Transferring Employees on an Outsourcing in Luxembourg: Overview

by Ann Morel and Harmonie Méraud, *BSP*

Country Q&A | Law stated as at 01-Sep-2022 | Luxembourg

A Q&A guide to outsourcing in Luxembourg.

This Q&A guide gives a high-level overview of the rules relating to transferring employees on an outsourcing, including structuring employee arrangements (including any notice, information and consultation obligations) and calculating redundancy pay.

Transfer by Operation of Law

1. What is an outsourcing?

Luxembourg law does not define outsourcing. In general, an outsourcing occurs when an organisation decides that a service or activity previously provided by its internal resources will be sourced from an external provider. The services being outsourced do not have to be fundamentally the same and do not necessarily have to be carried out within Luxembourg national territory.

Transfers of undertakings are governed by:

- Articles L. 127-1 to L. 127-6 of the Labour Code.
- Directive 2001/23/EC on safeguarding employees' rights on transfers of undertakings, businesses or parts of businesses (Transfer of Undertakings Directive).

2. In what circumstances (if any) are employees transferred by operation of law?

Initial Outsourcing of Service Provision

According to Article L. 127-1 of the Labour Code, the following rules will apply:

> "In the event of the transfer of a company or a change in the employer's situation, in particular by succession, sale, merger, transformation of the company's assets or incorporation, all employment contracts in force on the date of the change continue to exist between the new employer and the company's employees."

Therefore, the affected employees' rights are maintained and automatically transferred to the transferee on a transfer of an undertaking.

The rules on transfers of undertakings apply whenever the undertaking to be transferred is located in Luxembourg, and apply to all employees, including those employed on part-time, fixed-term or temporary work contracts. The rules apply to outsourcings if the outsourced activities constitute an economic entity that maintains its identity. This is the case if the transferred undertaking or part of an undertaking both:

- Constitutes an organised set of resources (in particular personnel and equipment) enabling an economic activity.
- Is continued in an identical or essentially similar manner by the transferee.

Therefore, a change in the management, the organs of the company or shareholding is not considered to be a transfer of an undertaking within the meaning of the law.

Change of Supplier or Service Provider

A change of supplier or service provider can result in the transfer of employees, if the change of supplier or service provider involves the transfer of an economic entity that maintains its identity and that constitutes an organised set of resources enabling the pursuit of an economic activity. This would then qualify as a transfer of an undertaking resulting in the transfer of the employees.

Service Provision Returning In-house

As for an initial outsourcing or change of service provider, a bringing back of a service in-house should be checked on a case-by-case basis whether the operation involves an organised set of resources enabling an economic activity and whether the entity maintains its identity. If so, the rules on transfer of undertakings will apply and the employment contracts of the employees of the service concerned will automatically be transferred.

3. If employees transfer by operation of law, what are the terms on which they do so?

General Terms

In a transfer of an undertaking, the transferee must take over the existing employment contracts. This automatic transfer is binding on the transferor, the transferee and the employees concerned (the law applies to all types of employees). The transferor and the transferee cannot agree in a commercial agreement that the employment contracts will not be taken over, nor can employees object to the change of employer.

A refusal by the transferee employer to continue the employment relationship would be treated as a dismissal (and would be necessarily unfair because it was given without notice and without justification). Similarly, an employee's refusal would constitute a resignation with immediate (unjustified) effect.

Length of Service

As the employment contracts of the transferred employees are taken over "as is" with all the rights and obligations attached to them by the new employer, the transferred employees retain their seniority.

According to case law, when calculating the employee's rights related to seniority, the transferee must also take into account the length of service completed by the employee before the transfer. Therefore, the transferred employee can rely on rights arising from seniority acquired with the transferor. As a result, employees can invoke their seniority against the transferee in the event of dismissals or resignations, for the purposes of calculation of notice periods or severance payments, as well as in the event of salary increases.

Employee Benefits

The automatic transfer of employment contracts has no impact on any benefits stipulated in the employment contracts. The individual clauses and other benefits provided for in the employment contracts remain with the transferred employees.

Pensions

The automatic transfer of employment contracts has no impact on the employees' pension benefits, which continue without disruption.

Other matters

The rule maintaining employee's former working conditions is mitigated in relation to benefits granted to employees under a collective bargaining agreement (CBA), as CBAs are unique to the specific establishment. Therefore, transferred employees

only continue to benefit from the working conditions and collective rights of their former CBA until the date of termination or expiry of the CBA or the entry into force or application of another CBA.

4. If the employees do not transfer by operation of law but there is a commercial agreement in place for them to be transferred, what employment rights, obligations, and terms must the parties to the agreement adhere to or are common practice to honour? Is the position only governed by the commercial agreement between the parties?

General Terms

If the transaction does not qualify as a transfer of an undertaking, the parties may agree to "transfer" employees contractually, subject to agreement of the employees. The old employer, new employer and employees concerned would then have to agree that the old employer will terminate the existing employment contracts and that the new employer will then rehire the employees.

The old employer and the employees concerned will then enter into a termination agreement by mutual consent, and the employees will then enter into a new employment contract with the new employer.

Such commercial agreements can be freely negotiated between the parties. However, in practice, to limit any possible dispute by the employees concerned, the parties usually provide that the new employer will take over the contracts as they stand, or at least that the employees' seniority will be taken over.

Length of Service

As the employees sign a new employment contract with the new employer, the parties are free to set new terms and conditions of employment, even if they are less favourable than those in their former employment contract. However, in practice it is common for the employee's seniority acquired with the old employer to be included in the new employment contract with the new employer.

Employee Benefits

The parties are free to agree on whether benefits that were provided for in the former employment contracts with the old employer will be taken on. In general, it is common practice to include these in the new employment contracts.

Pensions

The maintenance of any pension benefits would depend on the existing arrangements and would be subject to negotiation between the parties to the transaction and the employees concerned.

Harmonisation

5. Is a transferee required to harmonise the terms and conditions of transferring employees with those of its existing workforce? If so, what does it mean to harmonise terms in your jurisdiction? What are the risks for the transferee of not harmonising terms, or failing to do so correctly?

The transferee is not legally obliged to harmonise the terms and conditions of the transferring employees with those of its existing workforce. However, if the terms and conditions of the existing workforce are more favourable than those of the transferees, it may be recommended to do so to avoid any claims of unequal treatment by the transferees.

Harmonisation of the terms and conditions of transferring employees with those of the existing workforce requires the consent of the transferred employees.

6. If there is no legal requirement to harmonise terms and conditions of transferring employees with those of its existing workforce, what are the risks and challenges for the transferee of harmonising, or choosing not to harmonise, the terms and conditions of transferring employees with those of its existing workforce?

If the transferee chooses not to harmonise working conditions, the employees may bring a court action for unequal treatment. See *Question 5*.

Dismissals

7. To what extent can dismissals be implemented before or after the outsourcing?

Although some CBAs (such as in the banking sector) provide for guarantees of employment for a certain period following the transfer of an undertaking, the Labour Code itself does not require an employer taking over employment contracts to maintain those contracts for a certain period. The law only provides that the transfer does not in itself constitute a valid reason for dismissal. Therefore, it is not sufficient to invoke the mere existence of the transfer (or outsourcing, if it qualifies as a transfer of an undertaking) as justification for a dismissal, and such a dismissal would be unfair. However, the legislation does not prevent dismissals for economic, technical or organisational (ETO) reasons involving changes in employment. While it is not justified to dismiss employees because of the outsourcing, it may be justified to dismiss employees as a result of the outsourcing, for example, because the outsourcing has made certain positions redundant.

8. What liability could arise for the transferor or the transferee for any dismissals before the transfer?

The transfer does not in itself constitute grounds for dismissal. Therefore, if the transferor dismisses an employee before the transfer and justifies this dismissal solely on the basis of the transfer, the employee can bring an action against the transferor for unfair dismissal. Before the transfer, the transferee is not liable. This position cannot be amended/varied by a commercial agreement.

9. What liability could arise for the transferor or the transferee for any dismissals after the transfer?

As the transfer does not in itself constitute grounds for dismissal, if after the transfer, the transferor dismisses an employee and justifies this dismissal solely on the basis of the transfer, the employee can bring an action against the transferor for unfair dismissal.

After the transfer, the transferor and the transferee are jointly and severally liable for obligations that have fallen due before the date of the transfer as a result of an employment contract or employment relationship existing at the date of the transfer.

The transferor is liable to reimburse amounts paid by the transferee, unless the burden resulting from those obligations has been taken into account in a commercial agreement between the transferor and the transferee.

Redundancy Pay

10. How is redundancy pay calculated?

No redundancy pay is normally paid on a transfer of employees, as the transfer itself cannot be grounds for redundancy.

In addition to notice, any dismissed employee is entitled to severance pay after at least five years of service within the company. Severance pay is determined on the basis of the average gross salary effectively paid to the employee over the 12 months preceding the dismissal. Sickness benefits, bonus and any recurrent payments are included, but overtime compensation, premium paid on a discretionary basis and reimbursement of expenses are excluded.

The amount of severance pay varies according to the seniority of the employee, as follows:

- Between five and ten years of service: one months' salary.

- Between ten and 15 years of service: two months' salary.
- Between 15 and 20 years of service: three months of salary.
- Between 20 and 25 years of service: six months' salary.
- Between 25 years and 30 years of service: nine months' salary.
- 30 years or longer of service: 12 months' salary.

(Article L. 124-7 et seq, Labour Code.)

An employer with less than 20 employees can in the termination letter choose to provide either for severance pay or for an extension of the notice period (the notice period normally due plus the number of months due as severance pay).

Secondment

11. In what circumstances (if any) can the parties structure the employee arrangements of an outsourcing as a secondment? What are the risks of doing so?

Secondment arrangements are not allowed under the rules on transfers of undertakings. The employee must be either an employee of the transferor or an employee of the transferee. If the transaction does not qualify as a transfer of an undertaking within the meaning of the law, a secondment can be arranged, provided that it complies with the relevant provisions of Articles L. 141-1 et seq. of the Labour Code. Otherwise, it could be considered as illegal provision of labour.

Information, Notice and Consultation Obligations

12. What information must the transferor or the transferee provide to the other party in relation to any employees? Are there any time limitations or requirements?

The transferor must notify the transferee in good time of all the transferred rights and obligations, insofar as these rights and obligations are known or ought to be known by the transferor at the time of the transfer.

A copy of this notification must be sent to the Labour and Mines Inspectorate (ITM).

The failure of the transferor to notify the transferee of any such right or obligation does not affect the transfer of that right or obligation, or the rights of employees against the transferee or transferor in respect of that right or obligation.

13. Are there any restrictions or limitations on the personal data of employees that can be shared between the transferor and the transferee?

Under Article L.127-3 of the Labour Code, the transferor's rights and obligations arising for from an employment contract or employment relationship existing at the date of the transfer are transferred to the transferee by the transfer of the employees. Therefore, the transferor must share with the transferee a certain amount of the transferred employees' personal data.

This processing of personal data must occur in compliance with the general principles of General Data Protection Regulation (*(EU) 2016/679*) (GDPR). In particular, the processing of personal data must be based on one or more of the six legal bases listed in Article 6 of the GDPR. In the context of a transfer of undertaking where a transferor must transfer employees' employment contracts, the legal basis would be that the processing is necessary for compliance with a legal obligation to which the controller is subject (Article 6.1(c), GDPR).

The sharing of personal data between the transferor and the transferee must be limited to the employees' personal data contained in their employment contract, or more generally to the employees' personal data related to their employment relationship with the transferor.

The employees concerned by the transfer must be informed of the processing of their personal data, in accordance with Article 13 and 14 of the GDPR. It is common practice to include a clause in employment contracts concerning the processing of personal data, providing for the possibility that such data may be transferred to a group company or a third company in the context of, among other things, a transfer of an undertaking.

The commercial agreement entered into between the transferor and the transferee must also include a section dealing with the processing of the employees' personal data, and identify the:

- Data controller/processor.
- Personal data processed.
- Reasons and legal bases for such processing.

14. What are the notice, information and consultation obligations that arise for the transferor or the transferee in relation to employees, employee representatives, trade unions, works councils, or local authorities?

An employer must inform and consult the employees' representatives on any decision that might entail major modifications to the organisation of work or their employment contracts, as well as on any decision to carry out a transfer of undertaking (Article L.414-3, Labour Code).

In addition, the transferor and the transferee must inform in writing, in good time and before the transfer, the concerned employees' representatives, or the employees themselves in the absence of employee representatives.

The information must include the:

- Date set or proposed for the transfer.
- Reason for the transfer.
- Legal, economic and social consequences of the transfer for the employees.
- Measures envisaged for the employees.

The transferee must communicate this information to the employees' representatives in good time, and in any event before the employees' employment and working conditions are directly affected by the transfer.

If the transferor or the transferee contemplate measures affecting their respective employees, they must consult on these measures in good time with the legal representatives of their respective employees with a view to reaching an agreement.

The information and consultation must cover the contemplated measures with regard to the employees, and must take place in good time before the change is made.

The information obligations apply irrespective of whether the decision on the transfer is taken by the employer or by an undertaking controlling it.

Employee Objection to Transfer

15. What action can an employee take if they object to transferring on an outsourcing and what effect does their objection have?

Employees cannot oppose the transfer of their employment contracts. If employees do not wish to continue their contractual relationships with the new employer, they must initiate the termination of their contracts by resigning.

An employee that fails to resign and refuses to work for the new employer, would be committing an act of insubordination that may be sanctioned by dismissal.

Contributor Profiles

Anne Morel, Partner

BSP
T +352 26 025 1
F +352 26 025 999
E *amorel@bsp.lu*
W *www.bsp.lu*

Professional qualifications. Avocat à la Cour, Luxembourg

Areas of practice. Employment; compensations and benefits; data protection and privacy; intellectual property and general commercial; AML compliance; litigation.

Languages. English, French, German

Professional associations/memberships. Employment Law Specialists Association, Luxembourg (ELSA); European Employment Lawyers Association (EELA); International Bar Association (IBA); Member of Bar Council, 2014 to 2015 and 2015 and 2016.

Publications

- *Les nouveaux enjeux en droit du travail luxembourgeois.*
- *Comparative Guide Labour and Employment.*
- *L'impact du Brexit en pratique sur le détachement de personnel du Royaume-Uni vers le Luxembourg.*
- *Chambers Employment Global Practice Guide.*
- *Privacy in Luxembourg: overview.*

Harmonie Méraud, Senior Associate

BSP
T +352 26 025 1
F +352 26 025 999
E *hmeraud@bsp.lu*
W *www.bsp.lu*

Professional qualifications. Avocat à la Cour

Areas of practice. Employment; compensations and benefits; data protection and privacy; litigation.

Languages. English, French

Professional associations/memberships. Employment Law Specialists Association, Luxembourg (ELSA); European Employment Lawyers Association (EELA); International Bar Association (IBA).

Publications

- *Comparative Guide Labour and Employment.*
- *Regulation of State and Supplementary Pension Schemes in Luxembourg: overview.*

END OF DOCUMENT