

TUPE Applies to Acquisitions Out of Administration

There are essentially three types of insolvency proceeding: liquidation, receivership and administration. Liquidators realise and distribute a company's assets before dissolving the company. Receivers usually realise certain secured assets to repay certain debts, before appointing a liquidator. However, an administrator's first objective is to rescue the company as a going concern. It is only if this is not practicable that the administrator can realise and distribute a company's assets. Before 2006, TUPE applied in the same way to insolvent companies as solvent companies, regardless of the nature of the insolvency. Since 2006, certain important provisions of TUPE have not applied to protect employees upon a transfer of an undertaking by a company in liquidation and receivership. However, it was unclear whether this also applied to transfers of undertakings by companies in administration. According to *Oakland v Wellswood*, it depended upon the particular facts of the case. In the recent decision in the case of *Ms AE Olds v Late Editions Ltd*, however, the Employment Appeal Tribunal ("EAT") now says that employees are fully protected when the business in which they work is purchased from a company in administration.

On a business transfer to which TUPE applies, the employment contracts of those assigned to the relevant business transfer to the acquirer. The acquirer may also inherit unfair dismissal and other employment liabilities in relation to those dismissed prior to, but in connection with, the transfer in question. The protection of TUPE for those assigned to the relevant business is, however, disapplied under regulation 8(7) of TUPE where the business in question 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 and are under the supervision of an insolvency practitioner".

Where this exception applies, the acquirer of a business does not inherit either those employees employed in the relevant business or their accrued rights and entitlements or potential liability in respect of the claims of those

dismissed prior to, but in connection with, the acquisition. This exclusion of TUPE's protection from insolvency situations is seen as consistent with the objective of ensuring a rescue culture.

Whether administration, as distinct from other forms of insolvency (such as the various types of liquidation) falls within the scope of this exemption from the full force of TUPE's protection for the relevant staff has been uncertain. The issue was addressed in 2009 in the case of *Oakland v Wellswood* where the EAT expressed the view that an administration could fall outside the protective scope of TUPE but only if the objective of the administration was the liquidation of the insolvent company's assets. Whether the full protection of TUPE applied to a particular transaction would depend on the factual question of what the objective was of the administrator of the particular business—if the objective was liquidation of the relevant assets

then TUPE would not apply in full. This approach was debated but not resolved definitively when the case reached the Court of Appeal, although at that stage the analysis of the EAT in *Oakland* was doubted.

The EAT delivered its judgment in the case of *Ms A E Olds v Late Editions Ltd* on 16 February 2011 and held that TUPE applies in full to transactions out of administration.

In *AE Olds*, the EAT holds that as an absolute rule administrations under Schedule B1 of the Insolvency Act 1986 fall outside the scope of TUPE reg 8(7)—administrations do not constitute insolvency proceedings with a view to the liquidation of the assets of the transferor. Therefore TUPE will operate in the usual way to acquisitions of business out of administration, transferring to the acquirer both those employees who are “in scope” (and their accrued liabilities) and, potentially, claims from those dismissed pre-transfer. The rationale for this decision was a number of inter-related issues surrounding the intentions behind the legislation including the underlying purpose of TUPE to protect

employees and the difficulty and uncertainty of applying a test of whether TUPE applies to a given transaction based on the administrator’s intentions (which may alter during the course of his appointment).

It has to be said that the position is not conclusively resolved in the sense that there are now two competing EAT decisions, *Oakland* and *AE Olds*. However, the *AE Olds* decision may well be seen as representing the correct analysis, not least as it is the more recent judgment.

Assuming that *AE Olds* remains good law, TUPE will apply as normal in relation to transactions out of administration including pre-packs. Purchasers of insolvent businesses need to factor in to their commercial considerations, negotiations and deal strategy the transfer of staff who are “in scope”, their accrued liabilities and, potentially, claims from those dismissed pre-transfer in circumstances where the administrator may well be unable and unwilling to indemnify the acquirer against the relevant liabilities adequately or at all.

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