

## ARTICLE: Effect of pre-packed administration on employment

January 2010

### Introduction

A recent case has looked into the effect of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) where a company has gone or is going into liquidation.

### Legal background

**Regulation 8(7)** of TUPE applies where a transferor is the subject of "bankruptcy" proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor". It has the effect that the employees do not automatically transfer and any dismissals following the transfer are not unfair.

**Regulations 8(6)** and **9** of TUPE take effect where insolvency proceedings "have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor". In this case, the employees will transfer with certain debts being taken on by the Secretary of State.

**Section 218(2)** of the Employment Rights Act 1996 (ERA) provides that where a business is transferred, the continuity of employment of any transferring employee is not broken.

### Facts of Oakland

Mr Oakland was a director, shareholder and employee of Oldco, which sold food. When Oldco was in trouble, two insolvency practitioners were appointed as joint administrators. Newco was created to buy the assets of Oldco, take on the lease and some of the employees but avoid the substantial book debts. Mr Oakland was taken on by Newco then dismissed just less than a year later. He brought an unfair dismissal claim.

### ET and EAT

On the day of the preliminary hearing, there was a concession by the Newco that Oldco's undertaking had in fact transferred to it. In addition, a new point was put unexpectedly before Mr Oakland's Counsel – namely that Regulation 8(7) prevented Mr Oakland transferring to Newco because the proceedings in relation to Oldco had been instituted with a view to liquidation. Mr Oakland's Counsel was given a short adjournment to prepare and argued the opposite – that there was no view to liquidation when Oldco was taken over and so regulations 8(6) and 9 of TUPE applied to ensure that Mr Oakland's employment transferred to Newco.

The ET disagreed with Mr Oakland's Counsel, saying "It so happens in this case that the liquidation of assets involved the sale to Newco in circumstances that would otherwise have engaged regulations 4 and 7" (which deal with the principles of automatic transfer). The EAT also disagreed with Mr Oakland's Counsel and upheld the ET's decision.

### Court of Appeal

The judge seemed to have great sympathy with Mr Oakland's Counsel and the lack of notice she had been given to prepare her argument. This may have contributed to the Court allowing her to raise a new point which had not previously been raised: Counsel argued that section 218(2) of the ERA applied so that Mr Oakland's continuity was not broken and gives him the requisite one year's service necessary to plead unfair dismissal. The Court agreed with Counsel about section 218(2) and so bypassed the issue of regulation 8(7) altogether.

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### **Obiter regarding Regulation 8**

The Court commented that it would be "most unwise for us to give a binding pronouncement" in relation to "the contention that administration necessarily excludes the application of regulation 8(7)", especially since neither the Secretary of State nor Oldco were represented at the hearing. However, it added that it considered such to be "a strongly arguable point".

### **Conclusions**

Following the consideration of the ERA provision, the Court was not able to comment on when and in what circumstances Regulation 8(7) might apply so that a transferee does not take on the liabilities in a pre-pack administration. As such, the law remains uncertain in this area. For employees however, they can find some comfort in the fact that the ERA will work to soften the blow of Regulation 8(7) by ensuring that their continuity will be preserved.

If you would like further information on this case or the issues within it, please contact David Hill at [dhill@davidsonlarge.com](mailto:dhill@davidsonlarge.com) or Lucy Bond at [lbond@davidsonlarge.com](mailto:lbond@davidsonlarge.com).

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