

## Insolvency and Restructuring

The Court of Appeal has recently decided the latest round in *Oakland v Wellswood (Yorkshire) Limited*, a case that has stirred up a hornet's nest of issues in relation to employee rights and Administrations.

### **The factual background**

- 2003 to 2006 - Mr Oakland (O) was employed by Wellswood (W)
- December 2006 - W enters Administration
- December 2007 - Newco purchases W's business and employs 5 of the 7 employees of W including O
- November 2008 - Newco terminates O's employment, following which he brings a claim for Unfair Dismissal.

### **The decisions of the Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT)**

- Newco argued that W had entered Administration with a view to Liquidation as there were no offers to buy W's business in December 2006. Therefore, pursuant to Section 8(7) of TUPE, O's contract of employment had not been transferred to the Newco. This left O with less than 12 months employment with Newco and thus, he had no right to bring a claim.
- O's Counsel argued that the Administration of W could not be regarded as analogous to a Liquidation as its primary statutory purpose is to save the company or the business. Therefore, Section 8(7) did not apply.
- Both the Employment Tribunal and the EAT agreed that Section 8(7) did apply and so there was no transfer of the contract of employment. Thus, O had less than 12 months employment with Newco.

### **The Court of Appeal (CA)**

- Interestingly, the Secretary of State for Business, Innovation and Skills intervened on behalf of O. The decisions made by the ET and the EAT exposed the National Insurance scheme to a potential flood of claims from employees, whose employment protection would now be defeated by virtue of this application of Regulation 8(7).
- In fact, in deciding this case, the CA did not deal with Regulation 8(7) of TUPE at all but instead relied upon Section 218 of the Employment Rights Act 1996, which deals with the "Change of Employer". This provides that:-
  - a. If a business is transferred from one person to another; and
  - b. The period of employment of an employee in the business counts as a period of employment with the transferee;

c. The transfer does not break the continuity of the period of employment.

On this basis, the CA found that O should properly have been regarded as having nearly 4 years of continuous employment which conferred jurisdiction on the Employment Tribunal to consider his claim for unfair dismissal.

So is the Regulation 8(7) argument dead? That is far from clear but section 218 does seem to offer protection to employees if an Administrator sells the business. The better question to ask is whether the insolvent company's creditors are better served by a sale by an Administrator, with section 218 possibly discouraging prospective purchasers, or a Liquidator where Regulation 8(7) would apply. Pre pack liquidations anyone?

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**Navinder is Head of the Insolvency Team at Teacher Stern LLP, holds the Certificate of Proficiency in Insolvency and is a member of the Insolvency Practitioners Association. If you have any queries on this or any other matters relating to insolvency issues, please do not hesitate to contact Navinder on 07980 817386 or James McVeigh on 07813 545144.**

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