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Employment Law Case Update - Administration

Two cases will be of particular interest to insolvency practitioners and those buying businesses from an administrator. In the first case (*Spencer v Lehman Brothers Limited (in administration) and others*), the possibility of personal liability of administrators for discrimination is contemplated. In the second case (*OTG Limited v Barke & others*), contrary to a previous case, it is now decided that *TUPE* will apply on the sale of a business or a part of a business by an administrator.

Discrimination - Personal liability for administrators?

In what circumstances might an individual administrator be liable for discrimination against employees of companies in administration? This was the question the Employment Tribunal asked itself in the case of *Spencer v Lehman Brothers (in administration) and others*.

Ms Spencer was dismissed by the administrators of her insolvent employer whilst she was on maternity leave. There had been no consultation prior to the dismissal; she was merely recommended for selection by her employers' Head of Corporate Security. Ms Spencer duly bought a claim of unlawful discrimination under sections *3A* and *6(2)* of the *Sex Discrimination Act 1975*. The claims against the employer were stayed due to the statutory moratorium. However, Ms Spencer claimed that **both** the insolvency practitioners' firm **and** the individual administrators were liable because:

i) They knowingly aided the employer's discrimination; and
ii) The Head of Corporate Security acted as the administrators' agent in knowingly aiding the employer's discrimination.

Ultimately, Ms Spencer's claim failed because the tribunal found that no unlawful discrimination had taken place; there were no elements to her dismissal that meant she had been subjected to any less favourable treatment or detriment in comparison to her colleagues. Further, it was clear to the tribunal that Ms Spencer's dismissal arose out of a pure redundancy situation and not simply because she was on maternity leave.

But what if there had been evidence of unlawful discrimination? Firstly, the insolvency practitioners' firm would have no liability since it was the individual administrators who were appointed as administrators, not the firm. Second, the individual administrators could not be said to have knowingly aided the employer's discrimination; the administrators, quite reasonably, believed that the redundancy process would be carried out by the management of the employer in such a way that was both fair and within the law. The logic behind these conclusions is clear to see.

However, the tribunal's findings in relation to the agency argument are rather more troubling for insolvency practitioners. The tribunal did not agree with the administrators' argument that there could be no agency relationship between themselves and the insolvent company's employees. In effect, it appears entirely possible that administrators may now be found to be agents of both the company and each of the company's employees and as such may be liable for unlawful acts undertaken by such employees. It would be interesting to see the extent to which this proposition would stand up to scrutiny in a higher court or tribunal.

Administrations and the impact of TUPE

Since the *Transfer of Undertakings (Protection of Employment) Regulations 2006* were made in order to implement the European Union's *Council Directive 80/987/EEC*, there has been an ongoing debate on how *regulation 8 (7)* (the bankruptcy proceedings exception) should be

interpreted. Fortunately, a recent decision by the Employment Appeals Tribunal has gone some way towards clarifying the issue.

Regulation 4 of *TUPE* provides that, where there is a "relevant transfer", the contracts of employment of employees assigned to the transferor automatically transfer to the transferee on their existing terms. However, *reg. 4* is disapplied by *reg. 8(7)* in circumstances where there are "*bankruptcy proceedings*" or any "*analogous insolvency proceedings which are instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner*". But, asked insolvency practitioners across the land, are administration proceedings initiated under *Schedule B1* of the *Insolvency Act 1986* considered to be analogous to bankruptcy proceedings?

For the last couple of years, the case of *Oakland v Wellswood (Yorkshire) Limited* has been the leading authority on that point. In *Oakland*, the EAT held that *reg. 8(7)* applied because the administrator had clearly been appointed with a view to the liquidation of the insolvent company's assets. This surprised many insolvency practitioners, not least because it appeared to fly in the face of guidance published by the Department of Business, Innovation and Skills which stated that:

"*The Secretary of State takes the view that regulations 4 and 7 will always apply in relation to a relevant transfer that is made in the context of an administration…. Administration is not in the view of the Secretary of State analogous to bankruptcy proceedings.*"

The *Oakland* approach had far greater appeal to insolvency practitioners as it could be used by administrators to make a sale look far more attractive to a buyer; transferees would be persuaded that they could avoid *TUPE* liability for the insolvent company's transferring employees.

However, in the very recent case of *OTG Limited v Barke & Others*, the EAT chose not to follow *Oakland*, deciding that administrations (including pre-pack administrations) are not capable of falling within the definition of "*bankruptcy*" or "*analogous insolvency proceedings*".

The employment tribunal system appears to be wrestling with the conflict between the idea of protecting transferring employees and promoting the so-called "rescue culture". The leading judgment in *OTG* states that:

"*Promoting a rescue culture may favour the interests of the workers generally (though no doubt there are benefits to the wider economy too), but the Directive plainly proceeds on the basis that a balance requires to be struck between those interests and the rights of individuals prejudiced by a transfer by an insolvent transferor.*"

It is likely that a Court of Appeal (or higher) decision will be required to settle this debate once and for all. However, for now, insolvency practitioners need to be aware that the employment tribunal approach, at least for the time being, will be to interpret the provisions of *TUPE* in such a way so as to safeguard the rights of employees. As such, reliance upon the decision in *Oakland* can no longer be advised.

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