

Business & Employment Brief

Your Legal Team for Life

Issue 16



Ian Temple



Lauren Dimmack



Deborah Prance



June Hood



Kate Middleton

The Business & Employment Teams at Brooks & Partners

Court of Appeal Rules on TUPE Transfers and Administrations

In two separate cases the Court of Appeal has given guidance on the operation of the 'automatic transfer' principle under the Transfer of Undertakings (Protection of Employee) Regulations 2006 where a company goes into administration. Under regulation 8(7) of TUPE the principle that employees of one company automatically transfer to another on the transfer of the business is disapplied where insolvency proceedings have been instituted "...with a view to liquidating the assets of the transferor." However, it was unclear whether regulation 8 (7) applied to Companies in administration where one of the principle purposes of the administration is to rescue the business as a going concern. In *Key2Law (Surrey) LLP v De'Antiquis* the Court held that an administration does

not constitute "insolvency proceedings" for the purposes of TUPE meaning that an employee (in this case, a solicitor) was protected against a transfer connected dismissal. In the case of *Spaceright Europe Ltd v Baillavoine* the Court also held that a pre-transfer dismissal by an administrator can be connected with the transfer even where no transferee had been found or was even in contemplation at the time of the dismissal. Therefore, such a dismissal by an administrator is potentially unfair. The Court went further to hold that an administrator's desire to dismiss employees 'pre-transfer' to make the business more attractive to potential purchasers was not an "economic, technical or organisational" reason entitling the administrator to dismiss. The dismissal of the Claimant was therefore automatically unfair.

Britain's Got Talent Claim Fails

A contestant on the "Britain's Got Talent" variety show has failed in her claims against the shows two co-producers and two of the judges, Simon Cowell and Amanda Holden. She had primarily claimed that reasonable adjustments had not been made to accommodate her disability and that she had subsequently been harassed. Her claim failed primarily because (1) the Respondents were unaware of her disability (2) there was no contract of employment between her and any of the Respondents and (3) that her claims were out of time in any event.

Increase in Rates and Limits

The maximum compensatory award for unfair dismissal is to increase from £68,400 to £72,300 from 1st February 2012 with the cap on a week's pay (for calculating redundancy and certain other awards) increasing from £400 to £430 per week. Statutory maternity, paternity and adoption pay will increase from £128.73 to £135.45 per week from April. Statutory Sick pay also increases in April from £81.60 to £85.85 per week. Maternity allowance increases from £124.88 to £135.45 per week also from April 2012.

Pension Auto-Enrolment Delay

The Department for Work and Pensions has confirmed that the pension auto-enrolment staging dates for businesses with fewer than 50 employees will be delayed by at least a year. A revised staging timetable and guidance is to follow. The largest businesses are unlikely to be affected.

Kate Middleton
on Employment



Commercial & Employment Department members:

Legal Team:
Ian D Temple
Lauren Dimmack
Deborah Prance
June Hood
Kate Middleton

Support Team:
Carol Mapp
Janet England
Stephanie Stephenson
Andrea Tucker

Lyons House, 2 Station Road
Frimley, Surrey GU16 7JA

Telephone: 01276 681217

Facsimile: 01276 691290

law@brooks-partners.co.uk

www.brooks-partners.co.uk

Disclaimer

The contents of this newsletter do not constitute legal advice and are provided for general information purposes only. Brooks & Partners shall not be liable for any technical or other errors within the information

Advice on Acquisitions Deductible

Lauren Dimmack on
Commercial Matters



One common area of dispute between companies and HM Revenue and Customs (HMRC) is that of deductibility of expenses. One of the hottest areas of dispute is often whether an expense is a trading expense (deductible as part of the day-to-day running costs of the company) or a capital expense, which is normally allowable only through the capital allowances regime, if at all.

In a recent case, the Court of Appeal considered the position of an investment company which had incurred significant professional fees securing advice on the possible acquisition of another company.

The position arose because the company claiming tax relief on the expenditure had identified another company as a possible merger or acquisition target. After obtaining a great deal of accounting, legal and financial advice in order to evaluate the merits of the proposed acquisition, they made an offer to the board of the other company. The offer was rejected and was not pursued.

HMRC denied the company's claim for tax relief on the bills for the professional advice. The decision turned on the question of the treatment of the expenditure. Were the expenses management expenses deductible under the Taxes Act (S 75(1) ICTA 1988) or were they, as the Revenue claimed, capital expenses and thus not allowable as deductions in the corporation tax computation?

The judges accepted the company's argument, accepting that even if the acquisition had gone ahead, the expenditure would have been treated as a trading expense and not as part of the cost of the purchase of the target company. It was therefore a revenue item, not a capital item, and was deductible for corporation tax purposes.

The tax authorities not infrequently will fight taxpayers on issues in spite of their own arguments not being strong. A robust approach from the taxpayer can often be effective. To achieve the best result, sound advice is essential. If you would like advice on this subject contact Lauren Dimmack on 01276 681217 or e-mail:

lauren.dimmack@brooks-partners.co.uk.

Buying from an Administrator - Take Care

With businesses becoming insolvent in large numbers, opportunities abound to acquire assets from their administrators. However, the low prices sought for the assets are due, at least in part, to the additional risk to the purchaser.

Here are some of the main issues to be aware of when buying property from an administrator:

- Vacant possession of a property will not normally be guaranteed and the cost of clearance of items left in the building should be borne in mind;
- No guarantees or warranties re-

garding the property will be given – undertaking proper due diligence to reduce risks is advisable;

- There may be items that appear to be a part of the property being sold which do not in fact belong to the insolvent business; and
- The administrator acts only as agent for the insolvent company and will accept no liability for errors or omissions.

Buying a property from an administrator is a risky business. We can help you to control the legal risks.



June Hood
on Employment

Annual Leave Ruling by June Hood

The Supreme Court has held that an employer could force those employees working on offshore installations to take their annual leave entitlement during “field breaks” spent onshore and refused to refer the matter to the European Court of Justice for further determination.

The ruling will also be relevant to employers in other sectors where their employees have traditionally taken holiday during periods where they were not required to work such as those in the tourist industry, entertainers, teachers and professional sportsmen and women.