



Principles of Transfer of Undertaking Protection of Employment After the Omnibus Law on Job Creation

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Abstract— This essay seeks to determine how the Job Creation Law (Omnibus Law) applies to the Transfer of Undertaking Protection of Employment (TUPE) principle. Two issues will be covered in this essay: 1) How well-applied is the TUPE (Transfer of Protection of Rights) or Transfer of Undertaking Protection of Employment principle when transferring outsourced vendors? 2) How does the copyright law's (Omnibuslaw) regulation of TUPE work? This study's writing technique applies the normative juridical procedure through document analysis and a case approach. As a result of this study, the concept of TUPE, comprises the following guarantees: a) that work will continue; b) that relevant laws and regulations will uphold workers' rights; and c) that the working period will be calculated if the company that provides worker services or outsourcing is replaced. The Job Creation Law already governs the transfer of protection of rights, but there are no implementing laws to carry out this legislation.

Keywords— TUPE, Protection, Employment, Job Creation.

I. INTRODUCTION

It's an intriguing topic that will never be explored in Indonesia: outsourcing. Labor Party President Said Iqbal said in an interview that the reason he opposes outsourcing—also known as insecure work or casual work in other languages—is that it is akin to modern slavery. This is particularly intriguing given, according to Central Statistics Agency (BPS) data, there were 7.99 million unemployed persons in Indonesia in February 2023—a fall of almost 410 thousand from the previous month. People will go to great lengths to work to make ends meet when the unemployment rate is high. One alternative available to Indonesia's unemployed is working in the outsourcing industry.

Only a few positions are eligible for outsourcing under Labor Law No. 13 of 2003. However, this rule has been revoked due to Perppu No. 2 of 2022 and Law No. 6 of 2023 concerning the Ratification of Perppu No. 2 of 2022 concerning Job Creation. This means that, in contrast to the previous regulation, which limited the work that could be outsourced, all types of work are now possible through outsourcing. Employers now have it simpler because all jobs can be outsourced, whereas before, it was only possible to outsource a certain number of jobs. The fact that more jobs are available and no longer limitations on outsourcing presents a difficulty for employees.[1]

Protection for outsourced workers is necessary because if the user of the outsourced services is dissatisfied with the outsourced vendor's performance, the customer can switch out the outsourced vendor, but what about the workers? This paper focuses on two main issues: how copyright law (Omnibus Law) regulates the Transfer of Undertaking Protection of Employment (TUPE) in the transfer of outsourcing vendors and how this principle is applied in the transfer of rights.[2][3]

II. FINDINGS AND DISCUSSION

Nowadays, outsourcing is a hot topic. Labor groups are actively opposing the practice, believing it to be akin to modern slavery. Within the corporate sector, outsourcing is a typical practice. Businesses compete to identify which functions can be delegated to outside parties to streamline corporate processes. In foreign nations like China, outsourcing is commonplace as the entire country outsources to multinational corporations. China is a destination for outsourcing for global corporations like Apple, Microsoft, Samsung, Toyota, and others.[4]

Although Law No. 13 of 2003 on Manpower stipulates some guidelines that must be followed when outsourcing, there are several instances of noncompliance. First, when businesses outsource work that shouldn't be outsourced, they violate Article 65 of the Labor Law. Second, many companies disregard the three-year maximum working term stipulated in Article 59 of the Labor Law for outsourced workers who are not hired as permanent staff members. Third, because many workers do not receive overtime pay, food allowances, or health benefits, firms create unbalanced work arrangements with outsourced workers. Fourth, many outsourcing firms take payments from workers about to be transferred.[5]

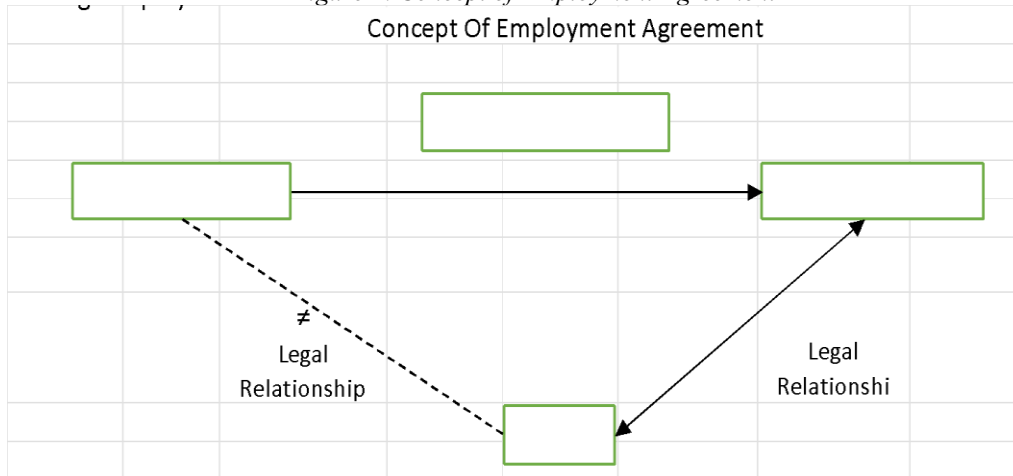
In Indonesia, outsourcing is primarily done to assist low-tech company processes, unlike China, which outsources high-tech business processes. At that time, Didik Suprijadi, speaking on behalf of the Indonesian Alliance of Electricity Meter Officers, filed Law No. 13 of 2003, which governed outsourcing, for judicial review with the Constitutional Court. Didik Suprijadi contested Articles 59, 64, 65, and 66 of Law No. 13 of 2003 in his petition, arguing that they violated Articles 27(2) and 28D (2) of the 1945 Constitution.

In response to this request, the Constitutional Court released Decision No. 27/PUU-IX/2011, establishing the parameters for protecting outsourced workers. Firstly, it stipulated that the employment agreement for outsourced workers must be PKWTT rather than PKWT.[6][7] Subsequently, it applied the TUPE principle for outsourced workers who are PKWT status holders. The TUPE principle has been in place for a while in industrialized nations, requiring the new outsourcing vendor to uphold the terms of the previous outsourcing employee's employment contract in case of a change of vendors.[8]

Industrialized nations, particularly those in the European Union, have generally adopted the TUPE philosophy. The TUPE Regulation 2006 was published by the European Union. The Minister of Manpower and Transmigration Regulation No. 19 of 2012 and Constitutional Court Decision No. 27/PUU-IX/2011 govern it in Indonesia. Let's say we take the ruling of the Constitutional Court seriously. If that is the case, we can conclude that employees of outsourcing companies with PKWT status are covered by TUPE, given that the work product is still being produced. (5) Stated differently, we can conclude that PKWT-status outsourced workers meet the conditions for TUPE. The following are some options for switching outsourcing vendors: One vendor changed on PKWT I, two on PKWT II (Extension), and three on PKWTT.

By Constitutional Court Decision No. 27/PUU-IX/2011, only possibilities 1 and 2 are protected by TUPE; TUPE does not protect possibility three due to the employee's status as PKWTT.

Figure 1. Concept of Employment Agreement



TUPE makes two assurances in the Constitutional Court Decision No. 27/PUU-IX/2011: the preservation of rights held by employees of the former vendor if the outsourcing vendor changes and the continuity of work. After this, the Directorate General of Labor Social Security and Industrial Relations of the Ministry of Manpower released a circular letter No. This is in B.31/PHIJSK/I/2012, dated January 20, 2012. Let's say the outsourcing business and the employee do not have a transfer of rights protection in their labor agreement. In that instance, the worker and the outsourcing company have a permanent employment relationship.[9]

The worker and the outsourcing company have a work agreement that transfers rights protection. However, the work's purpose is still the same with a different contracting company after the release of Circular No. B.31/PHIJSK/1/2012, dated January 20, 2012, the Minister of Manpower and Transmigration issued Minister of Manpower and Transmigration Regulation No. 19/2012, regulated in Articles 28, 29, 30, 31, and 32. In that scenario, the result can be carried out with PKWT status. According to the rule, an outsourcing company's working relationship may be an indefinite or particular time work arrangement. At the very least, a worker and an outsourcing company's specified time work agreement must contain: 1) Continuity of Employment Guaranteed; 2) Guarantees of the fulfillment of rights by applicable laws and regulations consist of a) Leave entitlement if you have met the required length of service; b) Social Security entitlement; c) Holiday allowance entitlement; d) One day of rest per week; e) The right to compensation if employment is terminated in the middle of the employment contract without the workforce's fault; f) Provider Efforts Calculated from Cumulative Years of Service; g) Additional rights specified in laws and regulations and prior labor agreements. 3) A guarantee that the length of service will be calculated if the Manpower Provider Company is replaced to calculate remuneration. If an outsourced company transfers, the new organization cannot lower the terms specified in the prior employment agreement. It is required to consider the duration of service of the employees.[10]

The government created Law No. 11 of 2020, an Omnibus law, to achieve all the goals of the right to work and a decent living. An omnibus law is a rule of law or a concept in law that combines multiple regulatory substances' powers into one cohesive regulation. The Job Creation Bill's omnibus bill seeks to boost economic transformation and revive the country's economy to generate employment.

It is envisaged that the Job Creation Law will provide as many chances for work as widely and equally as possible for Indonesians across the Republic of Indonesia's territory. Several clauses found in multiple laws, including Law No. 13 of 2003 on Manpower, have been changed by Law No. 11 of 2020 on Job Creation. According to the government, the issuance aims to facilitate corporate transactions and draw investment. Investors reportedly approved of Law No. 11 of 2020's distribution, but civic society—particularly labor unions—rejected it. The government regulation that implements Law No.11 of 2020 from the employment side is Government Regulation No. 35 of 2021 on Fixed-Term Employment Agreements, Outsourcing, Working Time and Rest Time, and Termination of Employment (PP PKWT-PHK).

The Constitutional Court heard a challenge to Law No. 11 of 2020. One of the laws that will be put to the most testing before the Constitutional Court (MK) throughout 2021 is Law No. 11 of 2020. Nine tests of the Job Creation Law were conducted during the year.

The judges of the Constitutional Court formally ruled the Job Creation Law to be flawed. The judges' panel declared the law to be unlawful under certain conditions. "Stating that the establishment of the Job Creation Law is contrary to the 1945 Constitution and has no binding legal force conditionally as long as it is not interpreted as 'no improvements have been made within two years of this decision being pronounced". According to the Constitutional Court's ruling, a statute is null and unconstitutional if the government does not formally amend its drafting within two years.[11][12]

President Joko Widodo replaced Law No. 11 of 2020 with a Government Regulation on December 30, 2022. 66 paragraph (3) of Law No. 6 of 2023 on the Stipulation of Government Regulation instead of Law No. 11 of 2020 reads, "If the outsourcing Company employs Workers/Laborers based on a specific time work agreement as referred to in paragraph (1), the specific time work agreement must require the transfer of protection of rights for Workers/Laborers in the event of a change of outsourcing Company and as long as the object of work remains." The House of Representatives passed this Perppu despite opposition from various social groups. However, Permenakertrans No. 19 of 2012 concerning Conditions for Partial Delivery of Work Implementation to Other Companies has been revoked, and Government Regulation No. 35 of 2021 has not yet detailed the implementation of TUPE in detail. As a result, Article 66 lacks an implementing regulation.

III. CONCLUSION

According to the paper's conclusion, outsourcing company employees with PKWT status are eligible for TUPE protection, provided the work product is still being produced. This protection includes three guarantees: a) ensuring that work will continue; b) ensuring that applicable laws and regulations will uphold workers' rights; and c) ensuring that the working period will be calculated if the company that provides worker services or outsourcing is replaced. Regulations about transferring protection rights are already included in the Job Creation Law. Since Permenakertrans No. 19 of 2012 on Conditions for the Submission of Partial Work Implementation to Other Companies has been canceled, and a new implementing regulation has not yet been issued, there are still no implementing regulations to carry out these regulations.

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