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NEWSLETTER

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Employment law vs Insolvency law – Law reform required

In the case of Palmer v. Northern Derbyshire Magistrates' Court, it was decided that IPs may be criminally liable for not notifying the Secretary of State at the earliest opportunity about proposed redundancies by way of a Form HR1. The case involved the early sale of a business shortly after appointment by the Administrators which excluded the business and operations of a warehouse and more than 20 employees.

Section 193(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA') states that an employer proposing to dismiss as redundant 20 or more employees at one establishment within such a period shall notify the Secretary of State, in writing, of his proposal: (a) before giving notice to terminate an employee's contract of employment in respect of any of those dismissals, and (b) at least 30 days before the first of those dismissals takes effect. There are similar provisions if the employer is looking to make more than 100 redundancies in a 90-day period with the period before dismissals can take effect increased to 45. Section 194(1) of TULRCA states that an employer who fails to give notice to the secretary of state in accordance with s193 commits an offence and is liable on summary conviction to a fine. Also, of note is s193(7) TULRCA, which states if there are special circumstances rendering it not reasonably practicable for the employer to comply with the requirements of subsections s193, he shall take all such steps towards compliance with that requirement as are reasonably practicable in the circumstances.

So, an Administrator must act in the best interest of creditors, which may involve making immediate redundancies but making immediate redundancies places the administrator at risk of criminal sanction. Catch 22! There is no current solution that resolves this conflict (unless the law in this area is changed), which means that a proposed Administrator may think twice about taking office if they must make redundancies on or shortly following appointment. In most cases, where redundancies are required, it is not practical to give employees the full notice period because speed of sale is often of the essence to achieve a valuable sale, there are often limited resources to pay wages in the notice period and the administrator will be deemed to have 'adopted' the employees' contracts after 14 days, which would then elevate their claims to preferential status – something that may conflict with the administrator's duties to act in the creditors' best interest overall. The Administrator in this case is to seek judicial review as to liability. However, the law does need changing to exclude formal insolvency situations or there is a risk that the restructuring and recovery regime in the UK advantages may be jeopardised.

Overdrawn Director Loan Accounts cannot be reclassified as remuneration when it suits

In the case of Bass & Others v Buchanan [2021] EWHC 2740 (Ch), sole director Ms B Buchanan was ordered to repay her director's loan account balance of £286,421 which she had retrospectively sought to re-characterise as remuneration. The case serves as a useful reminder that a director cannot escape a misfeasance claim by seeking to reclassify the nature of payments made to them after the event and on insolvency. Details of the case can be found at the following link:

<https://www.casemine.com/judgement/uk/617248b05e6c5d879b52ff7f>

Future of insolvency regulation – Consultation proposals

Since 1986, IPs have been regulated successfully by their professional bodies. Most appointment taking IPs in the UK (currently 1,290) are regulated by the ICAEW and the IPA. ICAS and CAI regulate in Scotland and Ireland. This may soon change. An outline of the Government's proposals in the consultation are: (1) Establishment of a single independent government regulator to sit within the Insolvency Service ('IS') in place of the current regulatory framework. The regulator would have powers to authorise, regulate and discipline Insolvency Practitioners and to set standards. It would also have the option to contract out certain functions to suitably qualified bodies. (2) Introduction of regulation of firms offering insolvency services, alongside the authorisation of individual Insolvency Practitioners. (3) Creation of a public register of individual Practitioners and firms offering insolvency services. (4) Introduction of a process for compensation where a party or parties have been adversely impacted by an error or transgression of an Insolvency Practitioner or firm offering insolvency services. (5) The consultation also covers proposals for some reforms to the current arrangements for Insolvency Practitioners to hold a bond or security (or in Scotland, a caution) in the event of dishonesty or fraud. Many IPs would prefer to see an independent regulator without conflicts of interest which the IS clearly have.

Draft Statutory Guidance to Arbitrators about the exercise of their functions under Part 2 of the Commercial Rent (Coronavirus) Act 2022

Where certain rent debts (protected rent debts) have fallen due for payment under a business tenancy that has been affected by coronavirus, the question of whether a tenant should be granted relief from payment will, in the absence of agreement, become a matter eligible for determination by an arbitrator. Part 2 of the Commercial Rent (Coronavirus) Act 2022 sets out the statutory arbitration process that will apply in such circumstances in England and Wales. Details of the draft published on 23 February 2022 for stakeholder consultation may be found at the following link:

<https://www.gov.uk/government/publications/arbitration-on-rent-debt-relief-for-businesses-affected-by-coronavirus>

| Insolvency Service Statistics Case numbers (E&W) | 2021 | | | | 2021 Total | 2020 Total | 2019 Total |
|---|--------|--------|--------|--------|---------------|---------------|---------------|
| | Q1 | Q2 | Q3 | Q4 | | | |
| Corporate | | | | | | | |
| Compulsory Liq. | 115 | 102 | 104 | 155 | 476 | 1,341 | 3,001 |
| CVLs | 2,085 | 2,861 | 3,591 | 4,127 | 12,664 | 9,400 | 12,058 |
| Administrations | 203 | 157 | 333 | 260 | 953 | 1,530 | 1,814 |
| CVAs | 37 | 25 | 20 | 33 | 115 | 259 | 351 |
| Receiverships | - | 1 | - | - | 1 | 3 | 1 |
| Personal | | | | | | | |
| Bankruptcies | 2,801 | 2,306 | 1,870 | 1,718 | 8,695 | 12,602 | 16,741 |
| Debt Relief Orders | 4,163 | 4,374 | 5,735 | 5,863 | 20,135 | 20,342 | 27,179 |
| IVAs | 19,158 | 21,726 | 20,559 | 19,942 | 81,385 | 78,298 | 77,962 |

Commentary on the statistics

Insolvency numbers were affected by the unprecedented levels of government funding and Covid restrictions in 2020 and 2021. January and February 2022 statistics suggest that Creditors Voluntary Liquidations and IVAs are approaching pre-Pandemic levels and other procedures while considerably below previous levels are rising quickly. Increased levels of taxation, interest rate rises, and the Ukraine invasion will all have their effect this year. Between 26 June 2020 and 28 February 2022, in England & Wales, 33 moratoriums were obtained, and 10 companies had a restructuring plan registered at Companies House. These two new procedures were created by the CIGA 2020, but uptake has been limited.

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