EMPLOYMENT | INSOLVENCY

Employment law issues in Channel Islands insolvencies

A recent English law case has highlighted an issue relevant to those involved in Channel Islands-related insolvencies – and particularly to insolvency practitioners ("**IPs**") who take on appointments as administrators – about the interplay between insolvency legislation and employment law.

Although the underlying UK statutes are not directly relevant to practitioners in Jersey and Guernsey, it is a good reminder that a number of different employment law issues can arise where insolvency practitioners are appointed in respect of trading companies and have to take decisions about potential redundancies.

The risks are not abstract – procedural mistakes in the management of redundancy exercises can lead to liabilities not just for the company but also for the insolvency officeholders on a personal basis.

Guernsey and Jersey employment law are highly specialised areas of practise and insolvency practitioners would be well advised to seek early employment law advice, in addition to advice on insolvency law, to avoid making similar mistakes.

The English case

In summary, the English case R (on the application of Palmer) v Northern Derbyshire Magistrates' Court [2021] EWHC 3013 held that an insolvency practitioner acting as an administrator of a company can be found criminally liable under English employment law for failing to notify the UK government about proposed redundancies.

The IP had taken on the appointment in respect of West Coast Capital, which went into administration on 13 January 2015. The following day he had issued 84 factory employees with a letter informing them that they were at risk of redundancy, followed 15 minutes later for a further letter dismissing them with immediate effect.

The required statutory notification that employees were at risk of redundancy was not issued to the Secretary of State until 4 February.

Criminal charges in respect of the failure to notify were brought, and the IP was convicted at the Magistrate's Court. He is currently seeking to appeal against his conviction at the Supreme Court.

The case creates a potential conflict of interest for IPs between their role to secure the best outcome for creditors and their own interests in not breaking the law.

English law requires that potential redundancies of more than 20 people are notified to the government at least 30 days before any redundancies take effect. At the same time, the law provides that any contract of employment not terminated within 14 days of an administrator's appointment will be taken to be "adopted" by the administrator.

If an administrator waited the required 30 days, the "adopted" employees would rank ahead of other creditors – this could be avoided by putting the company into liquidation, but doing so would prevent the company being sold as a going concern (which may be in the interests of creditors).

The position in Jersey and Guernsey

The particular circumstances of the case would not be repeated in Jersey or Guernsey. There are no collective consultation requirements in Guernsey, and consequently there is no equivalent requirement to notify the authorities.

In Jersey there are collective consultation requirements where 12 or more employees will be made redundant in a 30 day period, and the Minister for Social Security ("**the Minister**") should usually be notified of any collective redundancies before notice is given to the employees or at least 30 days before any dismissals take effect. However, if that deadline cannot be met the employer must notify the Minister as soon as possible. Importantly, there is no corresponding sanction for failing to notify the Minister about potential redundancies.

There are however other potential employment law pitfalls for IPs, including:

- Failing to follow any form of redundancy process could lead to unfair dismissal claims from the employees. Depending on their length of service, this could increase the liabilities of the company by up to 6 months per employee.
- In Jersey, failing to follow a collective consultation process can increase the liabilities of the company by up to an additional 9 weeks per employee.
- Should a scenario arise where some employees are to be retained or there may be alternative roles in any group companies there may also be discrimination risks that IPs will need to carefully consider in each jurisdiction given the different protected grounds and remedies available; and
- Employees may have priority claims, and these are different across each Island. IPs will need to make sure they deal with these priorities appropriately.

The implications of those pitfalls should be troubling for IPs – there are risks not just to the assets available for distribution, but also the danger of personal liability for IPs. If an IP increases the liability for the companies by failing to follow the correct redundancy process, they could personally be subject to claims by affected creditors.

Our Insolvency & Dispute Resolution group in Jersey and Guernsey was recently advising on a major local insolvency, and worked closely with our pan-Island Employment law team on issues relating to redundancies in Guernsey and Jersey, including notification, and the operation of redundancy exercises across both Islands. As markets harden there is an expectation that trading business insolvencies may increase. Walkers' industry-focused expertise can prove vital in navigating the potential pitfalls and the risks of officeholder liability.

Further information

We practice Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Irish and Jersey law from an international network of ten offices across Europe, the Americas, Asia and the Middle East. For more information, please get in touch with your usual contact at Walkers or any of the contacts in your region listed below.

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