

## WHITE PAPER CONFERENCE

### INDUSTRIAL ACTION

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#### IN A DEADLOCK SCENARIO, CAN EMPLOYERS (I) IMPOSE A PAY RISE OR (II) CHANGE TERMS AND CONDITIONS?

#### OR DOES SUCH ACTION OFFEND AGAINST S145B?

#### INTRODUCTION

1. Section 145B gives rise to a number of very interesting issues and is a very fast developing area of employment law. There is only one reported EAT decision so far on s145B (**Kostal v Dunkley** [2018] IRLR 428), but that case is going on appeal to the Court of Appeal and the Appeal will be heard in Spring 2019. There is also a pending appeal in the Scottish EAT in a case in which I act for the employer, **Arnott v Ineos**, for which a rule 3(10) hearing will be listed in the coming months.
2. In light of the pending appeals, there is no definitive guidance available on the scope of s145B, and so this talk will discuss and explore the issues, rather than set out any firm conclusions.

#### SECTION 145B

3. Section 145B provides as follows:

'(1) A worker who is a member of an independent trade union which is recognised, or seeking to be recognised, by his employer has the right not to have an offer made to him by his employer if—

(a) acceptance of the offer, together with other workers' acceptance of offers which the employer also makes to them, would have the prohibited result, and

(b) the employer's sole or main purpose in making the offers is to achieve that result.

(2) The prohibited result is 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.

(3) It is immaterial for the purposes of subsection (1) whether the offers are made to the workers simultaneously.

(4) Having terms of employment determined by collective agreement shall not be regarded for the purposes of section 145A (or section 146 or 152) as making use of a trade union service.

(5) A worker or former worker may present a complaint to an employment tribunal on the ground that his employer has made him an offer in contravention of this section.'

4. Accordingly, s145B makes it unlawful for an employer to make an offer to an employee that would have the prohibited result, which is that some or all of the employee's terms and conditions of employment will no longer be determined by collective agreement.
  
5. If an employer is found to have breached s145B, the new terms and conditions will still take effect, if the employees agree, but the employer will be liable to make a payment of £4,059 to each union member to whom the offer was made (regardless of whether the offer was accepted). Claims can be brought in the Employment Tribunal. The stakes are very high because the unlawful act consists of making the offer, and the right to recover £4,059 exists even if all of the employees immediately reject the offer<sup>1</sup>.

## **THE PRACTICAL PROBLEM**

6. Say that an employer and the recognised trade union have been negotiating for some time over the annual pay award. They cannot agree and eventually an impasse has been reached. The employer decides that no purpose would be served by continuing to negotiate, but, at the same time, the employer does not wish to deprive the employees of their pay rise, and so it goes ahead and implements the pay rise unilaterally, but adding the pay award to the monthly salary payments. Is that a breach of s145B?

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<sup>1</sup> In **Kostal** the employer was penalised twice because it was held to have made two unlawful offers, a couple of weeks apart.

## THE REASON WHY SECTION 145B WAS ENACTED

7. The purpose of s145B is clear from the heading to the provision: it is to penalise employers who provide employees with inducements relating to collective bargaining. In other words it is to ensure that employers do not offer bribes to employees to persuade them to come out of collective bargaining. Section 145B is part of a package of measures alongside s145A, which renders unlawful inducements to persuade an employee to refrain from joining a trade union or to resign from a trade union, and section 146, which prohibits submitting a worker to a detriment because of union membership and activities.
8. Section 145B was added to TULR(C)A by the Employment Act 2004. The change was made following a successful appeal to the European Court of Human Rights in **Wilson, Palmer and Doolan v United Kingdom** [2002] IRLR 568. The **Wilson** cases concerned employers who had offered employees a financial incentive to agree to come out of collective bargaining and to have individually-negotiated contracts. These were egregious examples of cases in which employers were trying to use sweeteners to take unions out of the picture in collective bargaining terms.
9. In **Wilson and Palmer**, the ECHR held that it was wrong for UK law to provide a remedy for union members who were subjected to a detriment for failing to agree to come out of collective bargaining and yet not to provide a remedy for those who lost out because they forfeited the right to an advantage because they would not agree to forego collective bargaining.
10. Section 145B is not a model of legislative drafting and the problems of interpretation have arisen because of the lack of clarity in the language used. For many years, unions did not make much if any use of section 145B, but in the last few years that has changed.

11. The scope and potential significance of s145B, if a wide interpretation is placed upon it, is quite extraordinary. On the face of it, it means, potentially, that a trade union has an absolute veto over variations to terms and conditions, because if the union is opposed to some changes, and the employer goes over the head of the union and offers the new terms and conditions to the employees themselves, this will be unlawful and will trigger a right to claim compensation in the sum of £4,059.
12. An alternative, narrower interpretation of section 145B is that it applies only when the employer is doing what was done in **Wilson and Palmer** itself, ie when the employer offered 'bribes' to employees in return for their agreement to give up collective bargaining, leading to a two-tier workforce, with higher paid employees who were outside collective bargaining, and lower paid employees who had remained covered by collective bargaining.

## **KOSTAL V DUNKLEY**

13. In **Kostal**, the employer and the recognised trade union were in the middle of difficult negotiations. The employer offered a pay rise and a Christmas bonus, and proposed changes to terms and conditions. This offer was rejected by the union members by a large majority. The employer wrote directly to the members to invite them to accept the offer saying that if they did not do so by a particular date, they would forfeit the Christmas bonus. A few weeks later, the employer wrote again to those employees who had not yet accepted the offer, inviting them to accept the offer and encouraging them to think again.
14. The ET held that each of these two offers was in breach of s145B. It is to be noted that (a) the offers were made in the course of negotiations which had not been broken off and which continued after the offers were made; (b) the employer had no intention of abandoning collective bargaining for the future; (c) only those employees who accepted the offer received the Christmas bonus and the pay award and so there was thereafter a two-tier workforce, meaning that those who had agreed to accept an offer the union had refused to agree to were better off than

those who had not agreed to it; and (d) in order to receive the pay rise and bonus, an employee had to sign a formal acceptance document.

## The one-off change issue

15. The issue in the appeal to the EAT in **Kostal** was about whether s145B applies only where the employees agree that the relevant terms will for evermore be outside collective bargaining, or whether s145B applies also if the agreement concerns a one-off variation to the terms. The EAT held that the answer was that s145B applies to a one-off. See judgment, paras 48-52.
16. This is also the single issue in the appeal to the Court of Appeal. The employer contends that s145B has no application to a one-off occasion in which the employer offers new terms and conditions to the workforce which the union has refused to agree to it, if the employer intended to continue with collective bargaining for the future. **Kostal** contends that s145B is only engaged if the main purpose of the employer is that the relevant term will no longer be governed by collective bargaining for the future, as well as on this single occasion. The employer draws attention to the use of the future tense in the language of s145B.
17. The point is made that this means that section 145B only applies if the acceptance by the worker has the result not only that the immediate offer takes effect, but that, in the future, changes to the relevant term will not be agreed by collective bargaining. The idea is that, if the employer makes an offer, which the worker then accepts, that has no impact on the future: the worker is simply accepting an offer that has already been made and that is an end to it. **Kostal** says that the future tense in the statutory language means that, at the point at which the offer is accepted, the worker must be agreeing that in future the particular term will not be covered by collective bargaining.
18. There are other arguments against the EAT's conclusion. One is that, under s145B, two conditions must be satisfied. The first is that acceptance of the employer's offer actually has the prohibited result, and the second is that the

employer's sole or main purpose must be to achieve the prohibited result. The 'prohibited result' is that the workers' terms of employment, or any of them, will not or will no longer be determined by collective agreement. Under the EAT's interpretation, the second condition is otiose. In any case in which there is an offer and acceptance which has the effect that a contract term is changed by direct agreement between the employer and the workers, it will inevitably be the case that it was the employer's sole or main purpose that the particular term would not be determined by collective agreement, at least for a short while. So, on the basis of the EAT's analysis, it makes no sense for Parliament to have added the second condition to section 145B(1). On the other hand, if *Kostal*'s interpretation is adopted, then the second condition makes sense: section 145B only applies if the motive of the employer was to get rid of collective bargaining for part or all of the employees' terms in the long-term.

## **The pressing business need and the impasse**

19. The EAT in *Kostal* recognised that its conclusion had potentially far-reaching implications. What if a union was being wholly unreasonable and intransigent, or had walked out of the negotiations. Will the employer fall foul of s145b if it goes ahead and implements the change to terms and conditions?

20. 'No', said Simler J. She said that in such a case there would be no breach of s145B, because the sole or main purpose of the offer would not be to achieve the prohibited result. At para 61, she said that if the employer has some 'pressing business aim' for making the changes or 'genuine business reasons (unconnected with collective bargaining) for approaching workers directly', this will not be in breach of s145B.

21. At para 62, Simler J said:

'This does not, as Mr Burns submits, give trade unions a veto over changes to terms and conditions that an employer seeks to make with employees or allow trade unions to block changes simply by

failing to agree. If collective bargaining breaks down, to the extent that the employer has a proper purpose for making offers directly to workers, there is nothing to prevent such offers being made.'

22. In the preceding paragraph, para 61, she gave the following as an example of a case that will not contravene s145B:

'At the other end of the spectrum will be employers who have engaged in lengthy and meaningful collective consultation and reached an impasse before considering making direct offers....'

23. At para 64, the EAT emphasised that 'Section 145B does not act as a veto preventing direct offers to workers....'

24. It is doubtful, in my view, if this solves the problem of s145B going too far. There is nothing in the statutory language to support this approach. It gives rise to very real practical difficulties. The main practical difficulty is that the question whether the prohibited result is the 'sole or main' purpose is a question of fact and degree, as Simler J herself recognised at para 61. In effect, this approach means that ETs have to make value judgments about an employer's conduct in an industrial dispute (something that courts and tribunals normally run a mile from). How is an ET supposed to decide if an employer has a sufficiently 'pressing' business aim, and how is an ET supposed to decide if collective bargaining has broken down so that the employer has a genuine and permissible business reason for approaching employers directly?

## **ARNOTT V INEOS**

25. The problems that the approach in **Kostal** give rise to are graphically illustrated by the **Arnott** case. In this case, the employer and the recognised union were engaged in collective bargaining in relation to a pay rise and a bonus. After many months of negotiations, the employer took the view that the union was not being genuine in the negotiations and was not acting in good faith. The employer decided that an impasse had been reached and that there was no point in going ahead any further in the negotiations. Once that decision was reached the

employer decided to go ahead and implement the bonus and the pay rise, but it did not make any offer to the employees: there was no requirement that the employees signed up to anything or agreed to anything in return receiving the extra pay. There was, therefore, no danger of anyone losing out because they remained loyal to the union, and there was no danger of a two tier workforce. At the same time that the decision that collective bargaining had broken down was taken, the employer decided to give notice to terminate the recognition agreement. Accordingly, there was no need to make any offer to the workforce to bring them out of collective bargaining: collective bargaining was going to end in any event.

26. The Employment Tribunal held that there had been a breach of s145B. The ET felt that Ineos had been reasonable in the way that it conducted its negotiations, but the ET formed a value judgment that Ineos was unreasonable in calling a halt to the collective negotiations and that the was not, in fact, an impasse. The employer has appealed to the EAT. There are three main grounds of appeal (amongst others<sup>2</sup>).

27. First, s145B requires that there be an offer an acceptance, but in **Arnott** there was no offer, and no requirement of an acceptance. There was no breach of the letter or the spirit of s145B, because there was no inducement, and no preconditions were imposed as the price for receiving the pay increase. No employee was required to choose whether to accept or reject the pay increase, or give up anything in return. It was the unilateral decision of the employer.

28. It is, in my view, clear that s145B does not go as far as ET in **Arnott** held that it does. It would be astonishing if it meant, as the logic of the Claimants' argument suggests it means, that every time an employer gives a pay rise to employees, that the union does not agree to, that is a breach of s145B, even if there are no strings attached. That would be to give the union an absolute veto, and would be greatly to the disadvantage of workers. More than that, s145B does not only apply where there is a recognised trade union, but also where there is a union that is seeking to

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<sup>2</sup> The same issue as in the **Kostal** appeal also arises in **Arnott**.

be recognised. It cannot possibly be the case that an employer will be in breach of the law if it gives a pay rise to its employees, without having agreed it with the union, even in circumstances in which the union is not recognised, has never been recognised and has no support amongst the workforce. Indeed, if the ET's decision were right, then unions, even unrecognised and unsupported unions, could hold employees to ransom, because they could block any pay rises at all until the employees agreed to the union being recognised.

29. Another example of an absurd outcome is this. Say that there is an employer with a recognised trade union. The employer has an extremely successful year, and wishes to share its good fortune with the employees by giving them a one-off bonus of 10% of pay. This is done for wholly benevolent motives. The employer wholly intends to negotiate the annual pay round with the union in the normal way when the time comes. According to the claimants in **Arnott**, if the employer does this, this is a breach of s145B and triggers a liability to pay nearly £4,000 to each affected employee. This cannot be right, but it is the inevitable consequence if the claimants' argument on the first issue is right.

30. The answer to this problem is simple; section 145B only applies in cases in which the employer offers an inducement, ie makes the change conditional on the employee agreeing in turn to give up something. It does not apply where there are no strings attached.

31. This is also consistent with the statutory language used. It is important to note the wording of the heading for the provision, 'Inducements relating to collective bargaining'. The employer has to make an offer relating to collective bargaining, and there has to be acceptance of the offer which will achieve the prohibited result. In other words, the employee must be asked to give a quid pro quo, to accept in return that the relevant term or terms will not be determined by collective bargaining. The employee has to be put to a choice: see **Kostal**, paras 51 and 52.

32. The second issue in the **Arnott** appeal is that the result of the pay increase was not that any of the workers' terms of employment would cease to be determined by collective agreement – the company did not in any way attempt to circumvent the collective bargaining process (temporarily or permanently). All the collective negotiation procedures described in the collective bargaining agreement were satisfied, over the course of a number of weeks; it was simply that an impasse had been reached, following which the Appellant's best and final pay award offer was implemented.
33. The third ground of appeal in **Arnott** is that the employer's main purpose in making the pay increase was not to avoid a collective bargaining process, either in respect of this pay increase or going forward. Further, at the time of the pay award, the Appellant had already given written notice under the collective bargaining agreements to bring recognition to an end. There was no need therefore to make offers to procure a state of affairs in which terms would no longer be determined by collective agreement - this would happen anyway as a result of the lawful decision to terminate - and so the main purpose of the pay increase could not have been to achieve that result.
34. The ET judgment in **Arnott** is a good illustration of the difficulties of the 'pressing business need' approach adopted by the EAT in **Kostal**. The practical reality in **Arnott** was that the negotiations had irretrievably broken down. In those circumstances, it cannot be right that the decision whether there was a breach of s145B depends on an ET's subjective view as to whether it thinks that the employer was in the right in deciding to pull the plug at the particular point that it did.

## **CONCLUSION**

35. It will be very interesting to see if the appeals in the s145B cases provide a clear steer in relation to the scope of this provision.

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