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## TUPE

### How far does the insolvency exemption go?

The Court of Appeal recently gave its long awaited judgment in *Key2law LLP v Gaynor De'Antiquis*, in relation to the scope of the exemption to TUPE for companies which are subject to insolvency proceedings. The key issue was whether administration proceedings constituted 'insolvency proceedings' within the meaning of regulation 8(7) of TUPE.

The claimant was a solicitor who was dismissed on the ground of redundancy on 21 July 2008. The firm that had employed her went into administration on 25 July 2008. Three days later, the administrators entered into a management contract with Key2 in relation to the office where she had worked. She brought a claim against Key2 on the basis that Key2 was liable as the transferee of the undertaking where she had worked.

Regulation 8(7) of TUPE provides that where the insolvency proceedings are analogous to bankruptcy proceedings and have been brought with a view to the liquidation of assets, there is no transfer of staff and no claim for unfair dismissal against the transferee arises.

The Court of Appeal held that the appointment of administrators was not "with a view to liquidation" because the administrator was bound to pursue certain objectives such as rescuing the company. This principle applied even if the administrator had no realistic hope when appointed of rescuing the business.

This case provides welcome clarification in an area which is becoming increasingly relevant in practise. Prospective purchasers must now be prepared to accept all employee liabilities of a business which is in administration.

### Can a pre-transfer dismissal be unfair even though no buyer was identified?

The Court of Appeal in *Spaceright Europe v Bailavoine* held that it could.

Under Regulation 7 of TUPE, a dismissal will be automatically unfair if the principal reason for the dismissal is the transfer itself or a reason connected with the transfer which is not an economic, technical or organisational reason ("**ETO**").

The Court in this case held that the employee, the CEO of the company, had been dismissed in order to make the business more attractive to potential buyers. The dismissal was therefore connected to the transfer, despite the fact that no actual buyer had been identified at the time he was dismissed. The employer's desire to achieve a sale of the business was not sufficient to establish an ETO reason.

This judgment makes it more difficult for organisations to make tactical staff dismissal decisions in the hope of attracting a buyer for the business. Unless the termination is for an ETO reason it automatically will be deemed unfair.

### Disability discrimination: what are reasonable adjustments?

The duty to make reasonable adjustments for disabled employees often causes employers concern and confusion in relation to discrimination issues. In the following two cases, the EAT considered what the phrase "reasonable adjustments" means, and to a limited extent has helped to clarify the position.

In *Salford NHS Primary Care Trust v Mrs A Smith*, the claimant was on long term sick leave with chronic fatigue syndrome and was offered redeployment and retraining by the Trust. She refused this on the basis that it was not suitable for her personally. The EAT held that the concept of "reasonable adjustments" was primarily concerned with enabling the disabled person to remain in or return to work. The duty does not extend to offering a career break or rehabilitative non-productive work.

In *Leeds Teaching Hospital v Foster*, the claimant was on long term sickness absence due to stress from 2006 and was dismissed on capability grounds in 2009. The EAT upheld the Tribunal's finding that he was unfairly dismissed and was subjected to disability discrimination. When considering what "reasonable adjustments" the employer ought to have made, the EAT noted that one such adjustment would have been to put the claimant on the redeployment register, even if the prospect of a redeployment opportunity becoming available was small. The mere prospect of an adjustment removing a disadvantage is sufficient to make an adjustment reasonable and there is no need for that prospect to be "good" or "real".

The Employment Code also provides guidance on the factors to be taken into account when deciding whether an adjustment is reasonable. These include:

- the effectiveness of the proposed adjustment;
- the costs which would be incurred by the employer;

- the extent of the employer's financial and other resources;
- the nature of the employee's activities; and
- the availability to the employer of financial or other assistance.

These cases indicate that employers do need to consider what reasonable adjustments could be made to assist the employee to return to work, i.e. offering redeployment and retraining, but this duty does not stretch to offering career breaks or rehabilitative work.

### Fiduciary duties

The High Court, in *Customer Systems plc v Ranson*, considered what breaches had been committed by ex-employees who set up a consultancy business to compete with their former employer before leaving its employ. The Court had to consider whether three former employees were liable to Customer Systems for establishing a new company and for using Customer Systems' business contacts and invoices in furthering the new company's business.

All employees owe their employer a duty of fidelity whilst still employed, which includes the duty not to compete. Directors and senior managers have additional fiduciary duties. In this case the Court held that one employee owed certain fiduciary duties because of his level of seniority, even though he was not a director. As such, he was in breach of these duties.

The Court noted that although an employee should be free to prepare for his future whilst still employed, he should at the same time serve his employer's best interests. The employee was therefore entitled to discuss his future plans with third parties and set up a potential contracting party. However, by obtaining contracting work during his employment, transferring business contact details and copying invoices to use in the new business, the employee had breached his implied duty of loyalty as well as his fiduciary duties to his employer.

The Court also considered the other employees' restrictive covenants, which included a 12 month non-compete covenant preventing the employees from being employed by any of the claimant's past or present customers. To be enforceable a restrictive covenant must be reasonable in the circumstances

and be in the public interest. The Court held the covenants in this case to be unenforceable on the basis that they were too wide, namely that no time limit was imposed on the interval between the employees' involvement with the customer and the employees' leaving the claimant's employment. Further, the covenants were not confined to the area of the business in which the employees worked and did not specify the level of involvement that the employees had had with the customers.

This decision helps to clarify the extent to which employees are able to compete, or prepare to compete, with their employer whilst still employed. It also highlights the care that should be taken when drafting restrictive covenants. If they are too wide they will be unenforceable.

### In brief

- The EAT recently held in *Dunn v Institute of Cemetery and Crematorium Management*, that less favourable treatment of an employee, not because she is married, but because she is married to particular person, is still discriminatory.
- The Government has recently suggested that the increase in the qualifying period for unfair dismissal claims from one year to two years will apply only to new employees who commence work on or after 6 April 2012.
- The EAT has confirmed that where an employer's offer of re-engagement is unreasonably refused, the Claimant will have failed to mitigate his loss and therefore not be awarded future loss of earnings, *Debique v Ministry of Defence*.
- The High Court considered the extent to which legal cost indemnities extended to the criminal investigations into the News of the World phone hacking allegations. The Court found that the indemnity given to Andy Coulson did not extend to the legal costs involved in his arrest and interview under caution, whilst Glenn Mulcaire's indemnity did. These cases highlight the importance in considering the structure and drafting of an indemnity for an existing or a departing employee very carefully.
- In *Weatherford v Forbes* the EAT held that an employment judge in Scotland does not have the power to order a person outside of Great Britain to disclose documents.
- The laying before Parliament of the Employment Tribunals (Increase of Maximum Deposit) Order 2012 appears to be paving the way for an increase in April 2012 to the maximum amount that employment judges are able to order to be held on deposit for a claim to proceed when it has little prospect of success. The maximum is currently £500.

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