Berryman

Insolvency update

Collective redundancies: are you informing and consulting?

Insolvency Practitioners are coming under increasing pressure from the Government to ensure that they comply with the requirements under the collective redundancy legislation. The requirements come into effect if it is being proposed to make 20 or more employees redundant. In March, the Minister for Employment Relations wrote to all Insolvency Practitioners to remind them of the requirements and in their latest edition of "Dear IP", the Insolvency Service warned Insolvency Practitioners that there continues to be a great deal of concern across a wide spectrum of interested parties that the requirements are being ignored.

What, then, are the requirements and most importantly, what are the potential implications for an office holder who fails to comply with them?

The duty to consult

Where an employer proposes to make 20 or more employees redundant, section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRA") imposes a duty on the employer to consult with affected employees or their representatives. The relevant consultation period depends on the number of employees the employer is proposing to dismiss. If between 20 and 100 employees, the relevant period is 30 days' ahead of the proposed redundancies. If 100 or more employees, the relevant consultation period is 90 days' ahead of the proposed redundancies. An employer's insolvency does not discharge it from the duty to consult.

If an employer fails to comply with the duty to consult, the penalties can be severe. If a complaint is made to a tribunal, the tribunal can make a protective award of up to 90 days' pay in respect of each redundant employee. There is no statutory cap on the amount of a day's pay. Further, case law has made it clear that the award is punitive and therefore, that the starting point in determining the amount of the award is 90 days' pay. This will only be reduced if there are mitigating circumstances - for example, to the extent that there has been some consultation.

Following an insolvency appointment, it will be the office holder who effects any redundancies. However, in making these redundancies, the office holder acts as agent of the insolvent company. This means that it is the insolvent company rather than the office holder personally who is liable for any protective award.

Insolvency Practitioners will recall an attempt some years ago to try and get a ruling that a protective award should constitute an expense of the insolvency and therefore, rank ahead of

the office holder's remuneration. Thankfully for Insolvency Practitioners, and the rescue culture, that attempt failed - see the Court of Appeal's decision in the joined appeals in Ferrotech Ltd & Others (2005) EWCA Civ 1072. However, that does not mean that Insolvency Practitioners can simply dismiss the duty to consult. A recent attempt by a liquidator to argue that a protective award is not a provable debt in the insolvency, failed - see the Court of Appeal's decision in Haine v Day (2008) EWCA Civ 626. This means that part of the protective award will constitute a preferential debt in the insolvency by virtue of paragraph 9 of Schedule 6 Insolvency Act with the balance constituting an unsecured debt. If the office holder causes the company to incur liability for a protective award that could have been avoided through consultation, the office holder could face possible criticism from other creditors on the basis that the office holder has failed to comply with his duty to the company to maximise recoveries for creditors (which obviously requires liabilities to be minimised). An administrator may risk a challenge to his conduct as administrator pursuant to paragraph 74 Schedule B1 on the basis that he has acted so as to unfairly harm the interests of other creditors, whose recoveries have been diminished through the making of the protective award. In particular, an Insolvency Practitioner could face criticism from a floating charge-holder where the Insolvency Practitioner's actions have resulted in increased preferential claims (which of course rank ahead of any dividend payable under the floating charge).

An office holder might be able to take advantage of a limited exception to the duty to consult on the basis that there were "special circumstances" which rendered it not reasonably practicable for him to consult. However, it is clear from case law that insolvency is not of itself a special circumstance and that something more is required. In particular, the act of an office holder dismissing employees to make a business more attractive to potential purchasers and/or a desire for commercial confidentiality are unlikely to amount to "special circumstances".

Insolvency Practitioners are therefore advised to consider carefully in every case whether or not it is practicable to engage in consultation, bearing in mind that some form of consultation will help to minimise the amount of the protective award. If the office holder believes that open consultation could jeopardise the business, the employee representatives can be asked to keep details of the consultation confidential.

The duty to notify

Section 193 TULRA imposes on an employer who is proposing to make 20 or more employees redundant a duty to notify BIS (specifically the Redundancy Payments Office) of the proposed redundancies on Form HR1. Breach of this requirement can give rise to criminal liability under section 194 TULRA. Whilst, due to the office holder's agency status, the criminal liability attaches primarily to the insolvent company, who is the employer for the purposes of section 194, some commentators have argued that criminal liability could possibly extend to an office holder pursuant to section 194(4) TULRA. Section 194(4) provides that "where an offence committed under [section 194] is proved to have been committed with the consent or connivance of, or to be attributable to neglect on the part of, any director, *manager*, secretary or similar other officer of the body corporate, or any person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence."

Even if it is not practicable for Insolvency Practitioners to engage in some form of consultation, therefore, in order to remove any potential criminal liability, they should ensure that they make the appropriate notification to BIS as soon as possible. The Government has made it clear that the notification will be treated as commercially confidential and details not given to any outside organisations other than Government agencies, such as JobCentre Plus, that are tasked with providing support to redundant employees. The idea of early notification is to

ensure that these agencies are prepared to take effective action once the redundancies are implemented.

TUPE

Finally, it should be noted that the requirements under the collective redundancy legislation are distinct from the information and consultation requirements that apply on a relevant transfer of the business and/or assets of the insolvent company under the TUPE Regulations. Breach of the TUPE information and consultations requirements might lead to the making of an award of up to 13 weeks' pay for each affected employee (again, there is no limit on a week's pay for this purpose) and somewhat confusingly, such awards are also known as "protective awards".

Again, Insolvency Practitioners should ensure that wherever possible, these information and consultation requirements are complied with. Protective awards under TUPE (as distinct from under the collective redundancy regime) do not, as the law currently stands, constitute preferential claims in an insolvency, but fall to be dealt with as unsecured claims. Again, however, Insolvency Practitioners could be criticised notwithstanding this point if their failure to consult results in significant additional, and potentially avoidable, unsecured claims against the insolvent company. Although liability for any protective award that is made pursuant to the TUPE Regulations will usually pass to the purchaser pursuant to the sale agreement (liability for the award is now joint and several under the TUPE Regulations), if the purchaser is concerned about the potential liability, the price the purchaser is prepared to pay, and therefore the recoveries for creditors, are likely to be reduced to reflect the potential liability.

Contact us

For further information, please contact:

Carl Mifflin
DD 0845 310 7265
E carl.mifflin@berryman.co.uk

Roscoe Fernandes
DD 0845 310 7283
E roscoe.fernandes@berryman.co.uk

Berryman Park House Friar Lane Nottingham NG1 6DN
DX 10004 Nottm 1 **T** 0845 310 7200 **F** 0845 310 7210
W www.berryman.co.uk

DISCLAIMER OF LIABILITY FOR CONTENT

The above article is intended to provide general information only and is not to be treated or relied upon as specific legal or commercial advice. Specific professional legal advice should be taken before any course of action is pursued in relation to the information contained in the article. We make no representations or warranties of any kind with respect to the accuracy, completeness, or suitability for any purpose of the article and the information contained in it. We expressly exclude all liability for any loss or damage howsoever arising from the information contained in this article to the fullest extent permitted by law. The copyright in the above article is owned by Berryman Shacklock LLP. Any copying or adaptation of the article without prior consent of the copyright owner is prohibited.