

Journal of International Banking & Financial Law/2009 Volume 24/Issue 2, February/Articles/Employee Liabilities and Pre-Pack Administrations - (2009) 2 JIBFL 83

Journal of International Banking and Financial Law

(2009) 2 JIBFL 83

1 February 2009

Employee Liabilities and Pre-Pack Administrations

Feature

Oakland v Wellswood (Yorkshire) Ltd [2009] All ER (D) 12 (Jan) (Employment Appeal Tribunal) (Judge Peter Clark) (9 January 2009)

Jonathan Lawrence

K&L Gates LLP

jonathan.lawrence@klgates.com www.klgates.com

© Reed Elsevier (UK) Ltd 2009

FACTS

The predecessor company ('Oldco') of Wellswood (Yorkshire) Ltd (the 'Employer') traded as a wholesaler in fruit and vegetables supplying catering businesses with fresh produce. From March 2003, Mr Oakland (the 'Employee') was a director of and 50 per cent shareholder in Oldco. In mid-2006, Oldco ran into financial difficulties resulting in its administration. The intended purchaser of Oldco's business did not want to buy Oldco as a going concern. That would have meant taking on the book debts of Oldco. Instead, the Employer was incorporated by the purchaser and used as a vehicle for acquiring the assets of Oldco, including seven employees. The Employee was one of the seven. In December 2006, the Employee was taken on by the Employer pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE'). On the same date the administrators of Oldco were appointed. In November 2007, the Employee was dismissed by the Employer.

The Employee complained of unfair dismissal. The Employer countered that the Employee had not completed a year's continuous service with the Employer so as to qualify for ordinary unfair dismissal protection. The tribunal found in the Employer's favour. The Employee appealed.

CONCLUSION

The tribunal's construction of TUPE was correct. The ordinary employee transfer provisions of TUPE were disapplied by reg 8(7) of TUPE: '(7) Regs 4 and 7 do not apply to any relevant transfer 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 and are under the supervision of an insolvency practitioner'. Regardless of his employee status with Oldco, the Employee did not have sufficient service with the Employer to bring his unfair dismissal claim against the Employer. Regulation 8 aimed to relieve transferees of the burdens which would otherwise apply. As there was no transfer of staff to the transferee under the terms of TUPE, therefore there should be no claim for unfair dismissal against the Employer.

If joint administrators had continued to trade the business of Oldco with a view to its sale as a going concern any relevant transfer would have attracted TUPE protection. This was not what happened. Instead, on the appointment of the joint administrators, they took immediate steps to sell the assets of Oldco to the Employer.

The construction of TUPE accorded with the policy of the 'rescue culture', whereby a purchaser was not put off buying a business in administration by the effects of TUPE protection. The outcome was that some jobs were preserved and the creditors benefited from the best available option.