

The ongoing tension between the Rescue Culture and the protection of employee rights



CLIENT ALERT

OTG Ltd v Barke and others (UKEAT 0320/09/1602)

On 16 February 2011 the Employment Appeal Tribunal (EAT) delivered a judgment in which it held that administrations, including 'pre-pack' administrations, are not "bankruptcy ... or ... analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor" for the purpose of TUPE.

Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)

The combined effect of regulations 3, 4 and 7 of TUPE is that when all or part of a company's undertaking or business is transferred to a purchaser where there is "an economic entity that retains its identity", all employment contracts of the vendor company (together with all liabilities) automatically transfer to the purchaser. If an employee is dismissed either before or after a relevant transfer and the reason or principle reason is the transfer itself (or a reason connected with the transfer that is not an economic, technical or organisational reason) then the dismissal will be automatically unfair.

An exception to the above situation is provided under regulation 8(7). This is where a vendor is subject to "bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor". In those circumstances vendor employee contracts are not automatically transferred to the purchaser.

The Previous Position: *Oakland v Wellswood (Yorkshire) Ltd (UKEAT/0395/08)*

In December 2008, the EAT decided in that in 'certain situations' regulation 8(7) would apply to a 'pre-pack' administration.

Adopting a "fact-based approach", the EAT held that the question to ask was whether the *intention* of the administrator at the time of appointment was ultimately to liquidate the vendor's assets e.g. by way of a pre-pack. If that was the case, the purchaser could take the vendor's assets without inheriting its employees and all associated liabilities.

The *Oakland* decision attracted much criticism, not least because it went against the guidance issued by the Department of Business Enterprise and Regulatory Reform.

The EAT drew a distinction between liquidation, where the aim was to dispose of the undertaking and/or its assets, and administration, which has the primary purpose of achieving the continuation of the undertaking in the same hands (i.e. rescuing the company as a going concern). The fact that the administration may lead to liquidation did not change this distinction. As such the EAT supported an objective approach (the object of the insolvency procedure) rather than a subjective approach (the intention of the office holder).

**The Current Position:
OTG Ltd and others**

The EAT voiced concerns it had about the effect of *Oakland* and, in particular, stated that the “fact-based approach” to the application of regulation 8(7) inevitably increased “*the likelihood of disputes as to who is liable for the transferor’s obligations. Such disputes generate cost, delay and uncertainty*”. The EAT was also concerned that the approach in *Oakland* meant that there is “*no authoritative way in which an employee or other person affected by a transfer by an administrator can establish whether regulation 8 (7) applies, and thus in turn whether regulations. 4 and 7 apply*” as much depended on the intentions of the administrator upon appointment.

The EAT therefore decided that it should not follow the decision in *Oakland* and adopted an “absolute approach”, that regulation 8(7) can never apply in the transfer of an undertaking from a vendor in administration to a purchaser. On that basis, the contracts of employment, together with all associated liabilities, of all persons employed by the vendor and assigned to the organised grouping of resources subject to the transfer, will now always automatically transfer to the purchaser under regulations 4 & 7.

Comment

- Practitioners will be well aware that the objective of rescuing the company is sometimes immediately over-riden as a pre-pack is the only viable option. However, although the EAT acknowledged this, it maintained that as the statutory hierarchy of objectives provided for the rescue of the company to be the primary objective of administrators then it could not be said that “at the moment of the institution of any administration proceedings their objective is to liquidate assets.”
- Purchasers will now be aware, when buying a business from administrators, that if employees have been dismissed because of the sale of the business then the purchaser may be liable to pay unfair dismissal compensation awards. The current statutory cap is £68,400 per employee.
- Do not overlook another practical consequence of this decision, being the liability for failure to consult. Following *OTG* a vendor and the purchaser could face liability for a failure to consult prior to dismissal.
- As such, practitioners may face increased calls from potential purchasers for them to consult with employees prior to any sale and decreased offer prices representing the purchaser’s risk in taking over the business.

Notwithstanding this decision, if consulted early on, we at Salans are able to advise on how to minimise the risk of successful claims.

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