senčur Peček (2016, 437), it is possible to propose a solution *de lege ferenda*, according to which the provisions of the collective agreement with better working conditions or more rights are applied to the employees covered by the transfer of undertaking. Any other solution would be contrary to the principle *in favor laborem*.

3.2. Employee consent to the transfer of employment contract

The rule of preservation of employment in the event of change of employer aims at providing employees the opportunity to continue to work for the transferee under the conditions previously agreed with the transferor and not to force them work for another employer, if they do not wish to do so. Any other interpretation of the preservation of employment principle would be contrary to the guarantee of the right of each person to earn a living from freely chosen occupation and employment (the right to work). As demonstrated elsewhere (Samuel 2002, 19; O’Cinneide 2015), there is no freedom of work if people are working against their will, including cases in which they were hired at their own free will but no

account the demanding conditions for obtaining the status of representative trade union in Serbia (membership of at least 15% of the total number of company employees), which the International Labour Organization’s Committee on Freedom of Association considered to be too high.

³⁷ Following Blanpain (2012, 400), some segments of this ban may last longer, because the collective agreement entered into with the transferor produces indirect effects even after its expiration if (more favourable) working conditions and rights have been incorporated into the employment contract; in this case, the collective agreement with the transferor permanently modifies the employment contracts.

longer wish to continue working in general or for a particular employer. The consent of an employee to work includes her/his ability to stop working for someone else, if she/he chooses so. Relatedly, it should be noted that any solution to the contrary would be in contravention of the principle of freedom of contract and freedom of the employee to choose his employer without the obligation to work for an employer whom they have not freely chosen.³⁸ In relation thereto, one should keep in mind that the Council Directive 2001/23/EC does not regulate the consequences of employees' refusal to work for the transferee, which was left to the Member States to regulate.³⁹ Following Blanpain (2012a, 788), this further means that, unless the national legislation claims otherwise, an employee who chooses not to continue the employment relationship with the transferee can still be bound by the employment contract concluded with the transferor. More precisely, the fact that an employee exercised her/his right to refuse the transfer of the employment contract does not automatically lead to the termination of her/his employment. Instead, employment relationship between the employee and the transferor can be preserved, while dismissal by the transferor can be the final consequence of exercising of the right to refuse the transfer.

According to the Serbian Labour Act, the transferor is obliged to notify employees of the transfer of contracts onto the transferee.⁴⁰ Once the employees agree to this, their contracts are deemed transferred. Conversely, if an employee refuses the transfer of the employment contract to a third party, the transferor may terminate their contract. The reason for dismissal is justified if the employee categorically refuses the transfer or if she/he fails to respond within five working days from the day of receipt of the employer's notification of the transfer.⁴¹ The Labour Act does not stipulate the obligation of the transferor to maintain, after the transfer, an employment relationship with an employee who refused the transfer of their employment contract, as far as is practically possible (e.g. in the part of the undertaking that was not included in the status change). However, when we have a situation where the transferor decides to dismiss an employee (even when the employee could have been offered a transfer to the part of the undertaking that was not included in the status change), the Labour Act does not explicitly confirm that such an employee can enjoy all (material and procedural) guarantees of protection, as in other cases of

³⁸ ECJ, joined cases C-132/91, C-138/91, and C-139/91 *Grigorios Katsikas v. Angelos Konstantinidis and Uwe Skreb and Günter Schroll v. PCO Stauereibetrieb Paetz & Co. Nachfolger GmbH*, ECLI:EU:C:1992:517, para. 32.

³⁹ For example, in French case law it is accepted that the refusal of the employee to continue working for the new employer produces the same effect as the employee's resignation (Cour de cassation, 10. 10. 2006, *Recueil Dalloz*, 2007, 472).

⁴⁰ LA, Article 149 (1).

⁴¹ LA, Article 149 (2).

“economic” dismissal by the employer. Following the research in A.-C. Hartzén *et al.* (2008, 10–15, 33), we believe that this legal vacuum should be interpreted in such a way that the employee is entitled to adequate protection, including the right to severance pay.

Since the employee’s categorical refusal of transfer or absence of response within the deadline represents valid grounds for dismissal, this raises the question of the status of employees who were not fired by the transferor, even though they did not accept to continue working for the new employer or did not declare by the given deadline whether they accept the transfer of their contract to a third party. According to Ivošević and Ivošević (2006, 277), a possible solution to this dilemma is the use of legal fiction for entering into an open-ended employment contract on the day that the person who has not previously entered into an employment contract with the employer comes in to work, meaning that just by coming to work after refusing the transfer of the employment contract would be enough to continue employment with the transferee. According to an alternative and more acceptable interpretation, if an employee opposes the transfer of his contract, and the transferor does not dismiss him, that means that the right to refuse the transfer of the contract aims to prevent the consequences of such transfer. The employment contract will still be transferred, only it will be without effect, i.e. the employee’s right to refuse the transfer of the employment contract, in fact, means that she/he has the right not to accept the legal consequences of the transfer of undertaking, in the part concerning his employment contract, of course. Finally, this means that, as suggested by Santoro-Passarelli (2007, 325), this means that an acceptable interpretation would be that the refusal of an employee, in the case that he was not dismissed by the transferor, means that his contract is transferred to the transferee (since all employment contracts are transferred *ex lege*), only it will be without effect.

3.3. Prohibition of transfer-related dismissal

In addition to the transfer of employment contracts from the transferor to the transferee, implementation of the principle of employment preservation in the event of change of employer presupposes that this change, in itself, does not constitute justified grounds for dismissal. Thus, EU labour law does not consider the transfer of undertaking to be valid grounds for dismissal by the transferor or the transferee.⁴² Article 4 (1) of the Directive prohibits transfer-related dismissal, i.e. dismissal solely by reason of the transfer. However, dismissals for “economic, technical or organizational reasons” are permitted. The distinction between economic reason on the one hand and transfer of undertaking as a reason, with obvious economic content, on the other hand is controversial. It is highly

⁴² Council Directive 2001/23/EC, Article 4 (1).

debated whether cost-cutting measures that intend to introduce more flexibility constitute permitted grounds for dismissal. In British case law these circumstances are not accepted as a valid economic reason, especially because the reason itself does not entail any change in the workforce (see, for example, Barnard 2012, 615; Kountouris and Njoya, 442). In contrast, according to Winter (2016, para. 7), in German literature scholars usually take the opposite view claiming that the Directive does not affect the capacity of the transferor and transferee for rationalization.

Following the report of the Commission (2007) and the research in Rogovsky *et al.* (2005, 31), EU Member States have the right to exclude certain specific categories of employees who are not covered by national legislation or practice in respect of protection against dismissal (e.g. senior managers, persons who enjoy special support or employment protection, and relatives of the employer or employees who perform paid work in the employer's household in Sweden). This, however, does not include the possibility of depriving of protection against dismissal the categories of employees who, in accordance with national legislation, enjoy even limited protection against dismissal.⁴³

In Serbian law the rule on protection against dismissal is not directly stated, but it is derived from the provisions of the Labour Act regarding change of employer and termination of employment. We can conclude that prohibition of dismissal by the transferor or the transferee does not mean the prohibition of dismissal due to (otherwise) legitimate reasons⁴⁴ related to the employee's abilities and conduct, or technological, economic or organizational changes that lead to the discontinuation of the need for a particular job or the reduction of the work volume.⁴⁵

The rule on the transfer of employment contracts would have no practical significance if an employer could easily terminate employment contracts several days, or even weeks before the company's restructuring.⁴⁶ Serbian law did not devise mechanisms for employers to be dissuaded in

⁴³ ECJ, case 237/84, *Commission of the European Communities v. Kingdom of Belgium*, ECLI:EU:C:1986:149.

⁴⁴ In relation to that, we should bear in mind that, modelled on ratified International Labour Organisation Convention No. 158, one of the basic rules of Serbian labour law reads: the employer may not terminate the contract of employment, unless there is a valid reason related to the ability or conduct of the employee or the needs of the employer. The requirement for valid reasons for dismissal was met by establishing a list of permissible reasons for dismissal in accordance with the Labour Act (Article 179).

⁴⁵ As suggested by McMullen (2007, 370), this does not mean that the transferor has the right to dismiss employees solely because they believe that the transferee will not need them. The wish of the transferor to achieve a higher sale price clearly does not constitute an economic reason.

⁴⁶ Following McMullen (2012, 358), the circumstances of each individual case will determine the length of period after which the dismissal can no longer be considered related to the transfer of undertakings, i.e. after which it will be safe to assume that

their intention to use termination of employment as a means of avoiding the rules on protection of employees in the event of a change of employer. On the other hand, there are efforts in the legislation of some European countries to limit the rights of the transferor to initiate termination of employment, but they are accompanied by the issue of determining the fair scope of restrictions, as well as the way in which the violations are sanctioned, as suggested by Pélissier (1990, 157). The prevailing solution in the law of several Member States is not to prohibit the employers from firing their employees before the restructuring in a general way, but rather to specify that restructuring does not represent justified grounds for dismissal. The proximity of the dismissal to the date of transfer represents a strong indication that the actual reason of dismissal was the transfer. This also means that dismissal of an employee by the employer for the purpose of future restructuring, or rather before the restructuring to facilitate this process, is deemed unlawful. According to Senčur Peček (2010, 312), this is important because often in practice a transferor will dismiss a number of employees immediately before the status change, so that the transferee can hire the same people after the transfer of undertaking, only under unfavourable conditions. This risk has been recognized in ECJ (CJEU) case law, where it has been held that employees whom the transferor unlawfully dismissed immediately before the transfer of undertaking, may file a request for protection against unlawful dismissal against the transferee as well.⁴⁷

On the other hand, the rule on the transfer of employment contract does not assume that the transferee cannot, after certain status changes, initiate the amendment or even termination of the employment contract. As concluded by Pélissier (1990, 155), the principle of employment preservation no longer protects the employees after the amendment has been made. They have the same status as any (other) employee, while the transferee has all the rights that an employer is entitled to by law. This further means that the transferee may offer an employee an amendment to the agreed working conditions, or even terminate their contract of employment in the event that she/he refuses the amendment. Following Smit (2005, 1873), we argue that the new employer may dismiss an employee who does not deliver appropriate results (poor performance)

even indirect links between the transfer of undertakings and the employer's decision on dismissal have been broken.

⁴⁷ This is because their employment contracts should be considered in force. The first reason is that the person whom the employer dismissed just prior to the transfer of undertaking should be considered an employee of the company on the day of the transfer, while the other reason concerns the obligatory nature of protection of employees from dismissal due to the change of employer, making the provision of the Directive confirming such protection unacceptable for derogation at the expense of the employee. ECJ, case C/319–94, Jules Déthier Équipement SA v. Jules Dassy and Sovam SPRL, ECLI:EU:C:1998:99, para. 39–40.

or does not have the necessary knowledge and skills to perform her/his tasks. He can also fire an employee due to disciplinary offences that occurred before the status change. These dismissal examples have certain specificities, reflected in the fact that the transferee must comply with all the benefits and limitations related to the exercising of the right to terminate employment regarding the facts that occurred before the change of employer, as is the case of severance pay and length of the notice period in the case of Serbian law.

Employees also need to be protected against dismissal by the transferee, assuming it has occurred immediately after the transfer of undertaking. Unfortunately, this need has not been recognized in Serbian legislation, while other legal systems deem unfair the dismissal by the transferee if the employee in question did not accept the offer to amend the employment contract which was submitted shortly after the transfer (e.g. offer to transfer to a lower-level job made one day after the transfer).⁴⁸ The employee has the right to refuse the offer of the transferee and it cannot be qualified as genuine and serious grounds for dismissal. Also, European Union law has adopted the view that the employer is held accountable for termination of employment if it occurred because the transfer of undertaking was accompanied by a fundamental change in working conditions to the detriment of the employee.⁴⁹

4. CONCLUDING REMARKS

Legal rules often differ from reality. In fact, employers often have much greater actual impact on the survival of the employment relationship than they are entitled to by law. Although the rules of change of employer formally ensure a greater degree of protection of employee rights, we should not lose sight of the fact that the prerogative to assess whether the requirements for termination of employment have been met and to terminate employment via declaration of will lies in the hands of every employer. The risk of abuse of this prerogative is intensified due to the lack of precise legal provisions regulating change of employer as well as certain (valid) reasons for dismissal (see Kovačević 2016, 580–586). This can deprive the legal guarantee for safeguarding employee rights of its legal substance and separate it from its original purpose. This is prompted by high unemployment rates, the weakness of the trade unions and insufficient capacities of the labour inspection and authorities in charge of effective implementation of protective legislation in the Republic of Serbia.

⁴⁸ Cour de cassation, 14 January 2004, *Bulletin des arrêts des Chambres civiles de la Cour de cassation*, V, No. 9.

⁴⁹ Council Directive 2001/23/EC, Article 4 (2).

Although we can conclude that the substantive and procedural rules related to the preservation of the employment relationship in cases of a transfer of undertakings in Serbian law are solid, abuses of prerogatives by employers in the event of transfer of undertakings have been facilitated due to the content of certain legal provisions on change of employer. First, the definition of the term “change of employer” is not clear at all, as the Labour Act does not provide a definition of it. The adopted term “change of employer” obviously has a broader meaning than “transfer of undertaking” in the sense of Directive 2001/23/EC, even if there are some uncertainties regarding the scope of this expression. The application of the transfer rules in cases of changes of company capital ownership and in certain privatization issues is uncertain. The Labour Act does not regulate the issue of liability for employee claims due before the change of employer, nor is there consistent and uniform case law on this issue. There is very little case law and literature on other aspects of protection of employees in the event of change of employer, where changes related to the employer invoke the application of the rule on transfer. Moreover, Serbian courts usually do not consider CJEU case law as guidance in contested issues.

Serbian law also contains significant uncertainties regarding the preservation of the employment relationship in cases of transfer of undertaking. The Labour Act states the obligation of the transferee to take on all rights and obligations arising from the employment relationships on the date of the change of employer. However, the transfer of the employment contracts depends on the declaration of each employee by a given deadline. The consequences of the omission of the declaration are unclear. Also, there is no specific prohibition of transfer-related dismissal, although it is regarded as implied in the rules on change of employer. The content and details of such a prohibition of dismissal are vague and unsettled. In this regard, employees in Serbia would be able to count on better protection if the aforementioned rules were clearer and more reliable, in order to enable the employees to continue to work for the transferee under the same working conditions and be protected from dismissal exclusively or predominantly motivated by the transfer of undertakings, particularly when termination of employment is initiated shortly before or immediately after the transfer.

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