Administrators' legal tightrope: the UK Supreme Court rules on HR1 filing failures and criminal liability

DENTONS

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Background

In *R (on the application of Palmer) (Appellant) v. Northern Derbyshire Magistrates Court and another (Respondents)*, the Supreme Court held that an administrator appointed under the Insolvency Act 1986 (**IA 1986**) is not an "officer" of the insolvent company under section 194(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA**).

Section 193(2) of TULRCA mandates that an employer proposing to dismiss 20 or more employees as redundant within a 90-day period must notify the Secretary of State at least 30 days in advance of the dismissals taking effect. This is done by a HR1 form. Failure to comply with this requirement is a criminal offence, for which any "director, manager, secretary or other similar officer of the body corporate" may be liable to a fine if they consented or connived with the offence, or if it can be attributed to their negligence.

Facts

This has long posed a problem for administrators who will typically come into an insolvent company and quickly need to take steps to reduce liabilities in the best interests of its creditors. This will often include making redundancies at short notice. That is what happened in the reported case. Mr Palmer was appointed as one of the joint administrators of WCC Limited and, the next day, issued notice of immediate termination by reason of redundancy to the company's employees. Time did not allow for a HR1 form to be lodged with the Secretary of State until after the redundancies had already taken effect, and Mr Palmer was subsequently prosecuted on the basis that he was an "other similar officer" of the company. Mr Palmer sought judicial review of the decision to prosecute him. This was ultimately considered by the Supreme Court.

Decision

In reaching its decision, the Supreme Court noted that there was no clear-cut definition of "officer" under TULRCA, nor was there any other generally accepted definition. That being the case, it turned to the IA 1986 (under which an administrator is appointed) to determine if an administrator appointed to a company was intended to be an "officer" of that company. Interestingly, the Supreme Court notes that, although the IA 1986 refers to an "officer" many times, none of those references are to an administrator. In fact, certain references draw a distinct line between an "officer" of a company and an administrator.

The Supreme Court decided that the provisions of the IA 1986 paint a clear picture: there was no intention under the IA 1986 for an administrator, appointed to manage a company's affairs for the benefit of its creditors on insolvency, to

be an "officer" of the company in question.

The Supreme Court acknowledged that this meant there would no deterrent against deliberate non-compliance by administrators in a situation where compliance was possible, rendering the criminal sanction pointless for companies in administration. It did not, however, consider this justified prosecuting an administrator for the criminal offence of failing to submit a HR1 form given the intentions of the IA 1986.

The Supreme Court also clarified that an "officer" for the purposes of TULRCA (and more generally) is someone who holds a position within the constitutional structure of a body corporate. As Mr Palmer was not in such a position, he was not an "officer" of WCC Limited and could not be prosecuted under TULRCA.

Implications

The ruling will come as welcome news to administrators who now have some comfort that they cannot personally be criminally liable for failure to file a HR1 form. That said, it is still best practice, wherever possible, for administrators to file a HR1 form at least 30 days in advance of proposed redundancies taking effect. This is the case even where directors (or other actual "officers" of the relevant company) offer assurances that they have done so prior to the administrators' appointment. Failure to do so still leaves the company open to prosecution (at least theoretically) and increases the risk of protective awards for failing to consult on redundancy – albeit that is often an unsecured claim.

The loophole which allows administrators to deliberately fail to file a HR1 form, even in the perhaps rare circumstances where they could do so, is problematic. It remains to be seen whether steps will be taken to amend the law to protect employees of insolvent companies from unannounced mass redundancies.

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