Kostal and beyond

- **What is a change in terms/conditions under .145B?**
- **Implications for unions and employers**

In *Kostal UK Ltd v Dunkley* [2019] EWCA 1009 the Court of Appeal held that s.145B TULRCA 1992 does not make it unlawful for an employer to change terms and conditions without a union's agreement in collective bargaining. They held it is only intended to close the *Wilson and Palmer* loophole and prevent abuses which were actually intended to deny unions the right to engage in collective bargaining for their members.

1. *Kostal* decides the meaning of "the prohibited result" for the purpose of section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992. The majority of the EAT in *Kostal v Dunkley* [2018] ICR 768 agreed with the wide interpretation which was put on the section by a number of trade unions in recent years. They argued that the words in the statute have wider effects and stop any direct offer to employees outside of collective bargaining even where there has been an attempt to reach agreement through collective bargaining. Employment tribunal judgments had gone both ways on this controversial issue.

2. The EAT had been split in its decision, with the majority rejecting the argument that s.145B's prohibition against 'Inducements Relating to Collective Bargaining' is aimed only at *Wilson and Palmer* [2002] IRLR 568 inducements to end or prevent collective bargaining of terms, and is not intended to catch offers outside of collective bargaining which might just be seen as undermining the union's negotiating position. On the facts Kostal argued that collective bargaining of pay would continue the following year, but the year's pay offer had to be made directly to employees in order to ensure that the workforce did not miss out on their Christmas bonus.

Kostal – the facts

3. A recognition agreement had been concluded between Kostal and Unite in early 2015 providing a framework for consultation and collective bargaining. It was agreed that "any matters related to proposed change of terms and conditions of employment will be negotiated between the Company and the Union".

4. The first collective negotiations started in October 2015, but the employer's offer was rejected by Unite and its members. Kostal said in December that it intended to make the offer to employees directly to avoid missing the window to pay a Christmas bonus.

5. It made two offers which Unite complained 'bypassed collective bargaining'. Unite took industrial action. Collective bargaining continued and agreement was eventually reached, whereby Unite accepted the employer's offer, in November 2016.

6. A breach of s.145B results in a fixed penalty on the employer – currently over £4,000 per recipient of each offer. For large employers the EAT's interpretation had put them at risk of potentially crippling pay-outs if they tried to resolve an impasse by making direct offers, as had formerly been common industrial practice. The potential need for an employer to make such an offer was illustrated by the Court of Appeal's hypothetical example:

> "Suppose an employer wishes to introduce bank holiday working for the first time. The trade union says that it will only agree if such days are paid at triple the usual rate: £300 for a worker ordinarily paid £100 per day. An impasse is reached. The employer, anxious to have work done on the forthcoming August Bank Holiday, makes a direct offer to workers inviting them to volunteer for work on bank holidays at double time, that is to say for £200 per day. On the Claimants' construction of s.145B the employers would be liable to pay each worker to whom the offer was made (whether or not he or she accepted) an award, at 2015-16 rates, of £3,800. The trade union would thus have an effective veto over the proposed change."

7. The ET preferred "the interpretation of the provision sought by the Claimants which has the result that both the December 2015 and January 2016 offers would, when accepted have the prohibited result".

8. The Court of Appeal (Bean, King and Singh LJJ) held that although the union's construction of s.145B(2) was 'possible' as a matter of literal interpretation of the words used, it was "extremely unlikely that it is the result which Parliament intended". Bean LJ said that "it would amount to giving a recognised trade union… a veto over even the most minor changes in the terms and conditions of employment, with the employers incurring a severe penalty for overriding the veto".

9. The trade union argument put much store on Article 11 ECHR: "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests". The Court of Appeal held that the right of workers under Article 11 is to be represented by a trade union and for that union's voice to be heard in negotiations with the employer; but there is no Article 11 right for workers, acting through their trade union, to impose their will on the employer in the sense of having the final say. As Singh LJ discussed during argument, there is a right to be heard, but not a right to prevail (see also *RMT v UK* [2014] IRLR 467, ECtHR).

10. Bean LJ rejected the suggestion of Simler J that the wider interpretation was available as an employer who has acted "reasonably and rationally" will not be liable pointing out that the statute says nothing about reasonableness. He said that it was settled

that courts and tribunals should not try to decide which side in a trade dispute is behaving reasonably and rationally.

11. The Court of Appeal accepted the argument that "will not or will no longer" attached naturally to the cases where a union was seeking to be recognised (and will not be determined by collective agreement) and where the union was recognised (and will no longer be determined by collective bargaining). "No longer" clearly indicated a change taking the term or terms concerned outside the scope of collective bargaining on a permanent basis; and corresponded to the ECtHR's use of the word "surrender" in *Wilson and Palmer*.

12. Bean LJ held that there was not a third type of case where an employer makes an offer whose sole or main purpose is to achieve the result that one or more of the workers' terms of employment will not, on this one occasion, be determined by the collective agreement. That construction would give a recognised union an effective veto over any direct offer to any employee concerning any term of the contract, such a veto would go far beyond curing the mischief identified by the ECtHR in *Wilson* and in such a case the members of the union are not being asked to relinquish, even temporarily, their right to be represented by their union in the collective bargaining process.

13. The Court noted that its interpretation did not render a union powerless to oppose an unwelcome change by the employer, saying "It remains open to [unions] (for example) to ballot their members for industrial action, as Unite did in the present case in order to implement an overtime ban."

14. The Court therefore allowed the appeal and dismissed the claims. This will be a major relief to all large employers with recognised unions who – following the decisions in this case below - were often being faced with the prospect of agreeing to the collective demands or risk an employment tribunal investigating the rights and wrongs of the trade dispute to decide whether it had a proper purpose or not.

15. If collective bargaining reaches an impasse, the employer may make a direct offer as long as that offer is not to forego, surrender or relinquish collective bargaining rights as in *Wilson and Palmer*.

***Kostal* in the Supreme Court?**

16. Mr Dunkley's union has applied for permission to appeal to the Supreme Court on behalf of Mr Dunkley and his colleagues. A decision on permission is expected in November 2019.

17. The union's first ground of appeal is that the Court of Appeal erred in construing s.145B to exclude the circumstance when the result of acceptance of offers made by the employer directly to workers, during a process of collective bargaining between the employer and union, in relation to various terms of their employment, does (or would) result in those terms not being determined by collective bargaining.

18. The second ground suggested that the Court of Appeal had failed to separate the 'prohibited result' from the separate issue under s. 145B(1)(b), whether "the employer's sole or main purpose in making the offers is to achieve that result". The union suggests that the Court confused those two issues so that its conclusion on the 'prohibited result issue' was in effect no more than a sub-set of its conclusion on the 'main purpose issue'.

19. The union ambitiously suggests in its third ground that Bean LJ had an "unrealistic understanding of the industrial relations context" within which s. 145B operates. He employed "fallacious premises as to how the collective bargaining process works, or might work in hypothetical situations". They finally submit that the construction of s.145B renders it incompatible with Article 11 ECHR.

20. The union endorses the construction of the majority in the EAT. The claimants characterise the two possible readings thus:

- One or more of the workers' terms of employment will, at least on the material occasion, not be determined by collective agreement, but by individual agreements between the employer and the workers; or

- One or more of the workers' terms of employment will, not just on the material occasion, but either permanently or at least also in the next potential round of collective bargaining, not be determined by collective agreement, but by individual agreements between the employer and the workers.

21. The union's suggestion is that the words "or any of those terms" strongly point to the correctness of the first interpretation. However that just focuses on whether s.145B engages even if one term is taken out of collective bargaining. It does not help on the question of whether a one-off response to a failure of collective bargaining is sufficient or only the *Wilson & Palmer* mischief of trying to reduce the reach of collective bargaining by taking a term or terms out of the collective process.

22. If an employer tries to agree a particular term, pay for example, with its workers directly, whilst continuing to negotiate over the other terms of their employment it will be unlawful only if that term is no longer will be determined by collective bargaining. If the term remains within the collective bargaining process and so will be negotiated in the future, then there is no s.145B breach if pay is determined directly on a one-off basis. That is the *Wilson* mischief.

23. It is correct for the union to say that s.145B does not requires a 'permanent' surrender of collective bargaining rights – but it does require some sort of *surrender* of bargaining – not just a decision to agree a pay rise directly if collective bargaining has been exhausted without agreement.

24. A point is taken that the Court of Appeal did not address the argument that s. 145B is "unworkable" given the three month time limit to bring a claim (on the basis that

workers can only determine prohibited result and purpose with hindsight). However the same is true of any discrimination or whistleblowing claim in which it is often difficult to see evidence of an employers' motivation until much later. The 3 month time limit tells the Court little or nothing about the true construction.

25. The objection to the Court of Appeal judgment is that each year an employer could make offers directly to its workers in respect of one or more of their terms of employment, whilst maintaining an expressed intention to collectively bargain over those terms next time around. There is an answer to that. If the intention is genuine – there is no prohibited result or purpose. If the intention is a sham and hides a true intention to circumvent collective bargaining – then a tribunal can so find and thus uphold a s145B claim.

26. The appeal to the Supreme Court tries to draw on the legislative history. Section 145B was enacted to address a successful challenge to the UK in the ECtHR in *Wilson & Palmer.* However the Court of Appeal's judgment means that all s.145B does is close the *Wilson & Palmer* problem of inducements to forgo collective bargaining and that it goes no further. The legislative history could be said to confirm the Appeal Court's judgment.

27. It is correct that it is key to s.145B that the tribunal looks for the employer's main purpose, i.e. what was in the employer's mind at the moment when the offers were made. The purpose at that time must be to achieve the prohibited result – i.e. achieve a variation to the contract such that a term or terms will no longer be determined by collective agreement with the union.

28. The union also suggests that the Court of Appeal confused the prohibited result with the 'purpose test'. The problem with this is that the same wording applies to both – the employer must both achieve the prohibited result and its purpose must be to achieve the prohibited result. In both situations the phrase must mean the same. It is wrong to say that this approach renders the two stage test in s.145B redundant. The prohibited result may be achieved unintentionally, so it is necessary for there to be a second *purpose* test in order to provide a necessary safety check.

29. If an employer delays collective bargaining and makes an offer with the sole or main purpose to achieve the result that the workers' terms of employment will not be determined by collective agreement in the future – that would be unlawful. An intention and effect of taking some terms out of collective bargaining, even for just the next bargaining year, would be unlawful on the Court of Appeal's judgment.

30. The words "will not" in 145B(2) apply to situations where no union is yet recognised and "will no longer" is for where there is a recognised union and terms were in the past determined by collective agreement. However the application for permission to appeal to the Supreme Court suggests that the parenthesises around "(or will no longer)" are significant in some way to change this reading.

31. The union criticises the 'veto' reading. Acceptance of the offers would have the prohibited result and, as the hypothetical scenario shows, it would be the employer's purpose to change the contract to introduce bank holiday working and thus to achieve that prohibited result. Only if (as the Court of Appeal found) s.145B is actually looking at whether the prohibited result (and therefore the purpose) is to take terms out of the collective bargaining sphere is the veto problem avoided. That approach also makes all the factors in s.145D relevant and useful.

Other Cases on s.145B

32. Although for many years there were no cases revealing any doubt over the meaning of s.145B, after about 2012/2013 there was a flurry of ET decisions which took different approaches to s.145B. Only *Kostal* went on appeal to the EAT. Unite the Union was in particular keen to push the new approach and the s.145B 'veto' argument has been a feature of most industrial disputes of recent years. Employers are warned that if they do not agree to the union's demands in collective bargaining, they risk a potential s.145B claim.

33. The Scottish EAT is due to consider a related issue in *Arnott v INEOS Chemicals Grangemouth* which is currently stayed (or sisted) by Lord Summers pending the outcome of *Kostal.* INEOS argued unsuccessfully before the ET that its business reasons for making its offer was a 'proper purpose' – the gloss added to the statutory wording by the EAT in *Kostal*. Ineos was found liable to pay each of the claimants that received an offer of new terms.

34. The facts in outline were that the employer imposed a pay increase having exhausted collective bargaining and after its 'final' offer had been rejected by the union. Things had reached an impasse. Ineos decided at this time to give notice on the collective agreement and impose a pay increase. The ET held that a pay imposition in such circumstances was an 'offer' (applying *Lee v GEC Plessey* [1993] IRLR 383 and *Solectron (Scotland) v Roper* [2004] IRLR 4). There may be arguments about whether a pay imposition amounts to an effective offer and acceptance in the light of recent case law, but in this case there is also the fact that it is a matter of Scots law.

35. The industrial problem with the EAT's 'proper purpose' test is demonstrated by *INEOS* as it will always be uncertain when an ET has to assess the purpose against the "infinite spectrum of facts" and where the test is "a question of fact and degree".

36. The ET would have to descend into the arena of collective bargaining and subjectively assess the employer's business rationale against the merits of the negotiating stance of the unions. Such an assessment by an ET would be an unwelcome stumble into areas from which the laws have insulated them since their creation.

37. The Court of Appeal has brought a realistic approach to collective bargaining and remove the s.145B sword of Damocles that has been hanging over collective negotiations for some time. On the EAT judgment, it would be a high risk strategy to

walk away from failed collective negotiations and impose a pay increase in case the ET did not accept its 'proper purpose'.

38. The Court of Appeal's solution is a more straightforward construction of s.145B and is to be preferred to the EAT's unnecessary gloss and addition to the statute. However as there is controversy between the EAT majority and Court of Appeal and as there is a big divide over the reading of this section between employers and unions, it would not be very surprising if the Supreme Court thought that it was apt and in the public interest for it to be considered. We should find out towards the end of 2019.

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