

## TUPE DOES APPLY TO PRE-PACK ADMINISTRATIONS

The EAT in the recent case of *OTG Ltd v Barke* held that the protection afforded to employees under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") does apply to pre-pack administrations.

Regulation 8(7) of TUPE provides that where the seller is the subject of "bankruptcy proceedings or analogous insolvency proceedings which have been instituted **with a view to the liquidation of the assets of the seller**", the employees will **not** automatically transfer to the purchaser, and dismissals by reason of the transfer will not be automatically unfair.

This decision changes the EAT's stance as to whether a pre-pack administration can circumvent TUPE. Prior to the *OTG* case, the EAT in the case of *Oakland v Wellswood (Yorkshire) Limited* held that whether or not regulation 8(7) applied to a particular transfer is a question of fact, and effectively depends on the intentions of the administrator. In *Oakland*, it held that pre-pack administrations constituted terminal insolvency proceedings, regulation 8(7) therefore applied and therefore there would be no TUPE transfer in these circumstances.

However, in the *OTG* case, the EAT set out the following:

- Although an administrator can liquidate a company's assets as a last resort, his or her primary objective is to rescue the company as a going concern.
- The fact-based approach in *Oakland* was wrong. Administration can never constitute "analogous insolvency proceedings" under regulation 8(7) of TUPE; and this approach increases the likelihood of disputes as to who is liable for the seller's obligations, leading to cost, delay and uncertainty.
- The purpose of the Acquired Rights Directive (from which TUPE derives) was to protect employees in the event of a transfer, and to ensure that their rights are safeguarded. The approach applied in *Oakland* leads to less protection for employees.

### Practical Tip

- Administrators and potential purchasers should exercise caution when conducting business transfers.
- Putting an insolvent company into administration and then arranging a pre pack sale is likely to effect a TUPE transfer.
- Purchasers must therefore take into account the potential employee liabilities that they may inherit when purchasing a business and/or assets from an insolvent company when negotiating the price.

If you require any specific advice in connection with the material contained in this bulletin, or on any other Employment Law issues, please contact: Paul Chamberlain in Manchester on 0161 836 8864, Andrew Cross in Liverpool on 0151 600 3062 or Kevin James in Preston on 01772 229847.

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