

TUPE - Take care! (2)

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Why is this important? – In certain circumstances the dismissal of a senior key employee by an administrator will be unavoidably unfair.

Under TUPE, where an employee with at least a year's service is dismissed and the sole or principal reason for that dismissal is either the transfer itself or connected with the transfer (but not an economic, technical or organisational reason), then it is automatically unfair. Affected employees can claim compensation for unfair and wrongful dismissal.

Spaceright Europe Ltd v Bailavoine & anr (UKEAT/0339/10/SM) involved a claim by the CEO of Ultralon Holdings Ltd (the "Company"). The Company went into administration and the CEO was dismissed by the administrators very early in the administration as they expected that no purchaser would require a CEO. At this point, no purchaser had been identified. Just over a month later, the company was sold as a going concern. The Employment Tribunal and the Employment Appeal Tribunal both held that the dismissal was unfair as its sole reason was the transfer itself (even though at the time of the dismissal a purchaser had not been identified) and not an economic, technical or organisational reason. The dismissal was to make a future sale easier – the business would still need a CEO, but any purchaser would be likely to have its own.

Practical implications:

Senior Executives should be dismissed for an economic, technical or organisational reason to avoid passing on to a future buyer the significant cost of compensation for unfair dismissal.

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