

TUPE always applies to sales of companies in administration

When a business enters into administration, the primary aim will be to assess whether it can be sold as a going concern so as to raise the most money for creditors. The administrators will clearly want to make the business as attractive as possible to potential purchasers and reduce the running costs while they are looking for a purchaser. This can frequently mean that one of their first actions will be to dismiss employees who would otherwise still have to be paid.

In any transfer of a business, employees are generally given special legal protection. In particular, under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), all employees automatically transfer to the buyer with all their employment rights intact and any dismissal for a reason connected to the transfer will be treated as automatically unfair. However, where insolvency proceedings are instituted with a view to liquidation of the assets of the company these particular provisions under TUPE do not apply.

Given the potential legal claims, it is very important for all those involved to be able to identify whether the type of insolvency they are dealing with attracts TUPE rights. Confusingly, there had been different conclusions reached in two cases before the Employment Appeal Tribunal. In 2009, it was held in *Oakland -v- Wellswood (Yorkshire) Ltd* that where a company enters into administration, the particular facts may lead to the conclusion that the insolvency proceedings have been 'instituted with a view to the liquidation of the assets of the transferor'. In contrast, in 2011 in *OTG Ltd -v- Barke and ors*, the Employment Appeal Tribunal held that employees in an administration should always have TUPE protection as these types of insolvency proceedings were always instituted with the intention to keep the business going.

In *Key2Law -v- De'Antiquis* the Court of Appeal has resolved this difference in judicial opinion, finding that the more recent interpretation in *Barke* should be preferred. This means, that in an administration, there is no requirement to consider the facts in order to assess whether the employees have TUPE protection. It will always be the case that under TUPE their contracts of employment transfer and they have special protection against dismissal.

Comment

The judgment in the Court of Appeal does help provide a degree of legal certainty, such that both the administrators and, more importantly, any prospective purchaser of the assets of a company in administration will know where they stand in relation to TUPE liabilities. TUPE's automatic transfer principle will apply in all cases of administration. Administrators will need to balance the need to save costs whilst attempting to find a buyer for the business as a going concern, against the fact that prospective purchasers may be unwilling to take on liability for pre-transfer dismissals.

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