Briefing

Corporate Turnaround and Insolvency

BURGES SALMON

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When are employee debts recoverable from the Secretary of State?

Employees who transfer to a new employer from a business that is under insolvency proceedings may be able to recover unpaid wages and other debts from the Secretary of State.

However, ***BIS v Dobrucki*** has confirmed that the Secretary of State will only pick up the liabilities of the old employer (the transferor). It will not be responsible for liabilities that are incurred after the transfer has taken place; that is, any liability of the new employer (the transferee).

The background

Response FM Ltd provided emergency maintenance cover work for businesses around the M25. In 2011, it ran into financial difficulty and on 14 June 2011, joint administrators were appointed. Soon after, Mr Sibley, a 90% shareholder of the company bought the business as a going concern but it ceased trading only three days later on 17 June 2011.

Five employees brought claims against the Secretary of State, the joint administrators and Mr Sibley for arrears of pay, holiday pay, notice pay and redundancy.

The question arose as to who was responsible for these debts?

The issues

The standard position under TUPE (The Transfer of Undertakings (Protection of Employment) Regulations 2006) is that debts owed to employees by a transferor will transfer, along with the employees' employment, to the transferee (regulation 4).

However, where the business is in administration, this position is amended so that, if the employees are able to recover certain debts from the Secretary of State, those recoverable debts would not transfer (regulation 8(5)). The transferee would, however, take on liability for any remaining debts, after the Secretary of State had paid out.

The employees in this case were owed a number of payments:

- Arrears of pay up to 14 June 2011;
- Arrears of pay for 15-17 June 2011;
- Unpaid holiday pay;
- Three of them were owed notice pay; and
- One was due a statutory redundancy payment.

At first instance, the Employment Tribunal found that all of these payments were due from the Secretary of State, under the National Insurance Fund. The Secretary of State appealed.

What did the court decide?

The EAT held that the Employment Tribunal was wrong to apportion all liability to the Secretary of State.

Some of the debts only arose after the transfer on 14 June 2011; in particular, the pay from 15-17 June 2011, the notice pay and the redundancy pay. Regulation 4 could not have been intended to apply to these debts, as they were never debts owed by the transferor.

The EAT made it clear that the Secretary of State could only be liable for debts which accrued prior to or coincident with the transfer. If a debt accrued after the transfer, it would be the liability of the transferee and (unless the transferee itself was insolvent) there is no provision under TUPE that would pass this liability to the Secretary of State.

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The EAT found the Secretary of State liable for the arrears of pay up 14 June 2011 but not thereafter. Mr Sibley was liable for the notice and redundancy pay, but the EAT made no finding as to the unpaid holiday pay, as the claim was not substantiated on the facts of the case.

What does this mean for practitioners?

This case is a useful reminder that although the National Insurance Fund will pick up certain debts owed to employees of an insolvent employer; the Secretary of State will not be liable for any debts which have accrued post-transfer.

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