



Impact of the TUPE Regulations in administrations

You may be aware from our earlier update that the Court of Appeal has recently overturned the decision in *Oakland v Wellswood (Yorkshire) Limited*. In that case, the Employment Appeal Tribunal (“EAT”) held that employee liabilities would not transfer under TUPE where the business was sold through a pre-pack administration, holding that Regulation 8(7) of the TUPE Regulations applied to the transfer. Regulation 8(7) provides that where insolvency proceedings are analogous to bankruptcy proceedings and have been instituted with a view to the liquidation of the assets, Regulations 4 and 7 of the TUPE Regulations do not apply. Regulations 4 and 7 are the provisions providing for the automatic transfer to the purchaser of the employment contracts and liabilities of both transferring employees and those employees who are deemed to have been unfairly dismissed prior to the transfer.

The judgment of the Court of Appeal has now been released and a detailed report on the judgment is available on our website.

Briefly, however, as indicated in our earlier update, the Court of Appeal reached its decision on the basis of a provision in the Employment Rights Act 1996, which preserves continuity of employment on the transfer of a business (a point not argued before the EAT). Whilst the Court of Appeal declined to give any definitive ruling on the application of Regulation 8(7) in administrations, it is clear that it shares our doubts regarding the correctness of the EAT’s decision on this point, stating that there were strong grounds for thinking that the EAT had adopted the wrong approach to the construction of Regulation 8(7) and the EU Directive upon which the TUPE Regulations are based and emphasising that it remained a “strongly arguable point” that administration necessarily excludes the application of Regulation 8(7). Therefore, the cautious approach must be for Insolvency Practitioners and purchasers alike to approach a relevant transfer out of an administration on the basis that Regulations 4 and 7 may well apply.

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