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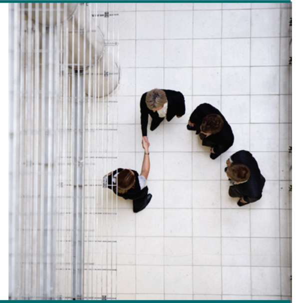
Review

Restructuring & Insolvency



Employees Transfer to the Buyer on Administration Sales – As We First Thought

The Employment Appeals Tribunal ("EAT") held in Otford Tool and Gauge Co Ltd v Barke (and others) ("OTG") that all administration proceedings fall within regulation 8(6) of Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") and the EAT decision in Oakland v Wellswood (Yorkshire) Limited [2009] IRLR 250 ("Oakland") has not been followed. As a result, on a business sale by a company in administration, the employees will transfer to the buyer.

Background

Regulation 8(6) applies where the transferor is subject to "relevant insolvency proceedings", not with a view to the liquidation of the assets of the transferor, at the time of the transfer of the undertaking. Where regulation 8(6) applies, the employees are afforded the protections of regulation 4 and the employees automatically transfer to the buyer.

Regulation 8(7) applies where the transferor 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", at the time of the transfer of the undertaking. Where regulation 8(7) applies, the employees do not get the protections of regulation 4, and the employees do not transfer to the buyer.

Guidance offered from the Department of Business Innovation and Skills suggests that, since the primary aim of an administration is to rescue the company as a going concern, rather than to liquidate its assets, it would always fall within regulation 8(6) of TUPE.

Oakland

However, in the case of Oakland, the EAT held that whether administration (or any other type of insolvency proceedings) falls within regulation 8(6) or 8(7) of TUPE was a matter of fact in each case. In Oakland, by the time of the administrators' appointment, there was no realistic prospect of rescuing the company as a going concern. The administrators declared the statutory purpose of the administration as being better for the creditors than an immediate winding up, pursuant to paragraph 3(1)(b) of Schedule B1 of the Insolvency Act 1986.

The EAT upheld the Employment Tribunal's decision that, at the date of the transfer, the seller was subject to "bankruptcy proceedings or any analogous insolvency proceedings instituted with a view to the liquidation of the assets of the transferor" and as such, the case fell within regulation 8(7). There was therefore no automatic transfer of employees to the buyer, as regulation 8(7) had the effect of disapplying regulation 4.

Whilst the Court of Appeal over turned the decision in Oakland, it was not overruled on this point. The Court of Appeal made it clear that there were strong grounds for thinking that the EAT's approach had been wrong and that the appeal on the TUPE point was "strongly arguable". Despite this criticism, the EAT's decision in Oakland has been binding on Employment Tribunals up until now.

Oakland created uncertainty for insolvency practitioners and potential purchasers as to whether employee liabilities would transfer to the buyer upon completion of a sale of the undertaking, or whether these would remain with the insolvent seller.

OTG

The EAT heard five appeals listed together, each relating to the same issue: whether administration proceedings can ever constitute “bankruptcy or analogous insolvency proceedings instituted with a view to the liquidation of the assets of the transferor” within the meaning of regulation 8(7), with the effect of disapplying regulation 4 of TUPE. Given the background of the Oakland decision and its subsequent criticism by the Court of Appeal, the EAT were keen to look at the question of the application of regulation 8(7) again.

The EAT considered the administration regime pursuant to Schedule B1. They considered that it was evident from the provisions of the Insolvency Act 1986 that the primary purpose of administration was to give the administrators the opportunity to manage the affairs of the company so that it can be rescued as a going concern. The EAT recognised that the broad policy behind this procedure was to promote and facilitate a “rescue culture”.

Four of the five cases before the EAT arose from “pre-pack” sales. A pre-pack sale occurs where the sale of the business and assets of the insolvent seller is negotiated and agreed in advance and affected immediately upon the appointment of administrators. The EAT noted that such a procedure may rescue the business as a going concern but does not rescue the company, which is typically left with no assets and has to be wound up or dissolved. But the result of administration in a particular set of circumstances does not alter the object or the character of administration as a procedure promoting the rescue culture.

It is significant that regulation 8(7) explicitly refers to the proceedings being instituted with a view to the liquidation of the assets of the seller. The EAT considered the obligations of an administrator to consider whether or not the primary purpose of administration - rescuing the company as a going concern - can be achieved. Whilst it may quickly be clear that rescuing the company as a going concern is not a possibility, the question must nevertheless be addressed. On this basis, the EAT concluded that it can never be said at the moment that any administration proceedings are instituted that the object of the procedure is to liquidate the assets. Further, as the administrator does not ordinarily declare which of the statutory purposes he is pursuing until he files his proposals, there is no authoritative way that an employee or person affected by the transfer can establish whether regulation 8(7) applies until that point in time.

The EAT rejected the fact-based approach adopted in Oakland of looking at each case on its own facts, preferring instead to look at the statutory purpose behind all administrations. The EAT took a different view from that of the Judge in Oakland and held that administrations are not capable of constituting “bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the seller” within the meaning of regulation 8(7), and so regulation 8(6) will apply.

Comment

This decision has provided much needed certainty and clarity on the correct approach to the application of TUPE in the case of a transfer made by a company in administration. The position following the Oakland decision was one where Employment Tribunals were bound to follow a decision that went against Government guidance and had been criticised by the Court of Appeal. This has created uncertainty for insolvency practitioners, employees and potential buyers alike.

The EAT has recognised the importance of the issue in practice and the implications of establishing whether employee liabilities transfer to the solvent buyer, or whether such liabilities remain with the insolvent seller. This authoritative decision on the application of 8(6) is one that is surely welcomed by all concerned.

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