OLD SQUARE CHAMBERS

Insolvency and Employment Law

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Introduction

1. When a company becomes unable to pay its debts employment practitioners are likely to ask several questions. Will the employment contracts of the company's employees be terminated? Can employees recover lost wages? What happens if a new company buys the insolvent company?

2. In order to address these issues, it is a good idea to have a basic knowledge of insolvency procedures. This paper aims to provide a basic introduction to the different types of corporate insolvency and to explore the consequences of the two principal types of procedure (administration and liquidation) on the employment relationship.

3. The principal focus of this paper will be on employee rights under an administration because a liquidation tends to be a clear-cut process that brings the employment relationship to an end and, for the most part, turns the liabilities of ex-employees into an unsecured debt. An administration, on the other hand, can have a variety of effects on employment rights and employer liabilities. To understand how those rights are affected in an administration, it helps to have a broad understanding of how an administration works and how employer liabilities rank in the hierarchy of debts.

4. This paper therefore:

    a) Summarises the types of insolvency procedures;

    b) Looks at the types of debts and the order in which they rank in an insolvency;

    c) Examines the nature of:

        i) liquidations;

ii) administration;

and how they affect liabilities towards employees;

d) Explains the effect of corporate insolvency on the application of TUPE;

e) Describes the debts that are guaranteed by the State.

What is Insolvency?

5. A company is said to be insolvent when it is unable to pay its debts as they fall due (cash flow model) or when it has insufficient assets to satisfy all its debts (balance sheet model). Section 123 of the Insolvency Act 1986 (IA 1986), which is the key piece of insolvency legislation, deems that a company will be unable to pay its debts where:

   a) It fails to comply with a statutory demand;

   b) It fails to satisfy a judgment debt (although note COVID 19 exceptions);

   c) It is unable to pay debts as they fall due (cash flow model);

   d) Its liabilities exceed its assets (balance sheet model).

6. A company in financial difficulty has various types of insolvency procedures open to it, including:

   a) **Liquidation or winding up:** a liquidation occurs when a company is wound up by order of the Court. This typically takes place upon the petition of a creditor. Upon liquidation, a liquidator is appointed to sell the company assets and to distribute the proceeds in accordance with the priority of debts set out in the IA 1986. At the end of the liquidation the company is dissolved and removed from the register of companies.

   b) **Administration**: The administration process aims to preserve the company as a going concern. It is designed to help restructure a company and, if possible, preserve jobs. An administration is run for the benefit of all creditors. A statutory moratorium

prevents any creditor from taking action against the company's assets while the administrator is devising the rescue plan. The administrator may trade the business while implementing the plan.

c) **Company voluntary arrangements (CVAs)**: A CVA is a legally binding agreement between the company and its creditors. Under this arrangement, creditors will typically agree to reduce the company's debt, which will allow the company to survive. This type of arrangement will often go hand in hand with an administration.

d) **Administrative receivership:** An administrative receivership occurs when the holder of a floating charge over the company's assets, such as a bank, appoints a receiver to collect and sell the company's assets to pay for the debt.

General Overview of the Priority of Debts

7. Clearly, an insolvent company is not going to be able to pay all its debts and satisfy all creditors. A creditor is a person who is either owed money by the company that has become insolvent or will be owed money by the company in the future. The future liability can arise as a result of a contract or a tort (such as discrimination). The debt can be certain or contingent, ascertained or for damages alone (see Insolvency Rules (England and Wales) 2016, Rule 14). The debt must be provable.

8. The insolvent estate of a company, from which the debts will be paid, includes all the company's tangible and intangible assets including real property, plant and machinery, intellectual property etc.

9. One of the main functions of an administration or liquidation is to realise those assets and distribute them in accordance with the statutory priority of debts to achieve an outcome that is fair as between the creditors. An insolvency practitioner must distribute the assets of a company to creditors in a prescribed order of priority.

10. Most debts owed to *employees* are unsecured debts and rank fairly low on the order of priorities for distribution. However, some debts towards employees are treated as

preferential debts which rank higher. In this part, we set out the order in which debts rank during insolvency and provide a brief explanation of each type of asset.

11. The IA 1986 ranks the debts of a company in the following order:

    1. Debts secured by fixed security / proprietary interests
    2. Fees and expenses of the winding-up
    3. Preferential debts
    4. Debts secured by floating charges and the Prescribed Part
    5. Unsecured debts
    6. Members of the company

12. Within each of these ranks, the creditors (for the most part) rank equally with each other. However, the IA 1986 sets out a sub-category of priorities within the fees and expenses category (see below).

The Types of Debt

Debts secured by fixed security / proprietary interests

13. A company's insolvency does not defeat a proprietary interest. If a creditor can show that he has the beneficial title to an asset, then that asset will fall outside the insolvency process – it merely belongs to the creditor. Similar considerations apply to assets held on trust for a creditor.

14. Creditors who hold a fixed charge over a particular asset are also able to make a specific claim to the proceeds realised from the sale of the secured asset to discharge the debt that they are owed.

Fees and expenses of the winding-up

15. This is an important category. The insolvency practitioner doesn't work for free. To ensure the insolvency practitioner gets paid and that the expenses of the administration are controlled and satisfied, the IA 1986 sets out an order of priority within a "fees and expense" sub-category.

16. Expenses include legal expenses or the costs incurred in trading the business during the administration – i.e. costs incurred by the administrator during the course of his appointment (see para.99, Sch. B1, IA 1986). The insolvency practitioner's own fees are also an expense of the administration, and the insolvency practitioner will charge either on an hourly rate or using a fixed fee. His fees are required to be proportionate.

17. While the insolvency practitioner's fees rank second in the order of debts, after proprietary interests and fixed charges, those fees are not prioritised over all the other expenses of the administration. The statutory order of priority of ***expenses*** is:

    a) expenses properly incurred by the administrator in the performance of his functions;
    b) the cost of any security provided by the administrator;
    c) any necessary disbursements by the administrator;
    d) certain costs relating to the application for the administration order or in connection with the appointment of the administrator including the cost of persons employed in the preparation of a statement of affairs in relation to the company;
    e) the remuneration of any person employed by the administrator to perform services for the company;
    f) the administrator's remuneration and unpaid pre-administration costs; and
    g) corporation tax on chargeable gains accruing on the realisation of company assets.

    (see Rule 3.51 of the Insolvency Rules (England and Wales) 2016)

18. The critical thing to note for our purposes is that debts arising out of any contract adopted by the administrator are paid in priority to the expenses and charges of the administrator itself (s.99(4) & (5), IA 1986). This would include the wages and salaries of employees whose contracts are "adopted" by the administrator. It would not, however, include redundancy or unfair dismissal payments (S.99(5), IA 1986).

    Preferential Debts

19. Preferential debts rank equally among themselves after payment of expenses. These debts concern money owed to employees and workers and consist of:

a) Remuneration, capped at £800 pp, for the four months before administration including:

   i) Wages/salary and notice pay;

   ii) Sick pay;

   iii) Maternity pay (statutory or contractual);

   iv) Overtime;

   v) Bonuses or other contractual entitlements;

   vi) Protective awards.

b) Accrued holiday pay (six weeks uncapped);

c) Specific types of pension contribution.

Debts secured by floating charges and the Prescribed Part

20. A floating charge is a charge that is taken over an asset or class of assets owned by a company, as security for borrowing. The floating charge will generally crystallise if there is a default. If this occurs the floating charge is converted to a fixed charge over the relevant asset. However, for the purposes of ranking debts, the charge is considered to have the character that it had on creation. Therefore, although a crystalised floating charge is a fixed charge, for the purposes of the ranking of debts, it will be treated as a floating charge since it was a floating charge when it was created.

21. Where the company's assets are subject to a floating charge, the insolvency practitioner must set aside some of the realised value to distribute to unsecured creditors ahead of the floating charge holder. This is called the "prescribed part" and is calculated as a percentage of the value of the assets subject to the floating charge (s.176A, IA 1986). The prescribed part is 50% of the first £10,000 of the net floating charge realisations, plus 20% of anything after that. The prescribed part is subject to a cap of £800,000 for charges created on or after 6 April 2020 and £600,000 for charges created before that date.

Where the floating charge was created before 15 September 2013, the insolvency practitioner has no duty to distribute a prescribed part.

Unsecured debts

22. Unless the administrator has adopted an employment contract, most debts owed to the employee will be unsecured and the liability of the insolvent company. These effectively rank last in the insolvency (before any value is returned to members of the company) and this sort of debt includes:

    a) Unpaid wages;

    b) Damages for breach of contract;

    c) Awards related to a failure to inform and consult under TUPE and regarding collective redundancies;

    d) Redundancy payments;

    e) Compensation for unfair dismissal/discrimination (against the company).

Members of the company

23. Finally, once all unsecured creditors are paid in full, the remaining money belongs to the shareholders.

Liquidation

24. Compulsory liquidation (which is often called winding-up) is a procedure by which a liquidator, appointed by the Court, wind-ups the affairs of a company. The winding-up involves the collection and realisation of the company's assets and the distribution of the proceeds to creditors (who are often not paid in full). Once the liquidation is complete, the liquidator sends the final accounts to Companies House. The company is then dissolved and ceases to exist.

25. There are two types of liquidation: compulsory liquidation, which is commenced by a petition, and voluntary liquidation, which is initiated by a resolution of the company.

Voluntary liquidation can take two forms: a members' voluntary liquidation and a creditors' voluntary liquidation.

26. Section 124 of the IA 1986 provides that the following persons may present petitions for the compulsory winding up of the company:

    a) The company;

    b) The company's directors or members;

    c) The administrator or administrative receiver;

    d) The supervisor of a voluntary arrangement;

    e) The Secretary of State;

    f) The Financial Conduct Authority;

    g) The Official Receiver.

27. Once a compulsory liquidation order is made the official receiver (or Court-appointed liquidator) takes control from the company directors, and s.131 of the IA 1986 requires directors to co-operate with the liquidator.

28. Where a winding-up order is made, it operates to automatically terminate the employment contracts of all employees of the company from the date of the publication of the winding-up order. Former employees may be entitled to a redundancy payment or a claim for wrongful dismissal if they have not received notice, but they will not be able to claim unfair dismissal since the termination was not "by the employer" but by operation of law.

29. Upon liquidation a moratorium on legal proceedings against the company comes into place and from that point proceedings may only be continued or started with the permission of the Court (s.130(2), IA 1986).

Administration

30. Administration is a mechanism that requires the administrator to take control of the business and assets of the company. The statutory scheme governing an administration is, for most companies, set out in Schedule B1 to the IA 1986.

31. There are two paths to administration, either through a Court order made following a formal application (Sch.B1, para.10) or by the filing of documents in Court by the company, its directors or the holder of a qualifying floating charge (Sch.B1, para.22).

32. Once appointed the administrator notifies his appointment to the company and creditors and publishes his appointment in the Gazette. The administrator can require specific persons (typically current or former officers of the company) to provide a statement of the company's affairs (a statement of assets & liabilities, of book value and an estimate of the realisable value of the company's assets). Following this, the administrator then prepares a proposal that includes the details of the statutory objective that he is going to pursue, plans for asset sales, and details of costs or expenses that the administrator anticipates incurring.

33. The administrator is required to carry out his functions in the interests of creditors as a whole and to do so quickly and efficiently. The administrator must pursue one of three statutory objectives (Sch.B1, para.3):

    a) The primary objective is the rescue of the company as a going concern. This aim must be pursued unless it is not reasonably practicable, or the second objective would achieve a better result for the creditors;

    b) The second objective is to achieve a better outcome for the company's creditors than would be achieved if the company were wound up straight away;

    c) the final, third objective is to realise property to make a distribution to the company's preferred creditors. The third objective can only be pursued where it is not practicable to pursue the first and second objective, and it will not harm the interests of creditors as a whole.

34. The administrator has wide-ranging powers and acts as the company's agent. The administrator's powers must be exercised to achieve one of the three statutory objectives, and those powers include:

    a) Taking control and possession of property;

    b) Selling or otherwise disposing of property;

    c) Bringing or defending legal proceedings or entering into compromises;

    d) Carrying on the company's business.

    (Sch.1, IA 1986 & Sch. B1, paras.65 & 66).

35. The Court is unlikely to interfere with the administrator's exercise of his responsibilities unless that exercise is plainly unreasonable.

Moratorium on Proceedings Against a Company in Administration

36. Upon entering administration Schedule B1, paragraphs 42 to 44 provide that no resolution may be passed for the winding-up of the company and no order may be made for the winding-up of the company.

37. Furthermore, none of the following steps can be taken without the permission of the administrator or the Court;[1]

    a) Steps to enforce security over the company's property;

    b) Steps to repossess goods in the company's possession under a hire-purchase agreement;

    c) Exercise of the right of forfeiture by peaceable re-entry to premises let to the company;

[1] In a liquidation the permission of the Court is required (para.130(2), IA 1986).

d) The institution of legal process (including legal proceedings, execution, distress and diligence) against the company or property of the company.

38. This prohibition is known as the statutory moratorium and applies to any claim that might be made by an employee against the company in administration.

39. This has the effect of suspending the enforcement of employee rights during the administration. However, employees with claims against companies in administration should still submit their claims within the normal time limits. Proceedings presented during the moratorium are not a nullity but instead are liable to be stayed pending a decision by the administrators or a civil Court (***Unite the Union v Sayers Confectioners Ltd*** UKEAT/0514/08*)*.

40. The Court considers whether to grant permission by carrying a balancing exercise between the interest of the applicant and those of the creditors. In employment cases, the EAT has indicated that permission should only be refused in rare cases for unfair dismissal and redundancy claims (***Carr v British International Helicopters Ltd*** [1994] I.C.R. 18*)*.

Employees During Administration

41. Unlike in liquidation, the start of the administration (the appointment of the administrator) does not operate to terminate the company's employment contracts automatically. The administrator has 14 days to decide whether he wishes to retain any employees.

42. If the administrator terminates a contract (including a contract of employment) any liability under that contract becomes an unsecured claim and does form part of the expenses of the administration.

43. However, where a contract is adopted it achieves what is commonly called a super-priority status – it becomes a qualifying liability that is paid out of the company's assets as an expense of the administration and in priority even to the administrator's own fees and expenses (para.99, Sch B1, IA 1986). The wages or salary of the relevant employees,

including holiday pay and contributions to pensions, will become qualifying liabilities. However, not all liabilities are adopted. Not all liabilities are qualifying liabilities. Wages that accrued before the administrator adopted the contracts, redundancy payments and protective awards do not become the responsibility of the administrator (see ***Re Huddersfield Fine Worsteds*** [2006] I.C.R. 205). Neither do claims for damages arising from claims of unfair dismissal. These all become unsecured claims.

44. The leading case on the meaning of "adoption" in the context of paragraph 99(5) is the decision of the House of Lords in ***Powdrill v Watson & Anor (Paramount Airways Ltd)*** [1995] 2 A.C. 394. Recent examples of an administrator adopting the contracts of employees on furlough are provided by ***Re Carluccio's Ltd*** [2020] EWHC 886 in which Oliver Segal QC and Stuart Brittenden represented Unite, and ***Re Debenhams Retail Ltd*** [2020] EWCA Civ 600).

45. For an administrator to be said to have adopted a contract, it is necessary to identify some positive conduct, after the expiry of the 14-day time limit, which causes the relevant contract to be continued. It has to be conduct which amounts to an election to treat the continued contract of employment with the company as giving rise to a separate liability in the administration. The mere continuation of employment is not sufficient. It is necessary to look at the facts and to decide whether there had been some conduct by the administrators which could legitimately be treated as an election. However, where employment is continued for more than 14 days after the appointment of the administrator, the conclusion that the entire contract has been adopted is almost inevitable - an administrator is only likely to be able to use the services of employees on the basis that they are entitled to be treated in accordance with their contract of employment.

The Effect of Insolvency on TUPE

46. The rules in the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006) are modified to facilitate the transfer and sale of insolvent businesses. TUPE 2006 implements the Acquired Rights Directive (Directive 2001/23/EC). It reflects the two

categories of supervised insolvency in the Directive that can be distinguished as terminal and non-terminal proceedings (reg 8(6) and (7), TUPE 2006).

Terminal proceedings

47. A terminal proceeding is one where there is no intention to rescue the business. These proceedings include compulsory liquidation, personal bankruptcy or sequestration, and creditors' voluntary liquidations.

48. In terminal proceedings, two standard TUPE rules are disapplied (reg 8(7), TUPE 2006); employees are not automatically transferred to the transferee (reg 4, TUPE 2006), and dismissals because of the transfer are not automatically unfair (reg 7, TUPE 2006).

Non-terminal proceedings

49. Non-terminal proceedings, referred to in the legislation as 'relevant insolvency proceedings' are defined as "insolvency proceedings which have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner" (reg 8(6), TUPE 2006). Government guidance indicates that administration, administrative receivership and voluntary arrangements fall within this category. The Court of Appeal has confirmed that administration falls within this category because its objective under Schedule B1, para.3, IA 1986 is to rescue the company as a going concern (***Key2Law (Surrey) LLP v De'Antiquis*** [2012] I.C.R. 881, CA).

50. The standard TUPE rules are applicable; employees will automatically transfer to the transferee (reg 4, TUPE 2006) and will receive unfair dismissal protection (reg 7, TUPE 2006). Two additional rules apply relating to the National Insurance Fund ('NIF') and the variation of employees' terms and conditions.

National Insurance Fund

51. Under reg 8 of TUPE 2006, debts under "relevant statutory schemes" owed to a "relevant employee" do not transfer and instead are paid by the Secretary of State out of the NIF.

Any debts owed to employees outside the scheme or the statutory cap will transfer to the transferee.

52. Debts that may be payable by the NIF include (subject to tax deductions) (ss.166(1)-(2) and 184(1) of the Employment Rights Act 1996 (ERA 1996)):

    a) Arrears of pay (capped at eight weeks, including equal pay);

    b) Statutory notice pay;

    c) Holiday pay (capped at six weeks taken or accrued in the 12-month period ending on the date of insolvency);

    d) Basic award;

    e) Statutory redundancy payment;

    f) Pension contributions;

    g) Apprentice fee.

53. A "relevant employee" is one whose contract of employment transfers to the transferee under TUPE 2006 or whose employment is terminated before the transfer in circumstances where the principal reason is the transfer itself and not an economic, technical or organisational (ETO) reason (reg 8(2), TUPE 2006).

54. There is uncertainty between the former Department for Business, Energy and Industrial Strategy (BEIS) and the Redundancy Payments Office (RPO) as to what debts are payable by the NIF.

55. "Relevant statutory schemes" are defined (under reg 8(4), TUPE 2006) as the following provisions in the ERA 1996: statutory redundancy payments (Chapter VI of Part XI, ERA 1996) and statutory insolvency payments (Part XII, ERA 1996). The statutory insolvency payment provisions usually require that an employee's employment is terminated. This requirement is removed by reg 8(3) of TUPE 2006. Instead, the date of transfer is treated as the date of termination, and the transferor is treated as the employer. There is no equivalent 'deemed dismissal' provision concerning statutory redundancy payments.

56. BEIS considers the NIF will cover statutory redundancy payments, arrears of pay, payment in lieu of notice, holiday pay, and basic awards of transferring employees.[2] However, the RPO considers that statutory redundancy payments ought not to be payable unless an employee's employment has been terminated.[3] The RPO considers the NIF will cover payments in the following circumstances:

    a) Employees who transfer to the transferee: wages and holiday pay for holiday already taken;

    b) Employees dismissed because of the transfer for an ETO reason: redundancy pay, wages, accrued untaken holiday pay and notice pay;

    c) Employees dismissed because of the transfer (with no ETO reason): wages and accrued untaken holiday pay. An Employment Tribunal (ET) will decide whether liability for an unfair dismissal or breach of contract claim ought to be paid by the transferor or transferee;

    d) Employees who refuse to transfer: wages and holiday pay for holiday already taken.

57. The NIF only covers debts owed at the date of transfer or when the employee was automatically dismissed, if that date is earlier. The Secretary of State is liable where an employee is automatically unfairly dismissed before the transfer but not where an employee is dismissed by the transferee (***OTG Ltd v Barke*** [2011] I.C.R. 781, EAT).

Variation of Terms and Conditions and TUPE

58. Regulation 9 of TUPE 2006 provides for flexibility in the variation of employment contracts. "Permitted variations" are those that are by reason of the transfer, not an ETO reason, and which are designed to safeguard employment opportunities by ensuring the

[2] Department for Business, Innovation & Skills, 'Employment Rights on the Transfer of an Undertaking' (January 2014) p40 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/275252/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf>

[3] The Insolvency Service, 'Redundancy and Insolvency - A Guide for Insolvency Practitioners to employees' rights on the insolvency of their employer' (2006) Appendix 5, para.11 <https://webarchive.nationalarchives.gov.uk/+/http://www.insolvency.gov.uk/guidanceleaflets/redundancypayments/guideforips/guideforips.htm>

survival of the business (reg 9(7), TUPE 2006). The variations can be agreed on behalf of an employee by either a union or non-union representative.

59. The "appropriate representative" will be a union representative if there is an independent trade union recognised by the employer for the purposes of collective bargaining on behalf of any of the affected employees (reg 9(2)(a), TUPE 2006).

60. There are no formalities that the union representative must comply with when agreeing to the variations. By contrast, in cases involving a non-union representative, the agreement must be: in writing, signed by the non-union representative (or an authorised agent of that representative) and, before signing, the employer must provide all the employees to whom the variation will apply with a copy of the text and guidance for them to understand it fully (reg 9(5), TUPE 2006).

61. If only part of a business is being sold, permitted variations will only apply to "assigned employees" that are assigned to the part of the business being sold (reg 9(7), TUPE 2006).

Protection from dismissal

62. The dismissal of an employee will be automatically unfair if the sole or principal reason for the dismissal is the transfer and is not for an ETO reason (reg 7(1), TUPE 2006). If an ETO reason can be established, the dismissing employer must prove it acted reasonably in treating that reason as sufficient to justify dismissal.

63. The protection applies to employees irrespective of whether they were assigned to the transfer of the business (reg 7(4), TUPE 2006). Employees must have the requisite continuous service to qualify for protection. Employees without the necessary continuous service can claim they were unfairly dismissed for asserting their rights under TUPE (ss.104(4)(e) and 108 ERA 1996).

64. The "sole or principal" reason for the dismissal must be the transfer. Prior to the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014, dismissals for a reason "connected with" the transfer were also automatically unfair if there was no ETO reason. Although the phrase "connected with" is

no longer in the legislation, guidance from BEIS states, "the transfer might be the sole or principal reason even if that reason might previously have been considered to be 'connected with' the transfer, rather than the transfer itself. It will depend upon the circumstances of any particular case".[4]

65. The BEIS guidance has described an ETO reason as including:[5]

    a) Economic reason: a reason relating to the profitability or market performance of the new employer's business;

    b) Technical reason: a reason relating to the nature of the equipment or production processes which the new employer operates;

    c) Organisation reason: a reason relating to the management or organisational structure of the new employer's business.

66. For example, in ***Nationwide Building Society v Benn*** [2010] I.R.L.R. 922, EAT, two employees resigned after their job responsibilities were downgraded following a transfer. An employee's resignation may amount to a dismissal where it is a consequence of a repudiatory breach of contract or a substantial change to the employee's working conditions to her material detriment (reg 4(9) and (11), TUPE 2006). The EAT upheld the ET's finding that the principal reason for the change in the claimants' roles was because the transferee did not have the range of products that would have allowed the claimants to work as they had previously. Although the ETO reason must be one "entailing changes in the workforce" (reg 7(2), TUPE 2006), the EAT in Benn confirmed that changes affecting a "body of transferring employees" will be sufficient (para.72 *per* Slade J).

67. An administrator's desire to make the business more attractive to transferees is not an ETO reason, even where the identity of the transferee is not known (***Spaceright Europe***

[4] Department for Business, Innovation & Skills, 'Employment Rights on the Transfer of an Undertaking' (January 2014) p22 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/275252/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf>

[5] Department for Business, Innovation & Skills, 'Employment Rights on the Transfer of an Undertaking' (January 2014) p23 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/275252/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf>

Ltd v Baillavoine [2012] 2 All E.R. 812, CA). In ***Baillavoine***, a CEO was dismissed one month before the transfer. He argued the reason was not an ETO reason and instead enabled a transferee to obtain the business without the CEO salary of £120,000 per annum. The administrator argued the reason was to save costs while running the business. The Court of Appeal held the reason for the dismissal was to give the company the best chance of success as a going concern and not for a financial reason unconnected with the transfer. This was not an ETO reason.

68. In ***Crystal Palace FC 2000 Ltd v Kavanagh*** [2014] I.C.R. 251, CA, a football club had signed a sale purchase agreement that was pending the sale of the club's stadium. When the club was experiencing cash flow problems, 29 employees that were not necessary for core operations were dismissed. It was argued that the club would have to be liquidated if the employees had not been dismissed. The Court of Appeal held that the CEO in ***Baillavoine*** was dismissed to make the business more attractive to a transferee, not because there were insufficient funds to pay him. By contrast, in ***Kavanagh,*** the objective of the dismissal was to avoid liquidation and not to make the club more attractive to a transferee.

69. The practical difficulties an ET may encounter when assessing these matters were considered in ***Marshall v Game Retail Ltd*** (UKEAT/0276/13). In ***Marshall***, a Financial Controller was made redundant six days before a transfer. It was argued that the reason for the dismissal was because of a belief the Claimant was employed in part of the company's business that was being dissolved irrespective of the transfer.

70. The EAT emphasised the "very fact-sensitive" nature of these types of cases (para.15 *per* His Honour Burke QC). Applying, ***Kuzel v Roche Products Ltd*** [2008] I.C.R. 799, CA, the EAT held that the burden of proof was on a Claimant to produce some evidence supporting his case, after which point the Respondent must prove the reason for dismissal was a different one.

71. A notable feature of this case is the lack of evidence provided to the ET. The person who decided to dismiss the Claimant had not been called to give evidence, thereby making it more difficult to establish what the reason for the dismissal was. There was also no direct

evidence that the Claimant's salary could not be paid for by the administrator. These factors are likely to be relevant in future cases where an ET is deciding whether the reason for dismissal was transfer-related.

72. The thought process of the decision-maker was considered by the EAT in ***Honeycombe 78 Ltd v Cummins*** EAT/100/99. In that case, the directors of a company informed the administrator of their intention to purchase the company. The administrator insisted that the company must cease trading immediately and that all staff must be dismissed because there were no assets from which they could be paid. The EAT held it was necessary to examine the reason in the mind of the administrator. The administrator decided to dismiss staff irrespective of the directors' offer to purchase the business, and the reason was consequently an ETO reason.

73. The Court of Appeal has since held that the relevant thought process is that of the administrator and not, for example, the company director's stratagem (***Dynamex Friction Ltd v AMICUS*** [2009] I.C.R. 511, CA, para.84 *per* Rimer LJ).

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