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Case Focus: Kostal UK Limited v Dunkley and others

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This case is the first case in which appeal courts have considered how section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 should properly be interpreted. The broad purpose of s.145B is to seek to avoid trade union member workers receiving offers made by their employer where, if such offers were accepted, one or more of the workers' terms of employment would not (or would no longer) be determined by collective agreement (and where the employer's sole or main purpose was to achieve this result). This is known as "unlawful inducement".

If an employer is found to have made such an unlawful inducement, a fixed amount of compensation is payable – the current amount of this compensation is £4,341 for each complainant.

Background to the claim

Kostal UK Limited entered into a Recognition and Procedural Agreement with Unite in February 2015. The agreement gave sole bargaining rights to Unite – with the agreement being binding in honour only. Pay negotiations were to commence in October of each year, to take effect on 1 January. The procedure was stated to include four stages. The first three stages related to meetings between trade union representatives and management. The final stage allowed for the matter to be referred by joint agreement to ACAS; if the parties did not agree to refer to ACAS, the process was stated to be exhausted.

The first round of pay negotiations took place in October 2015. The offer was put to a ballot of members at the beginning of December but was rejected. The employer wrote to its employees on 10 December 20015, making the same offer directly to them. If they did not accept, the employer stated that the Christmas bonus would not be payable.

By the end of December 2015, stage 4 of the process had been reached and the parties agreed to refer to ACAS. By January, around 90% of the workforce who had received a direct offer had agreed; a further offer was made to the remaining employees on 29 January, making a similar offer (including an amount equivalent to the Christmas bonus). The letter warned that if agreement could not be reached, notice might be served to terminate employment.

On 3 November 2016, a collective agreement was reached for 2015, substantially in line with the offer made by the employer in November 2015, but without the Christmas bonus.

Legal proceedings

57 claimants brought a claim arguing that their employer had breached s.145B. Their claim was upheld by the Employment Tribunal and the Employment Appeal Tribunal rejected the employer's appeal. The EAT's view was that if acceptance of a direct offer to workers meant that at least one term was to be determined by direct agreement (rather than by collective bargaining), then that was sufficient, regardless of whether the result was temporary rather than permanent. The question would then turn to whether the employer's sole or main purpose in making the offers was to achieve that result.

The Court of Appeal, however, disagreed, finding that s.145B would only be breached if the employer's purpose was to avoid a particular term or terms from being determined by collective agreement on a permanent basis.

The Supreme Court

The Supreme Court issued its judgment on 27 October 2021. The Court was unanimous in its findings that s.145B had been breached in this particular case but disagreed over how s.145B should be interpreted.

The Majority view

The majority view was that the EAT's decision went too far – this would effectively give a recognised union a veto over any direct offers to employees concerning any term of the contract, however minor. Where an employer has negotiated with a union and exhausted the procedure for collective bargaining without reaching agreement, then there would be no justification in preventing or deterring an employer from making a direct offer to its workers.

However, the majority did not agree with the employer's arguments that the offers made in this case did not require employees to forgo any collective bargaining rights (indefinitely or at all). There would be a contravention of s.145B if an offer was made which, if accepted, would in fact cause arrangements for collective bargaining which have been agreed with the union to be by-passed in whole or in part.

On the proper interpretation of s.145B "*an offer would have the prohibited result if its acceptance, together with other workers' acceptance of offers which the employer also makes to them, would have the result that the workers' terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union when, had such offers not been made, there was a real possibility that the terms in question would have been determined by collective agreement*"

Here, as the collective bargaining process was clearly still ongoing at the time the offers were made, there was a contravention of s.145B.

The Minority view

The minority view preferred the reasoning of the EAT – by accepting the offers made to them in this case, the workers' terms were determined by their direct agreement rather than by the considerably later collective agreement. The minority also did not accept that an employer could necessarily escape liability simply because the collective bargaining process had been exhausted – giving the example of an employer who sought to "thwart" the bargaining process.

Closing comments

The employer did seek to argue that it might be difficult to say with certainty when a collective bargaining process had been exhausted. The Supreme Court majority did not accept this argument – however, part of the reasoning for this was an ability to agree the particular process that will be followed in any collective bargaining arrangements. Employers may therefore wish to review their recognition agreement terms to ensure that a clear process for collective bargaining is included so that all concerned can easily identify when that process has been completed.

A secondary reason was the wording of s.145B(1)(b) itself – which provides that the section will not be contravened unless the employer's sole or main purpose in making the offers was to achieve the prohibited result. If an employer genuinely believed the collective bargaining process had been exhausted, it could not be said that the purpose of making direct offers was to procure the result that terms will not be determined by collective agreement.

This may not, however, apply where, although collective bargaining processes have been exhausted, an employer is held to have acted in bad faith during the negotiations – an Employment Tribunal is obliged to consider whether an employer did not want to use the arrangements agreed for collective bargaining when considering the employer's "sole or main purpose" in making the offer.

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