

ORDER IN COUNCIL

XVIII
2001

ratifying a Projet de Loi

ENTITLED

The Transfer of States Undertakings (Protection of Employment) (Guernsey) Law, 2001

(Registered on the Records of the Island of Guernsey
on the 4th September, 2001.)



2001

ORDER IN COUNCIL



IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 4th day of September, 2001 before Andrew Christopher King Day, Esquire, Deputy Bailiff; present:— David Charles Lowe, Esquire, Mrs. Eileen May Glass, Laurence Lenfestey Guille, Derek Martin Le Page, Stephen Edward Francis Le Poidevin, Alan Cecil Bisson, David Michael Jory, Keith Richard, OBE, Esquires, Michael John Wilson, Michael Henry De La Mare and Michael John Tanguy, Esquires, Jurats.

The Deputy Bailiff having this day placed before the Court an Order of Her Majesty in Council dated the 18th day of July, 2001, approving and ratifying a Projet de Loi entitled “The Transfer of States Undertakings (Protection of Employment) (Guernsey) Law, 2001”, THE COURT, after the reading of the said Order in Council and after having heard Her Majesty’s Comptroller thereon, ORDERED that the said Order in Council be registered on the records of this Island, of which Order in Council the tenor followeth:—

At the Court at Buckingham Palace

The 18th day of July, 2001

PRESENT,

The Queen's Most Excellent Majesty in Council

WHEREAS, there was this day read at the Board a Report from the Right Honourable the Lords of the Committee of Council for the Affairs of Guernsey and Jersey dated the 3rd day of July 2001 in the words following, viz.:—

“YOUR MAJESTY having been pleased, by Your General Order of Reference of the 22nd day of February 1952, to refer unto this Committee the humble Petition of the States of the Island of Guernsey setting forth:—

“1. That, in pursuance of their Resolution of the 26th day of January, 2000, the States of Deliberation at a meeting held on the 28th day of February, 2001 approved a Bill or “Projet de Loi” entitled “The Transfer of States Undertakings (Protection of Employment) (Guernsey) Law, 2001”, and requested the Bailiff to present a most humble Petition to Your Majesty in Council praying for Your Royal Sanction thereto. 2. That the said Bill or “Projet de Loi” is as set forth in the Schedule hereunto annexed. And most humbly praying that Your Majesty might be graciously pleased to grant Your Royal Sanction to the Bill or “Projet de Loi” of the States of Guernsey entitled “The Transfer of States Undertakings (Protection of Employment) (Guernsey) Law, 2001”, and to order that the same shall have force of law in the Island of Guernsey.”

“THE LORDS OF THE COMMITTEE, in obedience to Your Majesty's said Order of Reference, have taken the said Petition and the said Projet de Loi into consideration and do this day agree humbly to report, as their opinion, to Your Majesty, that it may be advisable for Your Majesty to comply with the prayer of the said Petition and to approve of and ratify the said Projet de Loi.”

HER MAJESTY, having taken the said Report into consideration, is pleased, by and with the advice of Her Privy Council, to approve of and ratify the said Projet de Loi, and to order, and it is hereby ordered, that the same shall have the force of law within the Island of Guernsey.

AND HER MAJESTY doth hereby further direct that this Order, and the said Projet de Loi (a copy whereof is hereunto annexed), be entered upon the Register of the Island of Guernsey and observed accordingly.

AND the Lieutenant Governor and Commander-in-Chief of the Island of Guernsey, the Bailiff and Jurats, and all other Her Majesty's Officers for the time being in the said Island, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

A. K. Galloway

PROJET DE LOI

ENTITLED

The Transfer of States Undertakings (Protection of Employment) (Guernsey) Law, 2001

THE STATES, in pursuance of their Resolutions of the 26th January, 2000^a and the 16th March, 2000^b, have approved the following provisions which, subject to the Sanction of Her Most Excellent Majesty in Council, shall have force of law in the Island of Guernsey.

Law applicable to transfer of Telecommunications undertaking.

1. (1) Subject as hereinafter provided, this Law applies to a transfer from the States to another person of the undertaking of the States Telecommunications Board ("**the undertaking**") or any part of the undertaking.

(2) Subject as aforesaid, this Law so applies -

(a) whether the transfer is effected by sale, by some other disposition or by operation of law;

(b) notwithstanding -

(i) that persons employed in the undertaking or part transferred ordinarily work outside

^a Article II of Billet d'État No. II of 2000.

Guernsey;

- (ii) that the employment of any of those persons is governed by the law of a country or territory outside Guernsey.

(3) A transfer of the undertaking or part of it -

- (a) may be effected by a series of two or more transactions; and
- (b) may take place whether or not any property is transferred by the States to the transferee.

Effect of transfer on contracts of employment, etc.

2. (1) Except where objection is made under subsection (5), the transfer of the undertaking or any part thereof shall not operate so as to terminate the contract of employment of any person employed by the States in the undertaking or in the part transferred; and any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to subsection (1), but subject to subsection (5), on the completion of a transfer of the undertaking or any part thereof -

- (a) all the States' rights, powers, duties and liabilities under or in connection with any contract of employment described in subsection (1) shall be

^b Proposition 2 of Article III of Billet d'État No. VIII of 2000.

transferred by virtue of this Law to the transferee; and

- (b) anything done before the transfer is completed by or in relation to the States in respect of that contract or a person employed in the undertaking or part thereof transferred shall be deemed to have been done by or in relation to the transferee.

(3) Any reference in subsection (1) or (2) to a person employed in the undertaking or part thereof transferred is a reference to a person so employed immediately before the transfer including, where the transfer is effected by a series of two or more transactions, a person so employed immediately before any of those transactions.

(4) Subsection (2) shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.

(5) Subsections (1) and (2) shall not operate to transfer an employee's contract of employment and the rights, powers, duties and liabilities under or in connection with it if he informs the States or the transferee in writing that he objects to being employed by the transferee.

(6) Where an employee so objects, the transfer of the undertaking or the part thereof in which he is employed shall operate so as to terminate his contract of employment with the States; but he shall not be treated for any purpose as having been dismissed by the States.

(7) Subsections (1) and (5) are without prejudice to any right of an employee arising apart from this Law to terminate his contract of employment

without notice if a substantial change is made in his working conditions to his detriment; but no such right shall arise by reason only that, under those subsections, the identity of the employer changes unless the employee shows that, in all the circumstances, the change is a significant change and is to his detriment.

Effect of transfer on collective agreements.

3. Where at the time of a transfer of the undertaking or any part thereof there exists a collective agreement made by or on behalf of the States with a trade union recognised by the States in respect of any employee whose contract of employment is preserved by section 2(1), then -

- (a) that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if made by or on behalf of the transferee with that trade union; and accordingly anything done under or in connection with it in its application as aforesaid by or in relation to the States before the transfer shall, after the transfer, be deemed to have been done by or in relation to the transferee; and
- (b) any order made in respect of that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if the transferee were a party to the agreement.

Non-application of sections 2 and 3 to public servants' pension scheme.

4. (1) Sections 2 and 3 shall not apply -

- (a) to so much of a contract of employment or collective agreement as relates to the public servants' pension

scheme; or

- (b) to any rights, powers, duties or liabilities under or in connection with any such contract or subsisting by virtue of any such agreement and relating to the public servants' pension scheme or otherwise arising in connection with a person's employment and relating to that scheme.

(2) For the avoidance of doubt, the provisions of subsection (1) are without prejudice to the rules of the public servants' pension scheme and to such rights to benefits as persons may have thereunder in respect of service completed prior to a transfer of the undertaking or any part thereof.

Obligations of transferee as to pension arrangements.

5. (1) Upon a transfer of the undertaking or any part thereof the transferee shall, in respect of any person -

- (a) who, immediately before the transfer, was employed in the undertaking or the part transferred; and
- (b) whose contract of employment, immediately after the transfer, has effect by virtue of the provisions of section 2 as if originally made between him and the transferee;

make arrangements for the provision to or in respect of him of benefits under an occupational pension scheme, being arrangements broadly comparable to those provided to or in respect of him under the public servants' pension scheme immediately before the transfer.

(2) A transferee who fails, in respect of any person, to make arrangements which comply with the provisions of subsection (1) shall, subject to the provisions of subsection (6), be under an obligation to compensate that person for any overall material detriment suffered by him, in terms of his future accrual of benefits during any relevant period of employment, as a result of the failure to make such arrangements; and -

- (a) that obligation shall be enforceable by the employee against the transferee as a civil debt;
- (b) the transferee shall be under no other obligation to the employee in respect of that failure; and
- (c) compensation under this subsection -
 - (i) shall be determined in accordance with the provisions of subsections (3), (4) and (5);
 - (ii) shall be calculated as at a time immediately after the date of the transfer; and
 - (iii) may, without limitation, take the form of additional remuneration in respect of any relevant period of employment of an amount necessary to compensate the employee, in respect of that period, for the overall material detriment suffered by him as mentioned in this subsection.

(3) Within a period of 28 days beginning on the date of a transfer of the undertaking or any part thereof, any person of a description set out in subsection (1) may make a written request to the Board for the determination, by the actuary appointed by the Board for the purposes of the public servants' pension scheme and at the expense of the States, of the following questions -

- (a) whether the transferee has, in respect of that person, made arrangements which comply with the provisions of subsection (1); and
- (b) if not, the amount required to compensate that person for any overall material detriment suffered by him as mentioned in subsection (2);

and the determination of the said actuary of those questions shall, subject to subsection (4), be final.

(4) Where under the provisions of subsection (3) the actuary appointed by the Board for the purposes of the public servants' pension scheme has, in respect of any person, determined either of the questions mentioned in that subsection, the transferee or that person may, if aggrieved by the actuary's determination, within a period of 28 days beginning on the date of the determination, refer that question to arbitration; and for the purposes of this subsection -

- (a) the Arbitration (Guernsey) Law, 1982, as amended^c, shall apply to any such arbitration; and

^c Ordres en Conseil Vol. XXVII, p. 525; and Vol. XXIX, p. 178.

(b) for the purposes of that Law -

- (i) the transferee and that person shall be deemed to have entered into an arbitration agreement within the meaning of that Law; and
- (ii) the arbitration agreement shall be deemed to provide that the reference shall be to a single arbitrator.

(5) In determining the questions mentioned in subsection (3) the actuary appointed by the Board for the purposes of the public servants' pension scheme or, as the case may be, the arbitrator appointed pursuant to subsection (4) may have regard so far as applicable to the principles for the time being set out in paragraphs 13 to 15 of Annex A to the Statement of Practice issued by the Cabinet Office and entitled "Staff Transfers in the Public Sector"^d as construed with the other provisions of that Statement; and in any legal proceedings a certificate of the said actuary or, as the case may be, the said arbitrator as to his determination of those questions shall be admissible in evidence as prima facie evidence of the matters stated therein.

(6) Where a person does not make a written request to the Board in accordance with the provisions of subsection (3), the transferee shall be under no obligation to compensate him as mentioned in subsection (2).

(7) The provisions of this section are without prejudice to any provision in a contract imposing obligations on a transferee.

^d Cabinet Office Statement of Practice; January 2000 edition.

(8) The States may by Ordinance amend the provisions of this section.

Dismissal of employee because of transfer of undertaking.

6. (1) Where, either before or after the transfer of the undertaking or any part thereof, any employee of the States or transferee is dismissed, the dismissal of the employee shall be regarded for the purposes of Part II of the Employment Protection (Guernsey) Law, 1998^e as having been unfair if the reason for the dismissal (or, if more than one, the principal reason) was the transfer or a reason connected with it; and the provisions of that Law shall apply accordingly.

(2) The provisions of this section apply -

- (a) whether or not the employee in question is employed in the undertaking or part thereof transferred or to be transferred;
- (b) subject to the provisions of the Employment Protection (Guernsey) Law, 1998.

Effect of transfer on union recognition.

7. (1) This section applies where, after a transfer of the undertaking or any part thereof, the undertaking or the part transferred maintains an identity distinct from the remainder of the transferee's undertaking.

(2) Where, before such a transfer, an independent trade union is recognised to any extent by the States in respect of employees of any description

^e Order in Council No. IX of 1998.

who in consequence of the transfer become employees of the transferee, then, after the transfer -

- (a) the union shall be deemed to have been recognised by the transferee to the same extent in respect of employees of that description so employed; and
- (b) any agreement for recognition may be varied or rescinded accordingly.

Restriction on contracting out.

8. Any provision of any agreement (whether a contract of employment or not) shall be void in so far as it purports to exclude or limit the operation of section 2, 5 or 6.

Interpretation.

9. (1) In this Law, unless the context requires otherwise-

"**benefits**" includes benefits in the form of pensions or otherwise payable on termination of service or on death or retirement;

"**Board**" means the States of Guernsey Civil Service Board;

"**Cabinet Office**" means the Cabinet Office of Her Majesty's Government;

"**collective agreement**" means any agreement or arrangement made by or on behalf of a trade union and an employer or employers' association and relating to any of the following matters -

- (a) terms and conditions of employment, or the physical conditions in which employees are required to work;
- (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of any employee;
- (c) allocation of work or the duties of employment as between employees or groups of employees;
- (d) matters of discipline;
- (e) the membership or non-membership of trade unions on the part of an employee;
- (f) facilities for officials of trade unions; and
- (g) machinery for negotiation or consultation, and other procedures, relating to any of the foregoing matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in any such negotiation or consultation or in the carrying out of any such procedures;

"collective bargaining" means negotiations relating to or connected with any of the matters specified in the definition of the expression "collective agreement";

"committee of the States" means any committee, council, board or

authority of the States constituted by resolution or law approved by the States;

"contract of employment" means any agreement, whether express or implied and whether written or oral, between an employee and his employer determining the terms and conditions of his employment;

"employee" means any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services, and cognate expressions shall be construed accordingly;

"employers' association" has the meaning given by section 34 of the Employment Protection (Guernsey) Law, 1998;

"independent trade union" has the meaning given by section 34 of the Employment Protection (Guernsey) Law, 1998;

"occupational pension scheme" means any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect in relation to one or more descriptions or categories of employments so as to provide benefits, in the form of pensions or otherwise, payable on termination of service or on death or retirement, to or in respect of earners with qualifying service in an employment of any such description or category;

"prescribed" means prescribed by Ordinance of the States under this Law, and cognate expressions shall be construed accordingly;

"public servants' pension scheme" means the scheme of that name

established and maintained under the States of Guernsey (Public Servants) (Pensions and other Benefits) Rules, 1972 to 1999 as from time to time amended, re-enacted (with or without modification), extended or applied;

"recognised", in relation to a trade union, means recognised to any extent by an employer, or two or more associated employers (within the meaning of section 34 of the Employment Protection (Guernsey) Law, 1998), for the purpose of collective bargaining;

"relevant period of employment" in relation to an employee means a period of continuous employment with the transferee beginning on the date of the transfer;

"States" means the States of Guernsey;

"trade union" has the meaning given by section 34 of the Employment Protection (Guernsey) Law, 1998;

"transfer" means a transfer to which, pursuant to section 1, this Law applies, and **"transferee"** shall be construed accordingly;

"undertaking" means the undertaking of the States Telecommunications Board and includes any trade or business of, and any department or operation conducted by, the said Board;

"working conditions" includes terms and conditions of employment and physical working conditions.

(2) Any reference in this Law to an enactment is a reference thereto as amended, re-enacted (with or without modification), extended or applied.

Power to extend Law to transfers of other States undertakings.

10. The States may by Ordinance provide that the provisions of this Law shall apply, subject to such exceptions, adaptations and modifications as may be prescribed, to the transfer of the undertaking or any part of the undertaking of any prescribed committee of the States other than the States Telecommunications Board.

Application of Right to Work Law.

11. Upon a transfer of the undertaking or any part thereof, a person who, immediately before the transfer, was employed in the undertaking or the part transferred, being a person -

- (a) to whose employment section 1(1) of the Right to Work (Limitation and Proof) (Guernsey) Law, 1990^f did not, immediately before the transfer, apply by virtue of section 1(2)(a)(i) of that Law; and
- (b) whose contract of employment, immediately after the transfer, has effect by virtue of the provisions of section 2 of this Law as if originally made between him and the transferee;

shall, notwithstanding the transfer, be deemed for the purposes of the said section 1(2)(a)(i) to have been continuously engaged; and accordingly section 1(1) of that Law shall not, by reason only of the transfer, apply to him.

^f Ordres en Conseil Vol. XXXII, p. 59; amended by Order in Council No. IV of 1994 and by Ordinances No. XXI of 1990 and No. XV of 1992.

Amendment of Employment Protection Law.

12. In section 13(2) of the Employment Protection (Guernsey) Law, 1998^g, after the expression "(read with section 12(2) and (3))" insert "or in section 6(1) of the Transfer of States Undertakings (Protection of Employment) (Guernsey) Law, 2001 (read with section 6(2) of that Law)".

General provisions as to Ordinances.

13. (1) An Ordinance of the States under this Law -

- (a) may be amended or repealed by a subsequent Ordinance hereunder;
- (b) may contain such consequential, incidental, supplemental and transitional provision as may appear to the States to be necessary or expedient including (in the case of an Ordinance under section 5) provision amending this Law.

(2) Any power conferred by this Law to make an Ordinance may be exercised -

- (a) in relation to all cases to which the power extends, or in relation to all those cases subject to specified exceptions, or in relation to any specified cases or classes of cases;
- (b) so as to make, as respects the cases in relation to

^g Order in Council No. IX of 1998.

which it is exercised -

- (i) the full provision to which the power extends, or any lesser provision (whether by way of exception or otherwise);
- (ii) the same provision for all cases, or different provision for different cases or classes of cases, or different provision for the same case or class of case for different purposes;
- (iii) any such provision either unconditionally or subject to any prescribed conditions.

Citation.

14. This Law may be cited as the Transfer of States Undertakings (Protection of Employment) (Guernsey) Law, 2001.

Commencement.

15. This Law shall come into force on the day appointed by Ordinance of the States; and different days may be appointed for different provisions^h.

^h In force 1st October, 2001 (Ordinance XXIV, 2001).