

Insolvency in the English Football League: impact on players and staff

In relation to the EFL, there have been dire warnings that in the absence of a substantially increased contribution from the Premier League, up to 60 clubs could go out of business.¹

But if a club does enter administration, or still worse liquidation, what claims are available to the players and other employees?

The Football Creditor Rule (the “FCR”)

The EFL has its own specific rules in place which provide some added protection for players and staff and least in relation to arrears of pay.²

This is achieved for “Football Creditors”³, including full-time employees or former employees⁴, in two ways.

First, where there is a default in payment to Football Creditors, central funds received by the EFL from broadcasting revenue etc are applied directly to pay these debts. A challenge by the Revenue to that approach failed even though the rule has the effect of placing Football Creditors ahead of others who could reasonably regard it as unfair that they should in effect be left subsidising the club’s wage bill or outstanding transfer fees.⁵ It was held to be permissible, in part since clubs have no entitlement to the central payments until the end of the season. However in the present situation, it is questionable whether there will currently be central funds to deploy in this way.⁶

Secondly, clubs subject to an “Insolvency Event”⁷ are given notice to transfer their EFL share, sometimes referred to as the golden share.⁸ The EFL’s Insolvency Policy provides that, other than in cases of liquidation, the Notice of Withdrawal will be suspended to afford the club time to restructure its financial affairs or effect a sale.⁹ Broadly, as a condition of cancelling the Notice there must be payment or security of all Football Creditors, and the same condition applies for transfer of the golden share. It is the golden share which enables the club to remain playing in the

¹ https://www.eurosport.co.uk/football/football-news-huddersfield-owner-warns-50-or-60-clubs-could-go-bust-by-next-year_sto7757594/story.shtml.

² The PL has a similar rule, and the RFU also has provisions favouring “rugby creditors” (see <https://www.englandrugby.com/governance/rules-and-regulations/regulations> at pp. 75, 78-82).

³ Defined in the EFL Articles of Association (Art 48.1).

⁴ It is doubtful whether the rule would be applied in practice so as to exclude part time employees. At least if the payment was made by the employer it would be an obvious breach of the pro rata principle under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, reg 5, and might entail indirect sex discrimination.

⁵ **HMRC v Football League Limited** [2012] Bus LR 1539.

⁶ <https://www.efl.com/news/2020/march/efl-statement-board-update-on-coronavirus/>

⁷ This includes the various UK insolvency processes. It will need updating for the proposed new moratorium (to be inserted as new Part A1, Insolvency Act 1986 by the Corporate Insolvency and Governance Bill 2020, expected to be passed in June 2020) but there is a sweep up power to serve notice where it is “appropriate” to do so (Art 4.7.6).

⁸ EFL Articles 4.5-4.8. There is also a discretion to give notice, depending on the circumstances if a member of the same group of companies is subject to an Insolvency Event: Art 4.7.5.

⁹ Insolvency Policy paras 4.2, 4.3

League, generating revenue from gate receipts, to own the registration of players (and therefore collect transfer fees), and to receive funding including the share of television revenue.¹⁰

In practice, therefore, if rescue is possible “Football Creditor” (including employment-related) claims will be paid.

Employee claims not covered by the FCR

The debts covered by the FCR in relation to employees are limited to arrears of remuneration up to the date of termination.¹¹

As a consequence once the club/ its administrator has taken a decision to dismiss non-core staff, there is an incentive to seek to do so without notice (or in the case of players, to cut short the fixed term of their contract), so as only to leave a damages claim for breach of contract which would not be caught within the scope of the FCR.

However, an employee is entitled to affirm the contract and so keep it alive.¹² The club’s staff will be well-advised to do so, holding the club to the contract so that the obligation to make payment up to the end of the notice period or fixed term contracts (or agreeing terms for a departure or transfer) continue to be subject to the protection of being within scope as a Footballing Creditor.

Payments guaranteed by the State

To a limited extent, the FCR is supplemented by the State (National Insurance Fund (“NIF”)) guarantee of certain employee debts in the event of the employer entering into an insolvency procedure. The Secretary of State is then subrogated to the employee’s claim, so this is not a means of reducing the insolvent club’s overall liability. The State guarantee covers:

1. Up to 8 weeks arrears of pay (if any, despite the FCR), capped at £538pw (or pro rata for part weeks).¹³ This includes any protective award for breach of collective information and consultation provisions.¹⁴

¹⁰ **HMRC v Football League** [2012] Bus LR 1539.

¹¹ Sums under compromise agreements with players after the Notice of Withdrawal may also be covered; the Insolvency Policy (at para 9.2) covers sums due to players/ former players but not under any compromise agreement entered into prior to service of the Notice.

¹² **Geys v Societe Generale** [2013] 1 AC 523 (SC).

¹³ Up to 4 months arrears of pay, including any protective award if relating to the period up to entry into the insolvency procedure, is also a preferential debt but capped at £800: IA 1986 Sch 6 para 9; SI 1986/1996 Art 4. The preference element would be shared with the Secretary of State’s subrogated claim.

¹⁴ ERA s.184(1)(a), 186. The collective redundancy obligations arise if the club proposes to dismiss 20 or more staff at the same establishment. Players (or other staff) released at the end of their fixed term contract do not count towards the numbers (TULRCA, s.282(2)). The process must begin in good time, and at least 30 or (if proposing to dismiss 100 or more employees) 45 days before the first dismissal takes effect (TULRCA, s.188(1),(1A)). See <https://littletonchambers.com/articles-webinars/first-update-on-collective-consultation-defining-the-triggers/> and <https://littletonchambers.com/articles-webinars/second-collective-consultation-update/>.

2. Statutory notice pay,¹⁵ subject to the £538 per week limit.¹⁶
3. Up to 6 weeks holiday pay (accrued or taken) in the 12 months up to the date of the relevant insolvency process¹⁷, subject to the cap of £538 per week.¹⁸
4. The basic award for unfair dismissal¹⁹ or a redundancy payment.²⁰

Aside from cases of a TUPE transfer, there are three conditions to be met to avail of the NIF:²¹ (a) a relevant insolvency related procedure has commenced,²² (b) employment has been terminated; and (c) the employee was entitled to be paid all or part of any of the applicable debts on “the appropriate date” (eg for holiday pay and arrears of pay other than a protective award, the date when the relevant insolvency procedure commenced).²³

This regime is modified for TUPE transfers when the club is subject to a non-terminal insolvency process, such as administration or a CVA.²⁴ For employees who transfer, or would have but for being dismissed by reason of the transfer, employment is treated (for the purposes only of the conditions for claiming on the NIF) as having terminated on the transfer date.²⁵ Liability up to the amounts recovered from the NIF does not transfer to the transferee.²⁶ However claims accruing post-transfer are not covered, eg a basic award for post-transfer unfair dismissal²⁷.

Adoption of employment contracts

Where a contract of employment is “adopted” by the administrator claims under the contract for wages or salary (including holiday pay and occupational pension contributions) from the date of adoption rank in priority to the administrators’ expenses in the administration, and only behind a fixed charge creditor.²⁸

Administrators have a 14-day grace period from appointment during which no action taken by them can result in adoption.²⁹ If employees are still working, continued employment after 14 days

¹⁵ ERA s.184(1)(b)

¹⁶ ERA, s.186

¹⁷ ERA s.183, 184(1)(c),(3),185

¹⁸ ERA, s.184(3), 186

¹⁹ ERA, s.184(1)(d)

²⁰ ERA, s.166

²¹ ERA, s.182

²² ERA, s.183(3). Separate provision is made for redundancy payments (ERA, s.166), with the alternative that the employee has taken all reasonable steps other than legal proceedings to recover it from the employer, which has refused or failed to pay it.

²³ ERA, s.185(a). This is problematic when a CVA precedes administration or liquidation as arrears post-dating the CVA cannot be claimed: **Secretary of State for Business Innovation and Skills v McDonagh** [2013] ICR 1177 (EAT).

²⁴ TUPE, reg 8(6).

²⁵ TUPE reg 8(3).

²⁶ TUPE, reg 8(5); **Graysons Restaurant v Jones** [2018] ICR 670 (EAT), affd [2019] ICR 1342 (CA).

²⁷ **Pressure Coolers v Molloy** [2011] IRLR 630 (EAT); **Secretary of State of Business Innovation and Skills v Dobrucki** UKEAT/050/13/JOJ, 3 February 2015.

²⁸ IA, Sch B1 para 99.

²⁹ IA, Sch B1 para 99(5).

will generally result in adoption.³⁰ The same applies even if employees are furloughed, at least if, after 14 days, they are paid (irrespective of whether this is funded by payments under the Coronavirus Job Retention Scheme) or the administrator makes an application to the Scheme in respect of them.³¹

Ordinarily the administrator will therefore seek to make most redundancy dismissals before the expiry of the 14 day period. However one consequence of the FCR may be to reduce the importance of doing so, since those liabilities that would acquire super-priority on adoption would in practice have that priority in any event due to the FCR. Super-priority does not cover claims not arising under the contract, including for unfair dismissal or statutory redundancy payments,³² protective awards³³ and wrongful dismissal damages.³⁴

Crown preference

Since 2003 the Revenue has ranked alongside other unsecured creditors for all taxes. The expected reintroduction of Crown preference from 1 December 2020³⁵ will give HMRC priority over unsecured creditors for certain taxes collected by employers and business – PAYE, employee national insurance contributions (“NICs”) and VAT (but not corporation tax or employer NICs). This will not affect the validity of the FCR or payment in full of claims covered by that rule³⁶. But it will mean fewer, if any, resources available for unsecured creditors such as, if claims do not pass under TUPE, employee claims not covered by the FCR (or by the NIF or administrator adoption).

TUPE

In so far as staff and players have remained in employment to the point of a TUPE transfer, they can expect to have reached a safe haven from the troubled waters of an insolvent employer. Rights and liabilities will transfer to the new employer.³⁷

Where staff have been dismissed before the transfer, a key issue is whether the transfer was the principal reason for dismissal. If so rights and liabilities will still transfer, unless dismissal was for an economic, technical or organisational (ETO) reason entailing changes in the workforce.³⁸ The same test applies in relation to the validity of any contractual changes such as agreed pay reductions.³⁹

³⁰ **Powdrill v Watson** [1995] 2 AC 394 (HL). The position is otherwise for someone not known to be an employee: **Re Antal International** [2003] 2 BCLC 406; **Allsop v Christiani & Nielsen** UKEAT/0241/11/JOJ, 14 March 2012.

³¹ **In re Debenhams** [2020] Bus LR 788 (CA).

³² **In re Alders Department Stores** [2005] ICR 867.

³³ **In re Huddersfield Fine Worsteds** [2006] ICR 205 (CA).

³⁴ **Re Leeds United Association Football Club** [2007] ICR 886 (CA).

³⁵ cl. 95 of the Finance Bill 2020. See <https://www.gov.uk/government/publications/introduction-of-changes-to-protect-your-tax-in-insolvency/introduction-of-changes-to-protect-your-tax-in-insolvency>.

³⁶ **IRC v Wimbledon FC Ltd** [2004] BCC 638 (CA), decided when Crown preference last existed.

³⁷ TUPE, reg 4. This does not apply to transfers when the club is in liquidation (reg 8(7)).

³⁸ TUPE reg 7

³⁹ TUPE reg 4(4),(5). This is subject to provision in TUPE reg 9, where the club is in a non-terminal insolvency procedure (eg administration), to agree with appropriate representatives contractual changes by reason of the transfer which are designed to safeguard employment opportunities by ensuring survival of the Club.

That issue has been addressed in the context of the administrator’s decision, in the hope of a sale, to “mothball” a club’s operations in the close season by dismissing non-essential staff on grounds of redundancy.⁴⁰ It was accepted that despite the administrator’s ultimate aim of achieving a sale, there was an ETO defence on the basis that the immediate objective was to meet the need to reduce the wage bill to keep the club running and avoid a liquidation before the club could be rescued.

Following amendment of TUPE in 2014, the restriction applies only to dismissals and variations principally by reason of the transfer, and not reasons merely connected with it. A broader line of defence may now be available, not reliant on the ETO defence, to the effect that the dismissal/variation was not by reason of the transfer. This leaves more scope for argument that where there is a commercial justification for changes with a view to business rescue, even if connected to a transfer this might be regarded as other than by reason of it.

In any event, clubs seeking to make contractual changes and dismissals, especially when against the context of a potential strategy of achieving a sale, will need carefully to document and be able to evidence the reasons based on the ongoing needs of the club irrespective of any such sale, and to avoid reliance on the transferee’s requirements in relation to the business.⁴¹

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2 June 2020

⁴⁰ **Kavanagh v Crystal Palace FC Ltd** [2014] ICR 251 (CA).

⁴¹ See **Hynd v Armstrong** [2007] IRLR 337 (CS); for a critique of the decision see Jeremy Lewis (ed), “Transfer of Undertakings” (Sweet & Maxwell) para A4.8.