



Corporate Turnaround and Insolvency

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Companies in administration will be bound by TUPE

Companies which are placed in administration are not exempt from the protection which the Transfer of Undertakings Regulations 2006 (TUPE) provides to their employees, even in a pre-pack situation. Employees will automatically transfer to the buyer of the business in administration and will have special protection against dismissal.

The Court of Appeal has just handed down its judgement on the impact of TUPE where businesses are placed into administration. In *Key2Law (Surrey) LLP v De'Antiquis* (a party to the OTG Ltd v Barke litigation in the Employment Appeal Tribunal), the Court found that all administrations, including pre-packs, will fall outside of the exemption provided by Regulation 8(7) of TUPE (which excludes the automatic transfer of employees under TUPE) as they are not 'instituted with a view to the liquidation of assets' as is required for that Regulation to apply. This means that the employees are deemed to transfer automatically to the buyer without variation to their terms of employment and are protected against dismissals connected with the TUPE transfer.

Practical impact of decision

This decision is helpful insofar as it offers a degree of certainty by resolving two previously conflicting Employment Appeal Tribunal decisions. It, therefore, allows those involved in the administration process to be more confident that employees of businesses placed into administration (even where pre-pack) will benefit from the protection of TUPE.

However, there is less clarity elsewhere for administrators, for example, dismissing employees pre-sale remains a difficult issue. Equally, this decision will do little to encourage a 'rescue' culture and potential buyers (and those considering pre-packs) will need to consider the implications and impact of TUPE before acting.

Key2Law (Surrey) LLP v De'Antiquis EWCA/Civ/2011/1567

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