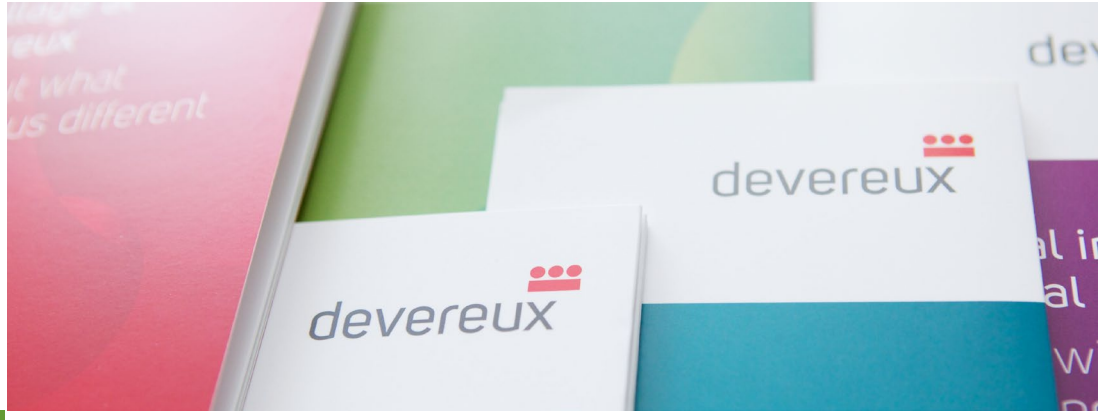
devereux

Case note



Court of Appeal rules on inducements relating to collective bargaining

Andrew Burns QC and Georgina Hirsch

Our legal specialists review the latest developments in employment law and offer a practical insight on how these may affect you and your clients.

In Kostal UK Ltd v Dunkley [2019] EWCA Civ 1009, the Court of Appeal holds 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 hold 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.

This important case 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 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.

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 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 that year's pay offer had to be made directly to ensure that the workforce did not miss out on their Christmas bonus.

A recognition agreement was 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*".

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.

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.

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."

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*".

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*".

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).

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

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*.

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 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.

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."

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. 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*.

The Union has applied for permission to appeal to the Supreme Court on behalf of Mr Dunkley and his colleagues.

Andrew Burns QC and Georgina Hirsch (instructed by Angela Brumpton of gunnercooke LLP) appeared for Kostal.

Andrew Burns QC specialises in complex commercial, employment and industrial disputes. He has featured in some of the leading appellate cases in insurance law and trade disputes in recent years including Durham v BAI (Run Off) Ltd (the Employers' Liability Policy Trigger Litigation), RMT v Serco (the key authority on strike injunctions) and Prophet plc v Huggett on restrictive covenant injunctions.). His recent appellate work includes discrimination in shared parental leave, restrictions on contractual changes in relation to collective bargaining and compensatory rest breaks for transport workers.

Georgina Hirsch has a wide employment practice, both on an individual and collective basis. Recent notable cases include success in the Court of Appeal in the trade union detriment case of *Kostal UK Ltd v Dunkley*; the Addison Lee employment status appeals, and acting for Coutts Bank – successfully defending claims of equal pay and associated Equality Act claims. Georgina writes the age discrimination section of Bloomsbury Discrimination Law, and regularly speaks and write on industrial and individual employment law issues.

For more information on their latest case highlights, or Devereux's leading employment team, please contact our practice managers on 020 7353 7534 or email clerks@devchambers.co.uk.

Follow us on twitter on @devereuxlaw.

Devereux Chambers
Devereux Court
London WC2R 3JH

Tel 020 7353 7534
DX 349 London Chancery Lane

clerks@devchambers.co.uk
www.devereuxchambers.co.uk
@devereuxlaw