

## Case report

### Oakland v Wellwood (Yorkshire) Ltd (2008) UKEAT/0395

#### Background:

The revised TUPE Regulations introduced in 2006 (“the 2006 Regulations”) contain new insolvency provisions that are designed to promote the “rescue culture” by alleviating the impact of TUPE on relevant transfers out of insolvency proceedings.

Broadly, the 2006 Regulations provide as follows:-

- Where the relevant transfer arises out of certain types of insolvency proceedings, Regulations 4 and 7 of the 2006 Regulations do not apply at all (Regulation 8(7))
- Regulation 4 is the provision providing for automatic transfer of the employment contracts and liabilities of transferring employees to the purchaser and Regulation 7 is the provision providing for the automatic transfer of the employment contracts and liabilities of employees who have been automatically unfairly dismissed prior to the relevant transfer
- Where the relevant transfer arises out of all other types of insolvency proceedings, Regulations 4 and 7 continue to apply but Regulations 8(2) to 8(6) of the 2006 Regulations modify their impact.

In particular, Regulations 8(2) to 8(6) provide for the Secretary of State to pick up some of the liabilities that would otherwise transfer to the purchaser under Regulations 4 and 7.

Unfortunately, the Government has failed to specify in the 2006 Regulations which insolvency proceedings are covered by Regulation 8(7), merely providing that Regulation 8(7) applies where the “transferor 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.....”. However, in its guidance to the 2006 Regulations, the BERR quite firmly takes the view that relevant transfers out of administration do not fall within Regulation 8(7).

#### Facts:

Mr Oakland was a director, shareholder and employee of Wellwood Ltd (“OldCo”), which traded as a fruit and vegetable wholesaler. When OldCo ran into financial difficulties, Mr Oakland consulted an Insolvency Practitioner and also sought a potential buyer for the business. A buyer was found and following discussions, it was agreed that OldCo would be put into administration and that the buyer would set up a new company, Wellwood (Yorkshire) Ltd (“NewCo”), to purchase the assets of OldCo, which included the lease of the industrial unit from which OldCo had traded together with various fridges and vans. NewCo also agreed to take on five of OldCo’s seven employees, including Mr Oakland.

The sale of the assets was structured as a pre-pack, the administrator taking the view that with the probability of ongoing losses, any further period of trading to allow the business and assets to be marketed for sale would further reduce funds available for creditors and result in the loss of customers.

Not long after the transfer, NewCo dismissed Mr Oakland. Mr Oakland subsequently brought a claim against NewCo for unfair dismissal. NewCo argued that Mr Oakland had not had the required one year's continuous service at the date of his dismissal in order to qualify for unfair dismissal protection. NewCo argued that Regulation 8(7) had applied to the relevant transfer, meaning that Mr Oakland was unable to rely upon his previous period of continuous service with OldCo pursuant to Regulation 4 of the 2006 Regulations.

The Employment Tribunal agreed that Regulation 8(7) had applied to the relevant transfer, finding that the purpose of the administration had been the liquidation of OldCo's assets, with it just so happening that the liquidation of those assets had involved the sale to NewCo.

Mr Oakland appealed to the Employment Appeal Tribunal ("EAT").

### **Decision:**

Dismissing Mr Oakland's appeal and reaffirming the Employment Tribunal's decision, the EAT held as follows:-

- The question whether the administration proceedings had been instituted with a view to the liquidation of the assets of the transferor and hence, whether they fell within Regulation 8(7) or not, was a question of fact for the Employment Tribunal.
- It was accepted that if the administrators had continued to trade the business with a view to its sale as a going concern, any relevant transfer in those circumstances would have attracted TUPE protection for Mr Oakland.
- However, this is not what had happened. Due to OldCo's weak financial position, it had been immediately apparent to the administrators that it would not be possible for them to continue trading the business. Instead, immediately following their appointment, they had taken immediate steps to sell the assets to NewCo. They had seen this as the best course for realising the optimum return to creditors in the final liquidation of OldCo. Accordingly, the Employment Tribunal had been entitled to conclude that the appointment of the administrators had been with a view to the liquidation of the assets of OldCo.
- This construction accorded with the policy behind Regulation 8(7) and the underlying EU Directive on which the 2006 Regulations were based – namely, to facilitate the "rescue culture" by ensuring that a purchaser, here NewCo, was not put off by the effects of TUPE protection.

### **Commentary:**

The decision is a step in the right direction in giving effect to the underlying policy behind the introduction of the new insolvency provisions in the 2006 Regulations – namely, to facilitate the "rescue culture" - and will be welcomed by Insolvency Practitioners and purchasers alike.

However, the decision does still leave significant areas open to uncertainty, such as the approach the Court would take where the administrators trade a business for a short period simply in order to enhance or maintain the value of its assets (i.e. where the purpose of rescuing the company as a going concern has been ruled out from the outset). The decision appears to suggest that the existence of any post-appointment trading, however brief, would preclude any reliance upon Regulation 8(7). This conflicts with the wording of Regulation 8(7), which would suggest that trading with a view to the liquidation of assets should attract protection from TUPE.

The Judge was satisfied in the present case that there was no prospect of the administrators trading the company whilst a purchaser was found. Again, it remains to be seen whether the Court would take a similar view in circumstances where the administrators could have traded the company for a short period whilst a purchaser was found. In such circumstances, where the use of the pre-pack would be for the sole purpose of avoiding TUPE liabilities, the Courts may not be so quick to apply Regulation 8(7).

It is likely, in light of the decision, that we will see an increasing use of the pre-pack procedure, albeit accompanied by a more involved pre-appointment marketing and valuation process (akin to an accelerated M&A process), so that Insolvency Practitioners can satisfy themselves that they have obtained the best possible price for the assets, whilst preserving the purchaser's ability to avoid liability under TUPE.

It remains to be seen whether the decision will be appealed.

## Contact us

For more information on any of the above, please contact:

Sue Lowry

**DD** 0845 310 7215

**E** [sue.lowry@berryman.co.uk](mailto:sue.lowry@berryman.co.uk)

Carl Mifflin

**DD** 0845 310 7265

**E** [carl.mifflin@berryman.co.uk](mailto:carl.mifflin@berryman.co.uk)

**Berryman** Park House Friar Lane Nottingham NG1 6DN

**DX** 10004 Nottm 1 **T** 0115 945 3700 **F** 0115 948 0234

**W** [www.berryman.co.uk](http://www.berryman.co.uk)

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