

Employment & Labour - South Africa

Communication with Employees in Business Transfers

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Contracts of employment transfer automatically to the purchaser when a business (or part of a business) is transferred as a going concern.⁽¹⁾ This means that there is no requirement to obtain the agreement of employees to effect the transfer; it occurs by operation of the law. There is also no obligation to consult employees over the transfer. However, proper communication with employees is key to the avoidance of disputes, even when there is no legal requirement to do so. The employers in a recent Labour Court case⁽²⁾ were reminded of this when they failed to communicate effectively with employees who were transferred from one employer to the other when part of the business was transferred.

BP South Africa had transferred its warehouse and distribution business as a going concern to Unitrans and all employees were to be transferred with the business under the terms of Section 197 of the Labour Relations Act. As the business was being transferred as a going concern, there was no obligation on the employer to obtain the agreement of or consult with its employees because their contracts were to transfer with the business by operation of the law.

BP informed the union that the transfer was going to happen on May 1 2006. On April 20 2009 Unitrans put on a slide show for employees about its business. The employees were then transferred on May 1 2009 without further ado. However, on May 17 2009 some employees became concerned when they failed to receive payslips from BP and because they were no longer covered by medical aid. It emerged that this was because they had not signed the option form required by Discovery, the scheme engaged by Unitrans to provide medical aid. The employees had not been informed of the need to sign the form. The employees were also unhappy with the way in which the transfer had been implemented. They gathered in the canteen to discuss the problems and subsequently refused to return to work. Several attempts to persuade them to return to work failed. When they refused to work the following morning, they were issued with notices to attend disciplinary enquiries and were subsequently dismissed.

Although the employees had been involved in an unprotected strike, the court held that dismissal was too harsh a penalty as both sides had contributed to the breakdown. Both BP and Unitrans should have informed the employees before the date of the transfer about what was going to happen with regard to the terms and conditions of employment, including what was required of the employees in relation to medical aid. It was the employers' failure to do this which brought about the impasse on May 17 2009. BP had owed its former employees better communication about the transfer to Unitrans and Unitrans should have communicated effectively to establish a relationship of trust. The employees should have been reassured of their job security.

The dismissals were thus found to be substantively unfair and Unitrans was ordered to pay each dismissed employee four months' remuneration as compensation because the employees made no case for reinstatement. Unitrans was also made to pay the employees' costs. It became an expensive exercise which could have been avoided if the parties had simply communicated more effectively.

Parties that are involved in mergers should note that if the transaction is notifiable under South African competition legislation, a copy of the merger notice must be sent by both the primary acquiring and primary target firm to any registered trade union that represents a substantial number of their employees or, if there are no such registered trade unions, to the employers themselves or their representatives.

For further information on this topic please contact [Susan Stelzner](#) at Edward Nathan Sonnenbergs by telephone (+27 21 410 2500), fax (+27 21 410 2555) or email (sstelzner@ens.co.za).

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Endnotes

(1) Section 197 of the Labour Relations Act 1995 (a provision similar to the transfer of undertaking provisions found in many other jurisdictions).

(2) *SACWU v Unitrans Supply Chain Solutions (Pty) Ltd* [2009] JOL 23664 (LC).

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