

The Involuntary Employer

A toolkit for insolvency practitioners

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Introduction

- Employee claims only
- Claims against those who are not parties to the employment contract
- Businesses and individuals

“Employee” has no single definition

Employment Rights Act

s.230:

An individual who has entered into or works under a contract of employment.

A contract for service or apprenticeship, whether express or implied and whether oral or in writing.

Equality Act

s.83:

Employment under a contract of employment, a contract of apprenticeship, or a contract personally to do work.

(Contract workers also protected – s41).

“Worker” status – for PID claims

s.230

An individual who has entered into

(a) a contract of employment; or

*(b) Any other contract, whether express or implied and... whether oral or in writing, whereby **the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.***

..... With further extensions

s.43K:

- Those introduced or supplied to work for one business, by another on terms not fixed by the individual;
- The work is done at a place not under the control or management of the individual and they would qualify as a worker under the standard definition if the requirement to do the work personally was removed.
- Various others working under contracts with defined entities (eg NHS bodies).

General insolvency principles

- Employees are creditors
 - General provability of debts: *Re Nortel* [2013] UKSC 52
 - Some claims carry preferential status: IA 1986, s. 387; Schedule 6
 - Remuneration (£800 limit)
 - Only employees within meaning of ERA 1996
 - Accrued holiday remuneration: paras 10, 14(2)
 - Pensions contributions
 - Other miscellaneous categories

Adopting contracts

- Compulsory liquidation = termination
 - ERA 1996, s136(5)(b)
 - *Re Oriental Bank Corporation* (1886) 32 Ch D 366
 - Waiver of dismissal: Dear IP December 2003
- CVL = not automatic
 - Power to continue under IA 1986, s. 87; Sch 4, para 5
- Administration
 - *Powdrill v Watson* [1995] 2 AC 394
 - Sch B1, para 99

Waterfall of priority

1. Fixed charge creditors
2. OR fees and expenses
3. Moratorium debts

Where a winding up commences within 12 weeks of the day after the end of any moratorium IA 1986 ss174A(1), 175(1). 'Moratorium debt' is defined in IA 1986 sA51. Also within this category are certain pre-moratorium debts, defined in IA 1986 s174A(2)(b) (as defined in sA18).

4. Expenses of the winding-up / administration
IA 1986, ss. 115 and 175(1)(b); IR 2016, r.7.108(1), (4)
Sch B1, para 99(5), (6)

5. **Preferential debts**
IA 1986, ss. 386-387; Sch 6

6. Floating charge creditors
7. General unsecured creditors
8. Statutory interest
9. Non-provable liabilities
Limited category after *Re Nortel*
10. Shareholders

Provable or payable?

- Expenses of the winding-up/administration
- Category 1: Back wages.
 - Any payment of wages or other sums which have fallen due and payable by the company but which have not been paid.
 - Due date for payment of some of these claims could be delayed so that, although they relate to a period of employment prior to the appointment of the insolvency practitioner, they in fact fall due and payable only after the insolvency practitioner has been appointed.
 - E.g. bonus payments due after the year in which they are earned / pension obligations.
- Category 2: Ongoing costs. Claims arising in respect of ongoing employment during the course of the insolvency proceedings. Adopted contracts
 - wages, pension rights, benefits in kind (eg car, medical insurance).
- Category 3: Termination claims. If the employment by the company of an employee is terminated, then various sums may become legally due and payable by the company by way of termination costs
 - Damages for breach of contract
 - Statutory claims for unfair dismissal
 - Redundancy
 - Protective awards

Protective awards

- Obligation to consult under Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA 1992'), ss. 188 and 193
- Preferential debt
 - *Mann v Secretary of State* [1999] ICR 898
- Guaranteed out of National Insurance Fund
- Liability of company only
- But criminal penalty on failure to notify Secretary of State: s. 194(3)
 - 'Officer' of the Company: *Re Powertrain*
- Based on seriousness of default, not on 'loss' caused
 - Court starts with maximum period and see if there are any mitigating factors
 - Insolvency not in and of itself a mitigating factor / 'special circumstances'
- Identifiable trend in employee protection?
 - *Angus Jowett & Co v NUTGW* [1985] IRLR 236
 - *TGWU v Morgan Platts* (2003) *EAT/0646/02* [2003] All ER (D) 9 (Jun)
 - *AEI Cables Ltd v GMB* (2013) *UKEAT/0375/12*
- Practical steps?
 - More applicable to administrators
 - Don't just talk to directors
 - Give as much warning as possible
 - But possible publicity/ impact on sale price

TUPE Considerations

- Transferee takes over employment liabilities incurred by insolvent company
- Transfer = no termination = no employee claim in the estate
 - Part of duty on IP to minimise unfair dismissal claims
- Claims arising from obligation to consult remain with transferor: Reg. 15(9)
- Rights and liabilities in relation to occupational pension scheme do not generally transfer: *Hagen v ICI* [2002] IRLR 31
- Reg 8(7): transfer and dismissal provisions in Regs 4 and 7 will not apply if
 - 'the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor'
- What about administration?
 - *Key2Law (Surrey) LLP* [2011] EWCA Civ 1567
 - Policy decision to take a 'brightline' – should not depend on which 'Objective' is targeted: Sch B1, para 3(1)
 - Nobody suggested all administration proceedings should be within Reg. 8(7)
 - Therefore no administration proceedings are
- But cf Annex A to the EU Insolvency Regulation?
- Will have to rely on ETO reason in administration

IP liability for criminal / civil penalties

- TULRCA 1992, s 194(3) which could impose criminal liability for failure to notify the Secretary of State of impending redundancies
- ERA 1996, ss 180 and 190 and the Pension Schemes Act 1993 (PSA 1993), ss 157 and 169 may be held to impose criminal liabilities on IPs for a failure to comply with requests from the Secretary of State for information about claims on the National Insurance Fund
- Insolvency practitioners are generally considered to have personal liability to deduct income tax and national insurance from amounts paid to employees and may have criminal liability if national insurance contributions are not paid
- Direct liability under the Equality Act 2010 for aiding unlawful discrimination
- NMWA 1998
- Health and safety legislation can impose civil and criminal liabilities on employer companies, e.g. Fire Precautions Act 1971 (FPA 1971), the Health and Safety at Work etc Act (HSWA 1974), the Environmental Protection Act 1990 (EPA 1990)
- Sale of assets at undervalue / undue reliance issues

Equality Act claims

8 protected characteristics

Age

Disability

Gender reassignment

Marriage/civil partnership

Pregnancy/maternity

Race

Religion/belief

Sex

Sexual orientation

6 types of discrimination

Direct: s.13

Indirect: s.19

Harassment: s.26

Victimisation: s.27

Disability-related: s.15

Reasonable adjustments: s.20

NB: Equal pay also now covered.

PID (whistleblowing) protections

Dismissal

S103A ERA:

An employee who is dismissed shall be treated..... as unfairly dismissed if the reason... or principal reason for the dismissal is that the employee made a protected disclosure.

Detriment

s.47B ERA:

*A worker has the right not to be subjected to **any detriment** by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*

What is a PID? To qualify:

S43B –H:

- Any disclosure of **information** which
- In the **reasonable belief** of the worker
 - **Is made in the public interest and**
 - **tends to show** that any of the following **has, is or is likely** to happen.
- Criminal offence
- Failure to comply with a legal obligation
- Miscarriage of justice
- Endangerment of health and safety
- Environmental damage
- Deliberate concealment of any of the above.

To be protected:

- The disclosure must be done in an authorised way, including:
 - To the employer or other responsible person
 - To various prescribed persons
 - To third parties, provided the qualifying criteria are met.

Can include a disclosure directly to an IP (in their capacity as agent for the employer company).

Discrimination claims - Why should the IP care?

s109(2)

Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

S110(1)

A contravenes this section if

- (a) A is an employee or agent*
- (b) A does something which by virtue of s109 is treated as having been done by the principal, and*
- (c) The doing of that thing by A amounts to a contravention of this Act by the principal.*

The statutory defence for Agents

S110(3):

A does not contravene this section if –

- (a) A **relies on a statement** by the principal that doing that thing is not a contravention of the Act; and*
- (a) It is **reasonable** for A to do so.*

The PID / Whistleblowing dimension

- S47B: Same principles apply to detriment claims.
- Detriment does not include dismissal where the claim is against the employer.
- But it does include dismissal where the claim is against a party other than the employer (*Timis v Osipov & Anor [2018] EWCA Civ 2321*).

So the agent can be liable for the dismissal!

Another approach to IP Liability?

Spencer v Lehman Brothers Ltd [2011] EqLR 319

- Claim failed on facts (guidance is first instance and *obiter*)
 - Firm not liable as agent – personal appointment
 - Administrators lacked requisite knowledge of potential discrimination to make them ‘knowingly aid’ any discrimination
 - Reasonable reliance on managers within Lehman
- Administrators *could* have been liable if (i) there had been discrimination; and (ii) on the basis the employees were agents of the administrators.
 - Seems unlikely? Employees remain agents of the company (even if their wages rank as expenses of the insolvency)
 - But possible that they could be engaged as agents of the IP, in the same way valuers etc. are
- But still leaves possibility of aiding under s.110.

Liability for post-termination conduct

Discrimination: EqA – s108:

*A person must not discriminate against or harass another if the discrimination **arises out of and is closely connected to a relationship which used to exist between them, and the conduct would contravene the act if it had occurred during the relationship.***

PID Detriment:

Detriment claims can be brought for post-termination acts / omissions, as long as there is the necessary causal link.

Agents and principals - joint and several liability

- If both are liable for the discrimination / detriment, each is jointly and severally liable for the losses resulting from it.
- A major issue for IPs when the employer may well be unable to meet any award.
- Discrimination / detriment claims often the highest value claims.

Discussion

- Theoretical liability only or potential to arise in practice? Practical examples
- Another reason not to continue trading?
 - How does this align with the avowed rescue culture?
- The oddity of automatic termination in compulsory liquidation and its impact
- Practical steps for IPs
- Establishing the statutory defence