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Legal Q&A... TUPE and insolvencies

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As the recession deepens, business failures represent opportunities for buyers to acquire the assets and goodwill of insolvent businesses cheaply in a 'fire sale'. However, acquisitions are often made in a rush with little or no chance for due diligence and without any warranty or indemnity protection for the buyer. Managers need to understand the TUPE issues they face.

Q Does TUPE apply to the purchase of an insolvent business?

A TUPE was amended in 2006 to promote the rescue and the sale of insolvent businesses as going concerns. Different provisions apply according to whether the business is subject to:

■ Relevant insolvency proceedings (RIPs) – an undefined term that is broadly intended to cover transfers of a going concern (for example, administration, administrative receivership and voluntary arrangements) rather than the liquidation of assets; or

■ Bankruptcy or analogous insolvency proceedings (BAIPs) – again undefined but where the purpose of the proceedings is to liquidate assets. It covers bankruptcy, compulsory liquidation and creditors' voluntary liquidations.

Q Will the buyer inherit the seller's debts to the employees?

A Where the seller is subject to RIPs at the time of transfer, TUPE is relaxed so that liability does not transfer to the buyer for payments under relevant statutory schemes by which employees can claim from the National Insurance Fund. For

example, they can claim up to eight weeks of pay arrears, six weeks holiday pay, statutory notice and redundancy pay. But the buyer will still be liable for debts to the employees not covered by the statutory schemes or which exceed the statutory limit on a week's pay.

Where the seller is subject to BAIPs, there is no transfer to the buyer of the contract of employment and, therefore, of any debts owed by the seller to the employees.

Q Does the special protection against dismissal under TUPE still apply?

A The normal protection against dismissal applies to the dismissal of employees of an undertaking subject to RIPs. Therefore, employees with one year's service who are dismissed due to the transfer or a transfer connected reason will be unfairly dismissed, unless it is for economic, technical or organisational (ETO) reasons. The buyer will inherit liability for that dismissal, even if the dismissal took place before the transfer. Buyers should be wary of dismissals by the insolvency practitioner to make a sale more attractive but for which the buyer could be liable.

Where the seller is subject to BAIPs, the special protection against dismissal does not apply. So not only will staff dismissed by the insolvency practitioner before the transfer be unable to claim that the dismissal is automatically unfair, but they will be unable to claim they have been automatically unfairly dismissed where they have been taken on by the buyer and subsequently

dismissed for a transfer-related reason.

Q Can the buyer vary uneconomic terms and conditions of employment?

A TUPE normally precludes a buyer from varying terms and conditions to the detriment of the employee for a reason connected with the transfer, unless it's an ETO one. However, where the seller is subject to RIPs at the time of transfer, subject to certain conditions, the seller or buyer can agree changes with a trade union or elected employee representatives – provided the reason for the change is to safeguard employment opportunities by ensuring the survival of the undertaking. This is significant: for example, it permits pay cuts or benefits variations that would not otherwise constitute an ETO.

If the business is subject to BAIPs, the automatic transfer principle of TUPE doesn't apply so staff do not transfer automatically. Similarly, restrictions on the buyer varying the contracts of employees do not apply. The buyer is free to change terms and conditions, although statutory continuity of employment still applies.

Q Does collective consultation still apply, even if the sale happens quickly?

A The duty to inform and consult on the transfer with a trade union or elected employee representatives applies regardless of the form of the insolvency proceedings. The speed at which acquisitions are sometimes completed often means there is little time for consultation. Nevertheless, buyer and seller are jointly and severally liable for up to 13 weeks actual pay per person for breach. However, the employer has a defence if there were special circumstances that made it not reasonably practicable to comply, and the employer did as much as it could.

TUPE, OR NOT TUPE?... Does TUPE apply to the purchase of insolvent businesses?

