

Court of Appeal Supports Crystal Palace FC Administrators Who Relied on ETO Defence

Comment

An administrator may be able to dismiss employees for economic, technical or organisational reasons to enable the company in administration to continue to trade and then sell the business without passing on employment liabilities to the buyer. The Court of Appeal decision in *Crystal Palace FC (2000) Ltd v Kavanagh & Others* distinguished the earlier case of *Spaceright Europe Ltd v Baillavoine* where the Court of Appeal held that the ETO defence was not available where the dismissal of an employee was to make the business more attractive to prospective purchasers. In that case, the administrators had made the managing director redundant. The Court appears to be sympathetic to the role and plight of the Administrators when appointed and is cognisant of the commercial realities that apply to a trading administration and the uneasy tension between insolvency and employment law. It followed the reasoning in the case of *Whitehouse c Chas Blatchford & Sons Ltd* that the purpose of TUPE "is to safeguard the rights of employees, vis-à-vis their employers, where an undertaking or business is transferred, but not to place the employees in any better position vis-à-vis their employers by virtue of such transfer". In other words, where there is a genuine ETO reason, absent an insolvency, the administrator should be able to avail himself of it.

How Can We Apply this in Practice?

Whilst this case stressed that each case is fact specific and requires a detailed examination of the facts and the administrator's motivation, it will be important for an administrator to properly document his grounds for making redundancies with contemporaneous notes. It would appear that:

- If the dismissals have the clear or primary effect of making the business more attractive to a prospective purchaser, then it is unlikely that the dismissals will be viewed as being for an ETO reason;
- If the dismissals do not materially impact on the attractiveness or value of the business to a prospective purchaser, then it is more likely that the Court will accept the dismissals were for an ETO reason.

Summary

In *Crystal Palace FC (2000) Ltd v Kavanagh & Others*, the Court of Appeal ("CA") considered when an administrator's reason for dismissals which were made before a business sale could come within the "economic, technical or organisational" ("ETO") permitted exception under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). The key issue in the appeal was the tension between the statutory objectives of administration, with the administrator's obligations to achieve the best results for creditors, and the employee protective regime of TUPE. The CA held that such cases require a subjective, fact-intensive analysis of the "sole or principal reason" for the relevant dismissal. Where the reason for dismissal is to change the workforce and continue to conduct the business of the company in administration, this can be an ETO reason, even though ultimately the administrator is intending to sell the business in the future.

Facts

Crystal Palace FC (2000) Ltd ("the Company") went into administration on 26 January 2010.

In March 2010, a consortium was incorporated as CPFC 2010 Ltd ("CPFC") and given preferred bidder status in respect of the proposed sale of the football club. Due to difficulties in negotiating and achieving a sale of the club to CPFC, which was partly as a result of a separation of ownership between the business of the football club, owned by the Company, and its ground Selhurst Park, owned by Selhurst Park Ltd, the administrators of the Company took the decision to dismiss the employees, including Mrs Kavanagh and three others, in May 2010 in order to minimise the costs to the business during the closed season pending a possible sale.

When a sale to CPFC was eventually concluded, the claimants brought tribunal complaints that they had been automatically unfairly dismissed under TUPE and that liability for their unfair dismissals had therefore passed to the transferee, CPFC. Rejecting their complaints, the tribunal found on the facts:

- **Reason connected with the transfer** – the Administrator's reason for dismissing the claimants was that he could no longer afford to pay all of the club's employees. He had to "mothball" the club to keep it alive in the hope that a sale could eventually be agreed. As at the date of dismissal, a sale to CPFC remained a possibility but no more than that. In these circumstances, the reason for dismissal was not the eventual transfer itself, but was a reason connected with that transfer.
- **ETO reason** – the Administrator's reason for dismissal was the necessity of reducing the wage bill in order to continue running the business. That was an ETO reason, which could be distinguished from the administrator's ultimate objective of selling the business in the future.

The claimants were successful in an appeal to the EAT, arguing that there had been no ETO reason for dismissal. The EAT overturned that decision and substituted a finding that the employees had been unfairly dismissed because the administrator's aim was the eventual sale of the club and so the dismissals were not with a view to continuing the business but with a view to a sale. CPFC then appealed to the CA.

Held

The CA distinguished the decision in *Spaceright Europe Ltd v Baillavoine* and held that the EAT had erred in law in misapplying the facts of the case to the statutory regime. Had it done so without error it would have concluded that the dismissal of the Appellants was for an ETO reason for the purpose of continuing the business and not with a view to achieving a sale. In the circumstances, the employment tribunal had drawn the correct conclusion. It followed that the employees' dismissals were not automatically unfair under TUPE, and liability for those dismissals did not pass to the buyer. Each case is heavily fact specific, so it is very hard to make generalisations about what would or would not constitute an ETO reason for dismissals made pre-disposal.