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Insolvency Update

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EMPLOYEES – CONTINUITY OF EMPLOYMENT - CASE UPDATE

DA SILVA JUNIOR v COMPOSITE MOULDINGS & DESIGN LIMITED

EAT 7 OCTOBER 2008

BACKGROUND

Mr Da Silva started working for Andream Limited on 11 November 2005. Mr Greenwood was the majority shareholder in Andream.

On 20 November 2006, Composite Mouldings & Design Limited was incorporated. Mr Greenwood was the sole shareholder.

On 1 December 2006, Andream dismissed all of its employees, following which it entered into Members Voluntary Liquidation.

Composite began trading in January 2007 and offered Mr Da Silva employment on 14 January 2007.

Composite dismissed Mr Da Silva on 17 August 2007.

Mr Da Silva brought an unfair dismissal claim against Composite.

KEY ISSUES

In order to proceed with his unfair dismissal claim, it was necessary for Mr Da Silva to demonstrate that he had been employed by Composite (or by a group of associated employers) for a continuous 12 month period.

Mr Da Silva claimed that his employment with Andream should count towards this continuous employment, which gave rise to 2 issues for the Employment Tribunal to consider:

1. Whether the 6 week break between Mr Da Silva's employment with Andream and his employment with Composite broke the continuity of employment; and

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2. Whether Andream and Composite were associated employers

THE DECISIONS

At first instance the Employment Tribunal held:

1. that the 6 week break was "an absence on account of a temporary cessation of work" and that, accordingly, it would not disrupt the continuity of Mr Da Silva's employment; and
2. that the companies were not associated employers and that, accordingly, the period of Mr Da Silva's employment by Andream would not be counted in the continuity of his employment. His employment with Composite commenced a new period of employment.

Mr Da Silva appealed the Employment Tribunal's second finding. Surprisingly, the first was not appealed.

On appeal the EAT held that Andream and Composite were associated employers as in practical terms Mr Greenwood had taken the principal decisions key to Mr Da Silva's employment in respect of both companies. The EAT considered that the two companies should be regarded as having been under the "control" of the same person. Mr Da Silva was, therefore, free to proceed with his unfair dismissal claim.

COMMENT

It has been established through case law that two companies are associated employers for the purposes of the Employment Rights Act 1996 if the same parties are able to exercise voting control in general meeting. On that basis, we would question whether it would have made any difference to the outcome of this case had the liquidator made the decision to terminate Mr Da Silva's employment rather than Mr Greenwood, although we would suggest that the liquidator's separation from the influence of the major shareholder would make the issue arguable. It would, therefore, have been preferable that the liquidator make the dismissal in this case following his appointment.

A rather surprising aspect of the case is the first instance decision that a 6 week break and the intervening appointment of a liquidator (albeit an MVL'r) did not break the continuity of employment. We rather hope that this reasoning is not followed by the Employment Tribunal (as a first instance decision it is not binding) particularly when it comes to TUPE!

Clearly this decision raises an issue in those cases where the office-holder is to effect a sale of all or part of the company's business and assets to an associated company (as defined by ERA 1996) and the acquiring company is intending to employ some of the staff of oldco. If oldco dismisses its employees pre-appointment and newco then offers

them employment there is a real risk that Newco is going to inherit the employees with their continuity of service intact.

AN IMPORTANT NOTE

Insolvency Practitioners should take care in the advice that they give to the management of a company seeking to acquire the business of the liquidating company in respect of which they are appointed (and this extends to any other insolvency in which the IP is selling a business).

It is important to note that the Insolvency provisions of TUPE 2006 will not create a break in the continuity of service of an employee where that employee is subsequently employed by an associated company as this is not an issue that arises out of a TUPE transfer, rather it arises out of the decision of the successor company to offer employment to the employee in question.

The acquiring company should be made aware that they may inherit the continuity of service of any employee of the liquidating company who they subsequently choose to employ as dismissal of that employee could subsequently turn out to be more difficult and expensive than might previously have been anticipated.

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