

## Buying the Assets of Distressed Companies:

### Deciding Whether Staff Automatically Come Too

As any of you who have been involved in buying or selling a business will know, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) can have a significant impact on the deal. Basically, if TUPE applies on the transfer of a business the Buyer will 'step into the shoes' of the Seller in respect of all employees working in the business at the date of transfer. This means:

- all such employees automatically transfer to the Buyer under their existing terms of employment and with their continuity of employment intact;
- any dismissal which takes place because of the transfer itself or, with certain exceptions, for a reason connected with it will be automatically unfair; and
- changes to terms and conditions of employment by reason of the transfer or, with certain exceptions, for a reason connected with it will be void.

It is not possible to contract out of TUPE. The best a Buyer can do is negotiate for the Seller to pick up all employment liabilities.

However, TUPE includes special rules for businesses which are subject to insolvency proceedings.

Broadly speaking, in the case of "bankruptcy or analogous proceedings", Regulation 8(7) of TUPE provides that:

- employees will not automatically transfer to the Buyer and the Buyer will not inherit the Seller's rights and obligations; and
- an employee will not be able to claim that his or her dismissal is automatically unfair for a TUPE reason, although the dismissal may still be unfair on ordinary principles.

So, in the case of compulsory and creditors' voluntary liquidations, the Buyer will not automatically take on the Seller's employees.

Different rules apply to company voluntary arrangements and, according to guidance issued by the Department of Business, Enterprise and Regulatory Reform (**BERR**), company administrations. CVAs and administrations are treated differently because they are ostensibly 'rescue' procedures for the company, as opposed to pure winding-ups. In these cases, TUPE will apply although Regulation 8(6) provides that the Buyer will not inherit all of the Seller's employment arrears and there will be greater scope to vary the terms of employment of transferring employees (by agreement) than is usually permitted on a TUPE transfer.

Commentators have frequently questioned whether the BERR guidance is correct, particularly in relation to a so-called 'pre-pack' administration, where a plan for an immediate asset sale and subsequent liquidation is in place before the administrator is appointed. Now, a tribunal case in November 2008 may have proved those commentators right.

### **The Oakland Case**

The Employment Appeals Tribunal (**EAT**) has recently considered the effect of pre-pack administrations on employees in the case of **Oakland –v- Wellswood (Yorkshire) Limited**.

In this case, Wellswood found itself in financial difficulties and was put into administration by its directors. Once appointed, the Administrators immediately transferred the assets to a new company (**Newco**). Book debts were not transferred and only five out of seven employees were taken on by Newco.

The EAT decided on the facts of the case that the pre-pack administration was "insolvency proceedings ..... instituted with a view to the liquidation of the assets". In other words, because the process was in reality more like a liquidation than an administration, the employees did not automatically transfer to Newco under TUPE.

This finding was made on the basis that, upon the appointment of the Administrators, steps were taken immediately to sell Wellswood's assets, with the book debts remaining with the old which was then put into creditors' voluntary liquidation. The Administrators chose this as the best course of action to maximise returns to creditors. It was therefore held that the appointment of the Administrators was made with the view of the liquidation of Wellswood and therefore TUPE did not apply.

### **Likely impact of the decision**

Administrations have proved an increasingly popular form of corporate insolvency. Whilst some observers have raised questions regarding the integrity of pre-pack administrations the Courts have accepted them and recently the Insolvency Service itself has issued documents containing further indications of their acceptance of the pre-pack.

It appears that the decision in **Oakland –v- Wellswood (Yorkshire) Limited** was made with a view that the facts of the case sat comfortably within the rescue culture policy promoted by the Government.

The case illustrates the view that may be taken by the Courts, but the decision as to whether a TUPE liability exists will be determined on a case by case basis, with each being decided on its facts. This case does not set any hard and fast principle for pre-pack administrations, and there is the possibility that the case will be appealed to the Court of Appeal. It should be noted that in this instance there was no trading and any continued trading makes a TUPE liability more likely. As we have mentioned, the decision also goes against BERR guidance which has indicated that because administration is a rescue process, it will result in a TUPE transfer of employees to the Buyer.

This case will provide guidance rather than certainty, and anyone purchasing a company or assets from an administrator will still need to take legal advice as to whether a TUPE liability exists. However, it is interesting to note that the EAT took a realistic approach to the matter, reflecting that the administrators had selected the second of the three statutory objectives of administration. It was clear that the administrators anticipated that Wellwood would not trade and would move from administration to a creditors' voluntary liquidation, so as to secure a better result for creditors by not incurring further losses through continued trading. In such circumstances it is possible for the purchaser to take just the employees they wish to retain on new terms and conditions without a continuation of service from the previous employer. The EAT distinguished this case from a situation where administrators continue to trade the business with a view to its sale as a going concern, where employees would transfer to the Buyer under TUPE.

## Summary

When buying the assets of a company which is not yet in liquidation or administration, TUPE will generally apply so staff automatically transfer to the Buyer. The Seller may agree to take responsibility – e.g. by making pre-sale redundancies and giving indemnities in the contract and/or agreeing a retention against the sale price. Otherwise, dismissing staff around the time of the assets purchase carries a high risk.

If the company has gone into an insolvency procedure you need to be clear what type of procedure it is.

If you are buying assets from a liquidator, TUPE will generally not apply and you won't pick up any staff unless you want them.

Conversely, if you are buying from an administrator, TUPE generally will apply and all staff will automatically transfer. If, however, it's a pre-pack that meets the criteria laid down in Oakland, then TUPE may not apply.

In many cases, the best solution for the Buyer and Seller may be a pre-pack. It's quick and cheap for the Seller. The Buyer is likely to prefer TUPE not to apply. Clearly, in such situations, an early conversation between Buyer and Seller, advised by a qualified insolvency practitioner or lawyer is advisable. For further information on this or related topics, contact: -

### Darren Stone

Insolvency Solicitor  
Tel: 01273 403223  
darren.stone@adams-remers.co.uk



### Cathy Hoar

Employment Solicitor  
Tel: 01273 403285  
cathy.hoar@adams-remers.co.uk



Legal disclaimer: Although we have taken care over what is said in this article, we have not attempted to give exhaustive statements of law or any opinions on specific legal issues. This article does not provide or offer legal or other advice. You should not rely on it as legal advice. You should consult a suitably qualified lawyer on any specific legal problem or matter.

---

**Riding Out The Downturn**  
**Practical Guidance for Businesses**

[www.adams-remers.co.uk](http://www.adams-remers.co.uk)