

ADMINISTRATORS AND THE UK CORONAVIRUS JOB RETENTION SCHEME

In these exceptional times, a decision handed down *In the Matter of Carluccio's Limited (in administration)* [2020] EWHC 886 (Ch) this Easter Bank Holiday Monday will be welcomed by many. It enables the administrators of Carluccio's to implement their proposals to furlough most of the company's employees with less concern that they might be criticised at a later date for trying to do the right thing. It may have wider implications for businesses operating in similar circumstances and 'would be' administrators who might be inspired by the court's pragmatic approach to the novel and urgent situation. In this case, it was also recognised that, wherever possible, the courts should work constructively together with the insolvency profession to implement the Government's unprecedented response to the Coronavirus pandemic. In doing so, the court also underlined the fact that the rescue culture embodied in the administration process and envisaged by the insolvency legislation should be given effect and interpreted in such a way as to deal with the economic consequences of the Coronavirus pandemic. It ought to be recognised, however, and as expressed in the judgment itself, that the decision and directions will not be binding on affected employees or the Government (or indeed in relation to other cases), who could take issue with the decision at a later date. Nevertheless, the guidance and approach of the court offers reassurance that courts will adopt a pragmatic approach when dealing with the extraordinary situations caused by the Coronavirus pandemic.

UNCERTAINTY AS TO HOW THE SCHEME OPERATES IN ADMINISTRATION

While the Government guidance issued in relation to the Coronavirus job retention scheme (the "**Scheme**") is clear that it is available to companies in administration, a lack of information about how the Scheme operates in the context of existing insolvency legislation meant that insolvency practitioners acting as administrators were uncertain of how it might operate in practice. The Court's decision means that in such cases, administrators do not have to take the precaution of dismissing those who fail to respond to the variation

Facts

- Carluccio's has 70 branches and around 2000 employees.
- All branches have been closed since 16 March 2020.
- Administration order was made on 30 March 2020.
- Administration strategy to mothball the business and in parallel seek a sale of the business to achieve a better result than in a winding up.
- Rather than make employees redundant, administrators wanted to access the Scheme, but only if costs are met under the Scheme and do not incur greater liabilities.
- Administrators wrote to the employees on 30 March 2020, seeking to vary their employment contracts and indicating their intention to apply to the Scheme. This meant that regular wages were to be reduced to 80% (subject to max of £2500) with the company in administration not able to pay any of the 20% remaining portion of the wage. The administrators would only be able to pay employees if and when the company received a grant from the Government under the Scheme. The administrators could not say how long this would take, but they would make payments within 7 days of receipt of the grant. In the absence of a response from employees, the company might have to consider redundancies.
- Out of 1788 employees, 1707 accepted the variation; 4 rejected and stated they wished to be made redundant; 77 did not respond.

letters proposing to amend their contracts of employment to place them on furlough leave at a reduced rate of pay prior to the expiry of the first 14 days of an administration, where the Scheme may offer employees a better alternative.

KEY ISSUES IN THE CASE

The case focused on the following:

- how the Scheme might operate to give effect to the furlough arrangements with the employees who agreed to a variation of their contract; and
- whether administrators could avoid incurring liabilities in relation to those employees who had not responded to an offer to vary their contracts (i.e. because obligations to such employees might rank as administration expenses if their employment contracts were deemed to have been "adopted"), so that they were not forced to make them redundant before the end of the first 14 days of the administration.

WHAT DOES THE DECISION SAY?

Employment contracts in administration

- The appointment of an administrator does not terminate contracts of employment – they will continue until notice to terminate is given or the contract repudiated.
- Failure of the company acting by its administrator to terminate the contract does not lead to the conclusion that the contract has been adopted by the administrator – some conduct that amounts to an election or a decision that the liabilities under the continued contract will be given super priority in administration, and not treated as an unsecured claim, is required. Administrators did not have to take the precaution of dismissing those who had failed to respond to the variation letter prior to the expiry of 14 days into the administration.
- Contracts may be adopted after the first 14 days of administration: in this case the adoption would be effective upon the earlier of the administrators making payments under the employment contracts as varied or making an application under the Scheme.

How can employment contracts be varied?

- Letters sent by the administrators to amend contracts of employment in the case of employees who have expressly agreed to the variation or those who have subsequently agreed were effective.
- Failure to respond would not be taken as consent to be furloughed under the terms of the variation letter. The Government guidance in relation to the Scheme also expressly requires employees to positively agree to being furloughed. Employees who failed to respond continued to be employed unless and until terminated, but they would be unsecured creditors in the administration. Employees' contracts would not be adopted where they do not attend for work and administrators do nothing to amount to an election to treat liabilities as super priority in administration.
- The employment contracts of employees who formally objected were not varied in accordance with the variation letter and neither were they adopted; they had stated they wished to be made redundant.

Administrators' duty to apply to the Scheme

- The administrators had no duty to apply to the Scheme for those employees who formally objected or those who had not responded to the offer to vary their contract.
- The administrators did have a duty for those who had consented to the variation.

WHAT DOES THE DECISION NOT SAY?

- The Scheme is not suitable for all administration cases, but only those where there is a reasonable likelihood of employees resuming work either for the company or after a sale of the business. In this case a number of expressions of interest for the purchase had been received and this was an important factor for the Judge.
- The Scheme does not as yet impose a trust mechanism or modify or bypass the insolvency legislation to justify payment of wages in priority to other claims (including the administrators' own expenses, claims of floating charge creditors and unsecured creditors), but paragraph 99 of Schedule B1 of the Insolvency Act 1986 can be interpreted as enabling such payments to be made.
- The effectiveness of paragraph 66 of Schedule B1 of the Insolvency Act 1986 in permitting a way to allow payments to be made by the administrators was considered and ultimately rejected.
- It does not prevent action being taken by affected employees at a later date in relation to the matters determined by the decision, in particular, in respect of the priority ranking of their claims.
- It does not address the statutory obligations to consult with affected employees who may subsequently be made redundant or TUPE transferred to a purchaser, or the extent to which there may be a 'special circumstances' defence available where consultation obligations are not complied with.

OTHER POINTS TO NOTE

The variation letter in this case included what was referred to as 'unfortunate wording' that stated that the administrators "will not be adopting and will not at any future date adopt your contract of employment". Such wording when sought to be imposed unilaterally by administrators to prevent the adoption of employment contracts has been considered to have no effect as per *Powdrill v Watson & Anor (Paramount Airways Ltd)* [1995] 2 AC 394. Fortunately, in this case, the wording was considered to be a mistake and was considered not to detract from the Judge's conclusion that those varied contracts would be adopted.

Please also see Coronavirus: Updated briefing: UK Job retention scheme, remuneration and employees and the Approved Judgment.