

RESTRUCTURING & INSOLVENCY NEWSFLASH

3rd August 2009



TUPE & Administration Oakland v Wellswood (Yorkshire) Ltd 2009

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In November 2008 the Employment Appeal Tribunal handed down judgment in Oakland v Wellswood (Yorkshire) Ltd, and found that TUPE did not apply to an administration sale.

The business had been sold by the administrators shortly following appointment, to a third party who took on some of the employees, and subsequently dismissed the Claimant. The Administrators were of the view that it was not possible to rescue the company as a going concern, and it was anticipated liquidation would be the exit route from administration. The Claimant brought a claim for unfair dismissal, which the EAT dismissed on the basis that the Claimant had been employed for less than 12 months by Newco.

The EAT held that TUPE did not apply as the administration had been instituted with a view to the eventual liquidation of Oldco's assets, rather than on a going concern basis, with the result that Regulation 8(7) TUPE meant that TUPE did not apply, and that therefore the Claimant could not take his previous employment with Oldco into account to demonstrate that he had more than 12 months continuous employment.

Following the handing down of judgment many people believed this decision meant that TUPE did not apply to sales of businesses by administrators in general.

On 30 July 2009 the appeal of this decision was heard, and upon appeal the director raised a new argument that his rights were preserved under S218 Employment Rights Act 1986. This section provides that:

218. - (1) Subject to the provisions of this section, this Chapter relates only to employment by the one employer.

(2) If a trade or business, or an undertaking (whether or not established by or under an Act), is transferred from one person to another-

(a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and

(b) the transfer does not break the continuity of the period of employment

The court found this to be a "knock out" blow, and allowed the appeal. Although it did not formally rule on this point, the court also commented that there was a strong argument that reg.8(7) of the TUPE Regulations did not automatically apply whenever a company is placed into administration.

The ruling on appeal reaffirms that:

- notwithstanding the EAT decision, the applicability of TUPE remains a live issue in insolvency appointments; and

- it is important that office-holders ensure that they obtain suitable indemnities in respect of any potential TUPE exposure in any Sale & Purchase agreement entered into.

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