

Getting more than you bargained for - current staff and liability to those dismissed on transfer come with a business acquired from an Administrator

The issue

After years of uncertainty, the Employment Appeal Tribunal ("EAT") has preferred clarity of legal effect and disapproved the previous factual test reliant on the Administrator's primary purpose in the administration.

A buyer of a business already in administration will now by law also take the assigned employees by reason of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

In a separate case, the EAT has decided that a dismissal of the Chief Executive of a business in administration by an Administrator to enable any potential buyer to buy the business free of his rights was automatically unfair. This was due to the sole or principal reason for dismissal being connected to a transfer (even though the transferee did not bid for the business until later) and was not exempted from TUPE protection as an economic, technical or organisational reason entailing changes in the workforce. The later buyer therefore took on the liability for that unfair dismissal.

The consequences

Buyers from Administrators are substituted as the employer and contracts of employment are transferred with accrued continuity and all other rights and liabilities (save for occupational pension rights) unless an employee objects. Dismissals by Administrators where the sole or principal reason is the transfer will be automatically unfair except in limited circumstances. Liability for unfair dismissals by reason of the transfer will pass to the transferee even for dismissals pre acquisition.

On a TUPE transfer, contract terms changes detrimental to employees usually are either void or can lead to constructive unfair dismissal claims. Where a business is in administration, variations designed to save the business and safeguard employment can be permitted with recognised trade union consent or written agreement by appropriate elected representatives of the assigned employees.

Post acquisition operational change which constitutes measures requires pre acquisition workforce consultation and its omission can result in a liability for up to 13 weeks' gross pay per employee.

The solution

Buyers proposing to acquire a business from an Administrator without hidden cost should:

- undertake a detailed fact find of current and recently dismissed employees, their rights and remuneration
- adjust the acquisition price to factor in acquired staff costs and liabilities
- obtain on acquisition personnel files and claims defence material for former employees who might bring termination or other claims
- ensure any transfer related dismissals required on acquisition qualify for economic, technical or organisational reasons entailing changes in the workforce, which term has a narrow focus
- only effect transfer related detrimental contract changes which qualify as permitted variations
- avoid early post acquisition operational changes for which there was no pre acquisition workforce consultation

Employment Group

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