



# Industrial Action Conference

Bruce Carr QC, Devereux Chambers

White Paper Conference – Tuesday 3 October 2017

# This afternoon's question

**Is there scope for employers to offer inducements to employees directly, i.e. when they are not getting the outcome they want from collective bargaining?**

- Around 29% UK workers subject to collective bargaining
- Private sector figure around 17%
- Public sector figure around 63%
- Standard provision along the lines of:  
“Your terms and conditions will be subject to agreement with recognised trade unions.”

- *Associated Newspapers v Wilson* 1995 IRLR 258 HL
- *Palmer & Wilson v UK* 2002 IRLR 568 ECHR
- Changes introduced to TULRCA 1992 under Employment Relations Act 2004
- Section 145A – Inducements relating to TU membership or activities
- Section 145B – Inducements relating to collective bargaining

# Section 145B – key concepts

- Applies to “workers” who are TU members
- TU must be recognised *or seeking recognition*
- Right not to have a relevant offer made to them
- Relevant offer is one, which when accepted by the worker and others would have “prohibited result”
- Employer’s “sole or main purpose” in making the offers is to achieve the prohibited result

- Declaration and an award – section 145E(2)
- Level of award - £3,907 per worker – section 145E(3)
- “sweetener” not recoverable from the worker – section 145E(4)(a)
- Cannot enforce agreement to vary but variation effective if it has already taken place – sections 145E(4)(a) & (b)
- 2 offers, 2 awards? *Dunkley v Kostal 2017 ET* – *remedy decision*

# The “prohibited result”

- Section 145B(2)
- “terms of employment, or any of those terms”
- “will not (or will no longer)”
- “be determined by collective agreement negotiated by or on behalf the union”

# “will or will no longer”

- The one-off agreement
- Does the statutory language look to the future?
- *Dunkley v Kostal 2017 ET* – ‘driving a coach and horses’ through the legislation
- EAT hearing listed for 14-15 November

# “Sole or main purpose”

- Statutory clues – section 145D(4):
  - Recent changes/attempts to change/non-use of collective bargaining
  - Employers wish not to enter into arrangements
  - Offers to particular workers because of performance or value
- Look at the immediate purpose not the ulterior one – eg. to achieve efficiency
- But – the wider view or the narrower view of that purpose? Again, see *Dunkley v Kostal* – cf. *Wyre v Pembrokeshire CC 2014 ET*; *Lowe & Malik v BA 2013 ET*

# Other strategies?

- Using a unilateral variation clause
  - Leaving the collective bargaining arrangements in tact
- Unilateral payments of increased wages
  - Making the problem go away
  - Is this an “offer”?



Thank you

Any questions?

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