



## Preparing for a Fire Sale: Top tips for HR in an Insolvent Business Purchase

By **Cerys Williams** - 30 July 2020

Economic forecasts for the next 12 months make bleak reading. The impact of COVID-19 has already claimed some high-profile corporate scalps and predictions are that business insolvencies will rise as we emerge from lockdown. On 30 September the current relaxation of rules on insolvent trading — which may be insulating some businesses from insolvency — will end, likely triggering a spike in insolvencies. Another peak is anticipated in 6-12 months as the longer term ramifications of COVID-19 start to settle in.

Thankfully, insolvency is not always the end. Businesses (or parts of businesses) are frequently bought out of administration. These transactions are good news but present challenges even for seasoned HR professionals who are familiar with M&A transactions and business integrations. Why?

- **They happen fast.** Insolvent purchases typically proceed at breakneck speed and with little time to prepare.
- **Buyer beware.** Insolvent businesses are “sold as seen”, with little advance information or contractual protection for the buyer.
- **Corners have been cut.** Inevitably, insolvent businesses will have had to reduce costs, sometimes through drastic action. Employment law breaches may have occurred and/or money may be owed to employees.
- **The legal rules are different.** When a business is bought out of administration, very often TUPE will apply — but this is TUPE with a twist, and there are some changes to the usual rules to look out for.

### Preparing for a Sale

HR typically have less structured involvement in preparing for a sale when the business is insolvent, because of the limited formal process. However, there are a few things you can do to get ready and maximise the chances of achieving a successful sale in time, should a buyer materialise:

- **Maintain an employee spreadsheet.** Keep an up to date working spreadsheet of employees with job titles, salary, bonus/incentives,

benefits, start date, notice period and date of birth.

- **Get your HR files in order.** Round up contracts and up to date appraisal, sickness and disciplinary/grievance records, which will need to be handed over to the purchaser.
- **Redundancy consultation.** When insolvency looms, there is a tricky (but important) assessment to be made about whether and when to start redundancy consultations and notify potential redundancies to the Government. Expert advice should be taken.
- **Gather information about redundancy payments.** Even if redundancies are not imminent, a buyer will want to be clear about its obligations in a potential future redundancy situation. Gather up information about the approach taken historically, including details of any formula used to calculate payments
- **Analyse shared services.** If part of the business is sold, the buyer will want to assess which employees will transfer under TUPE and will need information, particularly about “shared service” employees. Gather data on how much time individuals spend supporting different business units, how their cost is allocated and whether they are formally considered to be ‘point person’ for a particular division.

### Preparing for a Purchase

For the HR team at the purchasing employer, dealing with an incoming group of employees from an insolvent business can be a scramble. The lack of full information, in particular, about these employees can be challenging and you should not expect a seamless integration. However, on the plus side, employees are often highly motivated and relieved to still have jobs, which can help ease the transition.

Most of the tasks involved will be the same as in any purchase and will involve focusing on resolving differences in benefits, job titles, and other employment terms as well as, possibly, redundancies. However, key action points specific to an insolvent purchase include the need to:

- **Support claims under the NIF.** Employees who transfer under TUPE from an insolvent business may be owed money by their previous employer, some of which can be claimed from the National Insurance Fund (i.e. from Government funds). Get ready to provide information and support for them to make their claims. Consider hardship grants or advances while they are awaiting the payments. For more information on what can be claimed from the NIF see our article [here](#).
- **Acknowledge the stresses.** Transferring employees may have lived in financial terror for months before arrival in their new home and long-term stress and uncertainty may have taken their toll. Transitioning to a new employer will be an additional challenge when resilience may already be low. An understanding and upbeat environment will be almost as important as practical support. Make allowances and remind employees of access to employee helplines and counselling, where available.
- **Assess pre-transfer breaches, fast.** Often, employment law breaches may have occurred as a business approaches insolvency, from forced pay cuts to non-payment of bonuses or benefits. The new employer will generally inherit liability for these, with limited exceptions. Do your homework on what has happened and take risk mitigation steps (or at least make an informed decision not to).
- **Pre-empt the problems.** In insolvent purchases there is an elevated risk of unexpected employees claiming to have transferred or employees fired pre-transfer claiming they are now the buyer’s problem. While you can’t prevent that, you can get ahead of the issues by performing an early risk assessment and gathering relevant information and arguments ready to rebut any claims.

Transitioning a workforce from an insolvent employer will never be seamless but thoughtful and timely HR action can be the difference between a manageable process and chaos. The temptation can be to hope for the best and take a reactive approach. However, pre-emptive action can save a great deal of pain further down the track. With a little luck, you may snatch triumph from the jaws of disaster.

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If you or your organisation wish to seek advice regarding insolvencies, please get in touch with your usual GQ|Littler contact or email [info@gqlittler.com](mailto:info@gqlittler.com).