Neutral Citation Number: [2019] EWCA Civ 1009

Case No: A2/2018/0108

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL
THE HON MRS JUSTICE SIMLER (PRESIDENT), MS K BILGAN & MISS S M WILSON
UKEAT/0108 / 0109/17/RN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/06/2019

Before :

LORD JUSTICE BEAN
LADY JUSTICE KING
and
LORD JUSTICE SINGH

- -

Between :

KOSTAL UK LTD	**Appellant**
- and -	
DALE DUNKLEY AND OTHERS	**Respondents (Claimants)**

- -
- -

Andrew Burns QC and **Georgina Hirsch** (instructed by **gunnercooke LLP, Manchester**) for the **Appellant**
Stuart Brittenden and **Bruno Gil** (instructed by **Thompsons Solicitors, Newcastle**) for the **Respondents (Claimants)**

Hearing date: 22 May 2019

- -

Approved Judgment

Lord Justice Bean :

Introduction

1. These appeals concern the reach of s.145B of the Trade Union and Labour Relations Consolidation Act 1992 ("the 1992 Act"), a provision not previously considered at appellate level.

2. Kostal UK Ltd appeals against a judgment of the Employment Appeal Tribunal (reported at [2018] ICR 768) affirming the determination of an employment tribunal (Employment Judge Little, Mr Harker and Mr Priestley) ("the ET") promulgated on 10 January 2017. The ET upheld claims made by 55 Claimants who were members of a recognised trade union, Unite the Union ("Unite") that each of two offers made by Kostal to its workforce breached their rights under s.145B of the 1992 Act.

3. The ET awarded the mandatory fixed award of £3,800 under s.145E(2)(b) in respect of each unlawful inducement offer it found to have been made, that is to say £7,600 to each of 55 Claimants. There is no appeal to this court on remedy.

4. The ground of appeal is essentially that the ET and EAT erred in law in construing the "prohibited result" in s.145B(2).

The facts

5. The Respondent is concerned with the development and production of technically advanced electronic, electromechanical and electronic products. The Claimants are all members of Unite and employed as shop floor or manual workers. In November 2014, there having been little or no union activity prior to that, there was a ballot with significant support in favour of recognising Unite. Subsequently a Recognition and Procedural Agreement was concluded between the Respondent and Unite, signed by both sides on 16 February 2015, giving Unite "sole recognition and bargaining rights": clause 2.1.

6. It is common ground that the Recognition Agreement is binding in honour only, rather than legally binding. Subject to that, the Recognition Agreement identifies a common objective in using the processes of negotiation and meaningful consultation to achieve beneficial results for both sides (clause 3.4); and establishes a framework for consultation and collective bargaining. Clause 7 "Negotiating and Consultation Committee", provides:

> "7.1 Formal negotiations will take place between the parties on an annual basis. At this time the company and union will also agree to a member verification check with ACAS prior to negotiations commencing.
>
> 7.2 Negotiations will commence normally in October and with a normal effective date of 1st January.
>
> 7.4 Any matters related to proposed change of terms and conditions of employment will be negotiated between the Company and the Union."

7. Appendix 1 contains a Disputes and Resolution of Collective Grievances Procedure with four procedural stages, the last of which provides that in the event of a failure to agree at stage 3, the matter may, by joint agreement, be referred to ACAS for conciliation. The Procedure provides that:

> "(b) During the procedural process, there will be no sanctions of any kind applied nor change imposed by either party…"

8. Having achieved recognition earlier in the year, in October 2015 Unite requested a meeting so that formal pay negotiations could commence. There were preliminary meetings on 29 October and 12 November, with a first proposed pay offer for 2016 tabled by Mr Johnson for the Respondent at a meeting on 24 November. The offer was of a 2% increase in basic pay, a lump sum of 2% of basic pay to be paid in December as a Christmas bonus, and an additional 2% for those earning less than £20,000 payable with effect from 1 April 2016. In return the Respondent requested a reduction in sick pay for new starters, a reduction in Sunday overtime and consolidation of two individual 15 minute breaks into a single 30 minute break.

9. The offer was considered and discussed in the meeting. Mr Coop on behalf of Unite asked what would happen to the Christmas bonus if the deal was rejected. He was told by Mr Johnson that the Christmas bonus had to be paid in December from 2015 profits and

> "if this was not paid in December, it could not and would not be paid in 2016, therefore it would be lost to employees and they would be left with either the 2% on basic or 4% on basic depending on whether their basic salary was greater or less than £20K…"

10. Mr Coop then stated that he could not recommend the offer, and would give his members a 'free vote', neither recommending acceptance nor rejection, in a forthcoming ballot.

11. The ballot (described as a consultative ballot) of Unite's members at Kostal took place on 3 December 2015 and had an 80% turnout. Just under 80% voted to reject the proposal, and just over 20% voted to accept. The Respondent was disappointed by this result and by email dated 9 December 2015 Mr Johnson told Mr Coop that:

> "……..I am writing to inform you that I now intend to write to each and every individual employee at Kostal UK in order to offer the company pay increase and term and condition changes.
>
> I am doing this because otherwise we will run out of time to pay a "Christmas bonus" prior to Christmas in December's pay. Please be aware that any employee who rejects the pay offer will not receive the Christmas bonus and it cannot be paid at a later date even if we subsequently achieve an agreement between us".

12. Later on 9 December 2015, Mr Johnson issued a General Notice entitled "Pay Negotiations 2015", which was displayed on notice boards in the workplace, summarising Kostal's pay offer and its proposed changes to terms and conditions. The Notice set out the offer and continued:

> "Unfortunately, the above offer was rejected by a ballot of Trade Union members.
>
> Therefore, the Company has made the decision to write to every individual employee of Kostal UK in order to offer the above to each person directly.
>
> We are doing this due to the short timeframe in order to pay a Christmas bonus, which can and will only be paid in December's pay.
>
> Therefore…failure to sign and return [by no later than 18 December 2015] will lead to no Christmas bonus and no pay increase this year."

13. Letters in the same terms as the Notice were sent out to employees by the Respondent on 10 December 2015. These were the first offers relied on by the Claimants as breaching their statutory rights. The letters began by referring to the rejection of the pay offer in the trade union ballot and continued:

> "However, the company does wish to reward our employees for their efforts in 2015 and therefore wish to offer the pay increase to each individual employee."

14. There was a pay negotiation meeting on 14 December 2015. At the beginning of the meeting Mr Coop was noted as having said: "You sent a letter out to all employees – you are bypassing the collective bargaining agreement". The note records Mr Johnson's confirmation that:

> "he had distributed a letter……to all our employees because the pay offer had been rejected by TU members…"

15. Mr Coop made a proposal that if Kostal took out the provision about changing breaks he would guarantee to get the pay offer through. The company did not accept this proposal.

16. Later in December 2015 Kostal issued a further General Notice stating that the pay offer had been made to all individual employees directly because "we wanted to give the majority of employees the opportunity to be paid the Christmas bonus in their December pay. 77% of employees have already signed their acceptance including Trade Union representatives and members…" The Notice urged employees to agree to the changes by 18 December and reminded them that they would not receive their bonus if they failed to do so.

17. As for the dispute resolution process under the Recognition Agreement, the ET found that by the end of December 2015 the parties were at stage 4 of the process, namely reference to ACAS for conciliation. In anticipation of that, both sides set out their

cases in writing. The company's document, written by Mr Johnson, described the decision to write to individual employees as being for two reasons: first that the company had no idea how many employees were trade union members and was not therefore aware whether Unite was speaking on behalf of the majority. Secondly, the company wanted its employees to have the opportunity to receive the Christmas bonus. Towards the end of this document Mr Johnson wrote:

> "….my final point is to quote the Unite letter – 'Mr Johnson needs to listen to the voice of the workers' – I believe that I have, and that 91% of them have spoken, perhaps the Trade Union should follow their own advice and listen to the majority and not the minority."

18. By letter dated 14 January 2016 Mr Coop put Mr Johnson on notice that he believed that letters had been sent directly to employees because, following collective consultation, Unite had rejected the company's proposal, and that in Unite's view this appeared to breach s.145B of the 1992 Act.

19. Mr Johnson responded by letter dated 29 January 2016 rejecting that contention. He said:

> "The relevant circumstances are, in summary, that negotiations forming part of collective bargaining, reached stage 3 in December last year with no agreement. We have made it clear that our parent company in Germany insists that payment of any Christmas bonus happens in December, and cannot be carried over into the New Year. This has been the case for many years. Therefore, we decided to write to the employees directly, clarifying that if they did not sign to accept their new terms, they would not be able to take the benefit of a Christmas bonus…
>
> In my letter dated 15 January 2015, I made it clear that it was never the company's intention to induce people to opt out of collective bargaining. The only reason for making the offer to members was so that the Christmas bonus would be payable before the end of the year. If it was not accepted, the bonus would not be payable at a later date. There was absolutely nothing in the offer to staff that stated, or even implied, that acceptance of the offer would involve an agreement that they would no longer be subject to collective bargaining".

20. Also on 29 January 2016 the Respondent wrote letters to those employees who had not accepted the pay proposal. The letter noted that "unfortunately you rejected our offer". Reference was made to the three proposed changes to terms and conditions and an explanation was given as to why those were considered to be necessary. The recipients were invited to a meeting on 2 February 2016 with an HR officer or alternatively invited to return the then current letter accepting the offer no later than 4 February 2016. The letter went on to state as follows:

> "Please be aware that the proposed changes will not be implemented without your express agreement and the consultation process will be full and open. However you should be aware that in the event that no agreement can be reached between the parties, this may lead to the company serving notice on your contract of employment".

Nothing was said about that action being followed immediately by re-engagement on the new terms. The letter went on:

> "In consideration for your agreement to the proposed changes, the company is willing to pay a 4% increase in your basic salary backdated to 1 January 2016".

21. Following a ballot for industrial action, Unite called for an overtime ban.

22. Eventually, on 3 November 2016, a collective agreement was reached as to pay and amended terms and conditions. The ET recorded that:

> "save for the by then irrelevant issue of the Christmas bonus, the collective agreement endorsed the pay proposals which the [company] had put forward in November 2015 together with the three changes to terms and conditions".

23. The Claimants alleged that their rights under s.145B of the 1992 Act had been infringed on two occasions, by the letters of 10 December 2015 and 29 January 2016. The ET found that the offers were similar, but not identical in that the Christmas bonus did not feature in the second offer.

The legislation

24. S. 29 of the Employment Act 2004 inserted a group of new sections, numbered 145A-145F, into the Trade Union and Labour Relations (Consolidation) Act 1992. S. 145B provides as follows:-

> "*Inducements relating to collective bargaining*
>
> (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…….
>
> (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."

25. S.145C requires a complaint under s.145B to be presented to an employment tribunal within "three months beginning with the date when the offer was made or, where the offer is part of a series of similar offers to the complainant, the date when the last of them was made".

26. S.145D(2) provides that on a complaint under s.145B it shall be for the employer to show what was his sole or main purpose in making the offers. S.145D(4) states:-

> "(4) In determining whether an employer's sole or main purpose in making offers was the purpose mentioned in section 145B(1), the matters taken into account must include any evidence –
>
> > (a) that when the offers were made the employer had recently changed or sought to change, or did not wish to use, arrangements agreed with the union for collective bargaining,
> >
> > (b) that when the offers were made the employer did not wish to enter into arrangements proposed by the union for collective bargaining, or
> >
> > (c) that the offers were made only to particular workers, and were made with the sole or main purpose of rewarding those particular workers for their high level of performance or of retaining them because of their special value to the employer."

27. S.145E requires that when an employment tribunal finds that a complaint under s.145B is well founded it shall make a declaration to that effect and shall make an award to be paid by the employer of a fixed amount specified by s.145E(3). At the time relevant for the purposes of this case the specified amount was £3,800. There is, as the EAT observed in the present case, no statutory basis upon which an ET can reduce the award whether on "just and equitable" or any other grounds.

Wilson v United Kingdom

28. These provisions were introduced in 2004 at least in part in response to a ruling by the European Court of Human Rights in three cases considered together and reported as *Wilson and others v United Kingdom* [2002] IRLR 568. The cases concerned the

offering of inducements to employees to opt out of collective bargaining altogether. Employees and their respective trade unions complained that UK law on detriment relating to trade union membership (s. 146 of the 1992 Act) was inadequate to secure their rights under Article 11 of the Convention, which provides:

> "1. 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.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary to a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others…"

29. The mischief identified by the Strasbourg court was as follows:

> "41. The Court observes at the outset that although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights. In the present case, the matters about which the applications complain – principally, the employers' de-recognition of the unions for collective bargaining purposes and offers of more favourable conditions of employment to employees agreeing not to be represented by the unions – did not involve direct intervention by the State. ……..
>
> 47. In the present case, it was open to the employers to seek to pre-empt any protest on the part of the unions or their members against the imposition of limits on voluntary collective bargaining, by offering those employees who acquiesced in the termination of collective bargaining substantial pay rises, which were not provided to those who refused to sign contracts accepting the end of union representation. The corollary of this was that United Kingdom law permitted employers to treat less favourably employees who were not prepared to renounce a freedom that was an essential feature of union membership. Such conduct constituted a disincentive or restraint on the use by employees of union membership to protect their interests. However, as the House of Lords judgment made clear, domestic law did not prohibit the employer from offering an inducement to employees who relinquished the right to union representation, even if the aim and outcome of the exercise was to bring an end to collective bargaining and thus substantially to reduce the authority of the union, as long as the employer did not act with the purpose of preventing or deterring the individual employee simply from being a member of a trade union.

> 48. Under United Kingdom law at the relevant time it was, therefore, possible for an employer effectively to undermine or frustrate a trade union's ability to strive for the protection of its members' interests. The Court notes that this aspect of domestic law has been the subject of criticism by Social Charter's Committee of Independent Experts and the ILO's Committee on Freedom of Association. It considers that, by permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention. This failure amounted to a violation of Article 11, as regards both the applicant unions and the individual applicants."

30. The Explanatory Notes to the Bill which became the Employment Relations Act 2004 stated:

> "193. In July 2002 the European Court of Human Rights delivered its judgment in the case of *Wilson and Palmer*……. The Court concluded that UK trade union law was incompatible with Article 11 of the European Convention on Human Rights (freedom of association) in that where a trade union was recognised by an employer for the purposes of collective bargaining about the terms and conditions of a group of employees, the law did not prevent the employer from offering *inducements* to the employees in the group to persuade them to *surrender* their collective representation and have their terms settled instead by negotiations between each individual employee and the employer. The Government believes that the principle underlying the decision of the Court extends beyond the facts in *Wilson and Palmer* and is applicable to a number of other comparable circumstances. The purpose of sections 29 to 32 is therefore to secure that these provisions deal not only with the facts in *Wilson and Palmer* but also with the other circumstances considered by the Government to be comparable." [emphasis added].

31. The Government's response to the public consultation on a review of the Employment Relations Act 1999, published on 2 December 2003, was also relied on by Mr Brittenden, on behalf of the Claimants, as part of the legislative history. This stated:

> "3.12. The Government also confirms that the law should explicitly prohibit inducements or bribes being made to trade union members to forego union rights. These were the particular employer behaviours that gave rise to the *Wilson and Palmer* cases, and they should be made unlawful. The Government intends to make it unlawful for an employer to make an offer to an individual with the main purpose of inducing that person to relinquish rights to belong (or not to belong) to a union, rights to engage in trade union activities or the proposed right to use union services. In addition, offers

> should be made unlawful whose main purpose is to induce a group of workers, who belong to a recognised union, to accept that their terms of employment should be determined outside collectively agreed procedures. The result is that it would be unlawful for an employer to offer an inducement to the union members in such a group to have their terms of employment determined outside the framework set by any existing collective bargaining arrangements. This limits the scope of employers to offer individualised contracts. To avoid inflexibility however, the law should allow employers to make offers where the sole or main purpose of the inducement is unconnected with the aim of undermining or narrowing the collective bargaining arrangements. In particular, the law should give room for employers and individuals to enter individualised contracts designed to reward or retain key workers."

The findings of the employment tribunal

32. Having set out the relevant provisions of the 1992 Act, the ET dealt with its interpretation of s. 145B. At paragraph 8.2 the ET referred to a submission on behalf of Kostal that the statutory wording connoted a degree of permanence. It agreed that the word "determined" in s.145B(2) indicated that the prohibited result was about terms being changed permanently. The tribunal held that on the facts this had occurred, because any recipient of the offer was agreeing that he would accept the pay offer set out in the letter and that from the date of acceptance his terms with regard to Sunday overtime, daily breaks and pay would be governed by that bargain.

33. The tribunal concluded that, leaving aside the question of purpose,

> "it is not permissible for an employer to abandon collective negotiation when it does not like the result of a ballot, approach the employees individually with whom it strikes deals and then seek to show its commitment to collective bargaining by securing a collective agreement which is little more than window dressing – having destroyed the union's mandate on the point in question in the meantime. In other words, if there is a Recognition Agreement which includes collective bargaining, the employer cannot drop in and out of the collective process as and when that suits its purpose.
>
> It follows that we prefer 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."

34. The question of "purpose" in s.145B(1)(b) is addressed at paragraph 8.3. The Tribunal held as follows:

> "Although the burden of proof has not been debated in detail before us we take the approach that the Claimants need to establish a prima facie case that the employer had an unlawful

purpose and if they do that the provisions of section 145D(2) come into play, so that it is for the employer to show what his sole or main purpose in making the offers was. On the basis of our conclusions above we are satisfied that a prima facie case has been established.

It was common ground before us that section 145D(4) was not felicitously drafted or, as Mr Brittenden put it was "a bit of a hash". For one thing it is not entirely clear which way evidence of the three matters referred to might point.

The Respondent's case is that their sole or main purpose – at least in relation to the December 2015 offer – was to ensure that employees did not lose their Christmas bonus. As Mr Brittenden points out, that is the only reason pleaded in the ET3 and we cannot discern any other reason from the Respondent's evidence. It follows that in relation to the second offer – made at a time when the recipients of that letter would already have "lost" their Christmas bonus the Respondent has not shown any benign reason.

With regard to the Christmas bonus reason, it has to be borne in mind that that was introduced into the negotiations by the Respondent, that is as a bargaining tool. In those circumstances we consider that it is somewhat disingenuous for the Respondent to say that it made an offer to save the relevant employees from the consequences of a threat which it had made. We also bear in mind that whilst Mr Johnson's evidence was consistently that under no circumstances would the parent company allow the Christmas bonus to be paid other than within December of the relevant year, we note from the General Notice introduced on day two of our hearing that because of concerns about the outcome of these proceedings the Respondent indicated that it might not be in a position to determine pay or bonus entitlements in either December or January – therefore indicating that December was not a deadline.

Looking at any evidence we might have in the category of section 145D(4), Mr Brittenden has fairly accepted that a case of union hostility has not been made out…….

As far as section 145D(4)(b) is concerned we find that even accepting the Respondent's explanation for Mr Johnson's statement that "the offer will be the offer" that does not indicate a lack of willingness to enter into meaningful negotiations. It says no more in our judgment than simply 'we do not want protracted negotiations.'

It is however significant that the contemporaneous correspondence shows that the making of the first offer was an

> immediate reaction to the rejection at ballot of the Respondent's proposal.
>
> Further we agree with Mr Brittenden that the Respondent's true intentions can be gleaned from its publication via general notices of the percentage of employees who had already signed their acceptances "including trade union representatives and members"(page 81).
>
> On the facts before us it is plain that having found the ballot result "disappointing if not unexpected" (Mr Johnson's email to Mr Coop of 9 December 2015 page 79) the Respondent took the conscious decision to by-pass further meaningful negotiations and contact with the union in favour of a direct and conditional offer to individual employees who were members of that union. We therefore agree with Mr Brittenden that it was "exceptionally improbable" that the Respondent did not intend to circumvent the collective bargaining process when it made the offers.
>
> It follows that we find that both the December 2015 and January 2016 offers if accepted had the prohibited result and that that was the main purpose of the Respondent making those offers."

35. As to remedy, the ET referred to its earlier findings that there were two offers, that they were different and that both were unlawful. Accordingly it concluded that it was not now open to the Respondent to invite the Tribunal to make different findings and to find that the two offers should be viewed as part of a sequence or that the second offer should not be regarded as an unlawful offer because it was "lesser". The Tribunal referred to the natural meaning of the words used in s.145E(2)(b) of the 1992 Act. It referred to two inducement offers made to the majority of the Claimants. It said that the awards were to penalise the way in which the Respondent went about its purpose and the result was that each of the 55 Claimants who received two offers should receive two awards, that is to say £7,600 per person.

The appeal to the Employment Appeal Tribunal

36. Kostal appealed to the EAT. In a reserved judgment handed down on 13 December 2017 the appeal was dismissed by a majority (Simler P and Ms Bilgan, Miss Wilson dissenting). The majority found as follows:-

> "51. Two broad species of prohibited result are envisaged by s.145B(2). The first is that the entirety of the workers' terms of employment will not (or will no longer) be determined by collective bargaining and addresses the situation in *Wilson and Palmer*. The second is that 'any of those terms', in other words, one or more terms of employment will not or will no longer be determined by collective bargaining and addresses a situation where even just one of many collectively bargained terms would not, if offers are accepted, be determined by

collective agreement, even if the vast majority would continue to be negotiated on a collective basis.

52. This appeal concerns the second of those two situations. We consider that on a straightforward reading of the words of the subsection, if as a matter of fact, acceptance of direct offers to workers means that at least one term of employment will or would as a consequence of acceptance be determined by direct agreement whenever that occurs, and not collectively (even if other terms continue to be determined collectively) that is sufficient. That term, if accepted, would no longer or would not be determined collectively, at least until a further change is negotiated, agreed or imposed. The fact that the result is temporary (in the sense of being a one-off direct agreement following acceptance of the offers) rather than permanent does not affect this question, as both sides agree. There is nothing in s.145B that deals with the duration of the effect, or requires a permanent surrender of collective bargaining for the future. We can see no warrant for reading into s.145B (2) a requirement that the terms if accepted will no longer in the future (or will not in the future) be determined collectively, still less a requirement that future here is to be understood as Mr Burns contends, as 'at least at the next collective bargaining round'. If that was Parliament's intention, it would have been easy to say so.

53. On this basis, we consider that the s.145B (1)(a) question will usually be a straightforward question of fact about the effect acceptance of the offers would have and is to be judged at the date when relevant offers are made. We do not agree with Mr Burns that this question can only be judged when offers have been accepted or rejected. The conditional tense in s.145B(1)(a) makes that clear because the offers need not be accepted at all.

54. Moreover, this is consistent with the three month time limit in s.145C(1) for claims in the employment tribunal, which begins with "the date when the offer was made" or in the case of a series of similar offers "the date when the last offer was made". Following the enactment of s.145B offers are less likely to state expressly what effect their acceptance would have on collective bargaining. In those circumstances, it must be possible for a worker to determine what the effect of acceptance would be within the time limit prescribed. The approach we adopt allows that and creates a coherent scheme…….

55. Furthermore, we agree with Mr Brittenden that the consequence of Mr Burns' construction is that each year the employer could table offers or inducements directly to employees to accept changed rates of pay or varied terms whilst

at the same time maintaining union recognition and an expressed intention to bargain with the union about some or all of these matters in the next bargaining round, or in subsequent years. That seems to us to reduce the scope of s.145B almost to vanishing point

56. We consider that there is nothing in the enacting history or in the Government's Response that leads to a different conclusion. In the majority's view, the enactment of s.145A is no answer to the indication that the Government's intention was to introduce legislation to address situations beyond the facts in Wilson and Palmer and applicable to other comparable circumstances. The principle underlying the decision in Wilson and Palmer is not addressed by s.145A. It is applicable where conduct of an employer can operate to "undermine or frustrate a trade union's ability to strive for the protection of its members interests" by making offers of inducements for dealing directly with the employer in relation to some terms that lead to differential terms being made available and act as a disincentive to the exercise of Article II rights or undermine the mandate of the union. That is precisely what happened with the Christmas bonus on the Employment Tribunal's findings. Paragraph 3.12 of the Response underscores the wider intention of the Government in this regard. It makes no reference to foregoing union rights in future. We read the references to terms being determined outside collectively agreed procedures or outside the framework set by any existing collective-bargaining arrangements as consistent with the approach we have adopted and certainly not inconsistent with it. Moreover, this paragraph refers to the new legislation as limiting the scope of employers to offer individualised contracts but makes clear that where the sole or main purpose of the offer is unconnected with the aim of undermining or narrowing the collective-bargaining arrangements, such offers remain lawful.

57. That is important because the terms of s.145B make clear that it does not prevent employers from making offers that would merely have the prohibited result; the employer must also have as his sole or main purpose an unlawful purpose, namely achieving the prohibited result. Under s.145B (1)(b) (which is likely to be more difficult to determine) the question is whether the employer's sole or main purpose in making the offers is (or was) to achieve the result that if accepted, one or more of his workers' terms will no longer (or will not) be determined collectively. A plain reading of the words of s.145B(1)(b) shows that if reaching agreement directly takes one or more terms outside the collective agreement process and is (at least) the main purpose of making direct offers, it is unlawful.

58. The legislation does not limit or qualify the purpose in any way as it could have done by seeking to identify the employer's future rather than immediate purpose. The employer's purpose must be distinguished from the effect acceptance of the offers would have; in many cases they are different. Purpose connotes an aim, object or desire which the employer subjectively seeks to achieve, whatever the effect of the offers involved. Again this is essentially a factual question to be assessed by reference to any evidence that sheds light on the employer's sole or main purpose and any inferences that can properly be drawn from that evidence and the findings of fact properly made. We can see no warrant for interpreting the purpose in a way that restricts an employment tribunal's consideration to the next collective bargaining round or ignores the immediate effect of acceptance of offers in the context of considering the employer's aims or purpose……..

60. There are three mandatory factors in s.145D(4) to be considered in determining purpose: two pointing towards a purpose designed to achieve the prohibited result; and the third pointing in the opposite direction. Contrary to Mr Burns' contention, we consider that these factors underline the fact sensitive nature of the question posed by s.145B(1)(b), including the need to consider and assess the employer's attitude towards collective bargaining and its past dealings in that regard. We do not agree that these factors are more consistent with Mr Burns' construction of s.145B(2) than the one we have adopted. To the contrary, they focus on the circumstances that exist when the offers are made by the employer and underline the fact sensitive nature of the enquiry required by the legislation as we have described.

61. There is an infinite spectrum of facts that might have to be considered in a s.145B case: at one end of the spectrum there may be cases where the employer has sought to change collective bargaining arrangements and then, without entering into collective negotiations or acting precipitately in the midst of such negotiations, and absent some pressing business aim, makes offers that would have the effect that all employment terms will be agreed directly if accepted. 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; or who can demonstrate a strong history of operating collective bargaining arrangements with the union and/or have no wish to avoid entering into such arrangements when the offers are made; and there will be cases where employers can show genuine business reasons (unconnected with collective bargaining) for approaching workers directly outside the collective bargaining process. There may also be difficult cases in the middle where

> the employer has mixed aims or objectives it seeks to achieve, or the evidence is unclear. The question in each case is a question of fact and degree. As with other detriment cases, where an employer acts reasonably and rationally and has evidence of a genuine alternative purpose, tribunals are likely to be slower to infer an unlawful purpose than in cases where the employer acts unreasonably or irrationally or has no credible alternative purpose.
>
> 62. 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. What the legislation seeks to prevent is an employer going over the heads of the union with direct offers to workers, in order to achieve the result that one or more terms will not be determined by collective agreement with the union if offers are accepted. Mr Burns complains about the risk an employer must take on this approach, in making direct offers to workers in circumstances where these arguments are open to the union. He submits that even if there is no veto as a matter of law, in effect the trade union has a practical veto. We disagree. Although inevitably in cases that depend on questions of fact and degree there is less certainty as to the outcome and more risk, we consider that employers who act reasonably and rationally for proper purposes and are able to demonstrate that their primary purpose in making individual offers is a genuine business purpose, retain the ability to make offers directly to their workforce without fear of contravening s.145B."

37. The EAT concluded:

> "64. Finally, we do not accept that our interpretation undermines or is inconsistent with other legislation as Mr Burns submits. Section 145B does not act as a veto preventing direct offers to workers as we have already stated and for the reasons we have given. Indeed Mr Burns appeared to accept as much by contending that the practical as opposed to the legal effect of the construction we have adopted is to create such a veto.
>
> 65. The minority member of the Appeal Tribunal (Ms Wilson) accepts the arguments advanced by Mr Burns as we have summarised them above. She considers that Parliament cannot have intended that s.145B would prevent an employer by law from implementing changes to terms and conditions

> directly, when there is a failure to agree. She considers that the prohibited result concerns whether in future, terms will be negotiated by collective bargaining and finds support for this conclusion in both the Government's Response and the Hansard material."

The appeal to this court

38. On 2 August 2019 Underhill LJ granted Kostal permission to appeal to this court. Their grounds of appeal submit as follows:

a) The majority of the EAT and the ET erred in interpreting "prohibited result" as meaning that one or more terms of the workers' contract are – immediately on acceptance by the worker – determined directly and not by collective agreement;

b) The EAT and the ET ought to have held that "prohibited result" means that the terms after acceptance by the worker will not (or will no longer) (i.e. in the future) be determined by collective agreement negotiated by or on behalf of the union;

c) Contrary to the conclusion of the majority, the Appellant's argument did not require words to be read into s.145B: "will not in the future" is simply the natural meaning of "will not";

d) The majority of the EAT erred in failing to recognise that there are two future tenses in s.145B. In s.145B(1)(a) (acceptance of the offer… would have the prohibited result), "would" is focused on the moment of acceptance; whereas in s.145B(2) ("the prohibited result is that the workers' terms will not (or no longer) be determined by collective agreement.") the words "will not or will no longer" look into the future from and after the moment of acceptance. Viewed at the time an offer is made, acceptance must always be in the future. The prohibited result is not the effect the offer had at the moment of acceptance but the effect it will have on collective bargaining in the future after the time of acceptance. It is submitted that the majority erred in using the words "will not" and "would not" interchangeably in their judgment, and in failing to identify that "will not" looks to the future from the moment of acceptance and not from the time of the offer.

e) Having correctly held that s.145B must distinguish between situations where an employer has a sound business reason for making an offer direct to employees and situations where the employer intends to subvert collective bargaining, the majority of the EAT and the ET erred in finding that in both these situations the employer's purpose would "the prohibited result".

f) The majority of the EAT misdirected itself in holding that the effect of *Wilson v UK* was to prevent direct offers outside the collective bargaining process, rather than only to prevent inducements to relinquish collective bargaining.

39. Mr Brittenden submits in response that:

a) The EAT's construction of the plain natural wording of s.145B is undoubtedly correct. The Appellant unnecessarily over-complicates this straightforward issue of construction with references to 'Immediate Result' and 'Future Result'.

b) The Appellant's construction renders the rights conferred by s.145B inaccessible, and yields absurd results.

c) Furthermore, the Appellant's construction is one which ill-accords with ECtHR jurisprudence as to the Claimants' rights to associate under Article 11. The inevitable consequence of the arguments deployed by the Appellant would mean that s.145B would permit employers to treat members of a recognised union who do not accept direct offers made outside of collective bargaining less favourably than those who do. S.145B would therefore be incompatible with Article 11.

d) Further, the Appellant's appeal is necessarily academic because:

i) (i) Based upon the ET's unchallenged findings of fact, it failed to establish <u>any</u> valid purpose pursuant to s.145D(2); and/or

ii) (ii) Even on the Appellant's own construction, it has necessarily contravened s.145B.

Discussion

40. Mr Brittenden's construction of s. 145B(2), which found favour with both the ET and the majority of the EAT, is possible as a matter of literal interpretation of the words used. But I think it is extremely unlikely that it is the result which Parliament intended. It would amount to giving a recognised trade union with a collective agreement similar to the one in the present case 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.

41. The penalty issue is illustrated by the following hypothetical which we put to counsel in the course of argument. 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.

42. Such a result would go far beyond curing the defect in UK law identified by the Strasbourg court in *Wilson v UK.* As Singh LJ suggested to counsel in oral argument, 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. We were not shown any authority, whether Strasbourg or domestic, which suggests that there is an Article 11 right to achieve a particular result.

43. The ET and EAT both attempted to deal with the veto problem, but, with respect, neither of the answers they gave seems to me to be satisfactory. The ET said that the way an impasse in negotiations is resolved in real life, in the experience of the lay members, is that the employer can dismiss the relevant workforce and re-engage them on amended terms. I cannot accept that this is an outcome which Parliament was seeking to promote in enacting s.145B. For their part the EAT said that an employer who has acted "reasonably and rationally" will not be liable. But s.145B says nothing about reasonableness; and it has surely been settled law, at any rate since the 1980s, that courts and tribunals should not try to decide which side in a trade dispute is behaving reasonably and rationally.

44. An important finding of fact by the ET in the present case, based on a (clearly correct) concession on behalf of the Claimants, was that in acting as they did Kostal were not motivated by hostility to trade unions. That is not, of course, the end of the case for the Claimants, but it does distinguish the case on the facts from those of the three cases before the ECtHR in *Wilson.* It is also significant that the offers were made to the whole workforce, and that each individual (whether accepting or not, and whether a member of Unite or not) would continue to be represented by Unite under the collective agreement.

45. Once anti-union motivation has been rejected, the purpose of Kostal in making the offers directly could be described in a number of different ways: to settle the dispute; to circumvent the impasse in the negotiations; or to get the workers to agree to a change in breaks, Sunday overtime pay and sick pay for new starters in return for a Christmas bonus and other improvements in their terms. I doubt whether the description matters much. The ET found that it was "exceptionally improbable" that the company did *not* intend to circumvent the collective bargaining process when it made the offers: in effect (eliminating the double negative) they found, and were entitled to find, that Kostal's purpose was to circumvent the collective bargaining process. But it does not follow that this was a "prohibited result" within s.145B.

46. S.145D(4) gives some clues to the meaning of s.145B without providing decisive support to either side's argument. If s.145B(1)-(2) are to be construed so as to prohibit *any* direct offer which circumvents the collective bargaining process, it is hard to see how it could make a difference that (s.145D(4)(c)) there was evidence that the offer was made only to particular workers as a reward for performance or an aid to retention.

47. I do not consider that the Explanatory Notes to the 2004 Bill assist either way in deciding what the section means. Mr Burns is right to submit the reference to

extending the law beyond the facts in *Wilson* and making it applicable to a number of other comparable circumstances is probably a reference to the new rights which were created by s.145A. The "comparable circumstances" referred to are cases of inducements to relinquish the right to belong to a union, the right to engage in union activities, or the right to use union services, all found in s.145A. The offers made in the present case are not, in my view, remotely comparable to what took place in the *Wilson* cases, and there is nothing in the Explanatory Notes to suggest that they are.

48. I doubt whether the 2003 Government response to consultation about possible changes to the Employment Act 1999 is admissible as an aid to construction of the statute as passed by Parliament in 2004; and in any event paragraph 3.12 of the consultation response has the same ambiguity as s.145B itself.

49. I would construe the "prohibited result" provisions of s 145B(1)-(2) as follows.

50. The first type of case is where an independent trade union is seeking to be recognised and the employer makes an offer whose sole or main purpose is to achieve the result that the workers' terms of employment *will not* be determined by a collective agreement.

51. The second type of case is where an independent trade union is already recognised, the workers' terms of employment are determined by collective agreement negotiated by or on behalf of the union, and the employer makes an offer whose sole or main purpose is to achieve the result that the workers' terms of employment (as a whole), or one or more of those terms, *will no longer* be determined by collective agreement. "No longer" clearly indicates a change taking the term or terms concerned outside the scope of collective bargaining on a permanent basis; and corresponds, in my view, to the ECtHR's use of the word "surrender" in paragraph 48 of *Wilson.*

52. The difficult question is whether there is a third type of case – the one relied on in the present litigation – where an independent trade union is recognised, the workers' terms of employment are determined by a collective agreement negotiated by or on behalf of the union, and the 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.

53. I do not accept that there is. My reasons are essentially these: (1) because of the penal nature of s. 145B, that construction gives a recognised trade union an effective veto over any direct offer to any employee concerning any term of the contract, major or minor, on any occasion; (2) such a veto would go far beyond curing the mischief identified by the ECtHR in *Wilson*; (3) 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. All that has happened is that the employer has gone directly to the workforce and asked them whether they will agree a particular term on this occasion.

54. Such an interpretation of the section does not render the union powerless. It remains open to them (for example) to ballot their members for industrial action, as Unite did in the present case in order to implement an overtime ban.

55. I would therefore allow the appeal; set aside the decisions of the ET and the majority in the EAT; and dismiss the claims.

Lady Justice King:

56. I agree.

Lord Justice Singh:

57. I also agree.