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Employment Update by Attwaters

The recent decision handed down by the Employment Appeals Tribunal (“EAT”) in the matter of OTG Ltd v Barke and ors [2011] IRLR 272 EAT (“OTG”) has clarified the position of pre-pack administration sales and whether TUPE (The Transfer of Undertakings (Protection of Employment) Regulations 2006) applies. Regulation 8(7) of TUPE states that:

“Regulations 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.”

The case of Oakland v Wellswood (Yorkshire) Ltd EAT/0395/08 held that where a company is in administration and whether regulation 8(7) applied or not in each case was a question of fact. This created difficulties simply on the basis that the “fact” may be the administrator’s view at the time of appointment.

Under regulation 4 there is an automatic transfer of employees where there is a transfer of an undertaking. This is then supplemented under regulation 7 which provides that the dismissal of an employee because of a relevant transfer will be unfair unless there is an Economic, Technological or Organisational reason (“ETO”). Such as a genuine redundancy situation. Regulation 8(7) removes these requirements under TUPE. OTG has now clarified the position with administration cases and any business (unless they are in liquidation) including pre-pack sales will attract TUPE.

The OTG decision has serious ramifications for all business that are not in liquidation but subject to “analogous insolvency proceedings”. TUPE will apply even in situations where a sale of a business has been agreed between the parties prior to an administrator becoming involved. Under TUPE where there is a relevant transfer a purchaser will become liable for all liabilities such as salaries etc. There is also the requirement under TUPE to “inform and consult” with all affected employees; if an employer fails to do this each employee is entitled to claim 13 weeks uncapped pay. Consider that there are 10 employees the figures add up very quickly.

If you are looking to purchase a business you need to make sure that you take into account whether TUPE applies and if so that you are compliant with its requirements.

Should you wish any further information concerning this article or any other employment matters please contact Tim Carter by clicking on the button below.

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