

**BETWEEN:**

**MR D DUNKLEY & OTHERS**

Appellants (“Claimants”)

and

**KOSTAL UK LIMITED**

Respondent

**RESPONDENT’S CASE**

*Introduction*

1. The Claimants appeal the judgment of the Court of Appeal overturning the judgment of the Employment Appeal Tribunal (“EAT”) and the judgment of the Employment Tribunal (“ET”) as to liability and consequentially remedy (totalling £421,800). The ET found that the Respondent had made two offers in breach of s.145B Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA 1992”). The key error of the ET and EAT was that they held that workers who were members of Unite the Union (“Unite”) were made offers by the Respondent which, if accepted, would have the “prohibited result”.
2. There is effectively only one issue. What did Parliament intend by the “prohibited result”? 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” (s.145B(2)). The Court of Appeal held that “will no longer” can only apply to recognised unions and “will not” applies only to unions seeking recognition. The Claimants challenge this and seek to apply “will not” to recognised unions as well.
3. The Court of Appeal’s interpretation restored orthodoxy and construed s.145B and the “prohibited result” simply to outlaw an employer from making inducements to its workers to surrender, forego or relinquish collective bargaining rights in respect of any of the terms of their contract. It is common ground that the enactment of the section was prompted by the need to close a loophole in the law identified by the European Court of Human Rights

(“ECtHR”) in *Wilson and Palmer v United Kingdom* [2002] IRLR 568. The Court of Appeal held that s.145B closed that loophole and went no further. It correctly held that s.145B was not enacted to preclude the direct agreement of contractual terms between employers and workers. It does not make it unlawful for an employer to make an offer which leaves collective bargaining rights and arrangements entirely unaffected, and only varies one or more terms of the contract of employment.

4. The Claimants seek to reinstate the erroneous approach of the ET and EAT and apply “will not” to recognised unions. That would signal a paradigm shift in industrial relations in the UK. The issue, at its simplest, is whether the trade union’s collective power lies in the use or threat of industrial action or collective complaint (as now); or whether a recognised trade union has influence, indeed an effective veto, over the terms and conditions under which an employer contracts with its workers. In other words, whether:
  - a. the role of trade unions is to represent and negotiate for the protection and advancement of their members’ interests (not disputed by the Respondent); or
  - b. whether trade unions are also a bargaining party who ultimately determines terms – in that unions can use s.145B to dissuade or prevent an employer even offering its workers changes to their term, if the union has not agreed those changes collectively.
  
5. Commentators such as Bogg and Ewing<sup>1</sup> argue for such a shift saying that that a progressive approach to collective bargaining means that it should be seen as ‘joint regulation’ or ‘codetermination’ so that management cannot take decisions without the consent of the unions.<sup>2</sup> They criticise the common law approach which involves what they call ‘the jealous protection of the managerial prerogative’.<sup>3</sup> This agenda (adopted by the Claimants) would mean that whenever a union refuses to agree a proposed change to terms and conditions (including pay rises), the employer essentially has three choices; acquiesce, accept an impasse, or risk a significant strict liability financial penalty if it proceeds to make a direct offer to workers in an attempt to take the proposed changes forward. These provide compelling reasons why the Court of Appeal was correct - Parliament in 2004 simply did not intend these

---

<sup>1</sup> Relied on in the Appellants’ Case at section E - Professors Bogg and Ewing: Collective Bargaining and Industrial Contracts in *Kostal (UK) Ltd v Dunkley: A Wilson and Palmer for the Twenty-First Century?* Industrial Law Journal Vol. 49, Sept. 2020. [630-658]

<sup>2</sup> *Bogg and Ewing* at p.453 [653]

<sup>3</sup> *Bogg and Ewing* at p.454[654]

radical consequences as can be seen from the enacting history and Parliamentary materials (including those relied on by the Claimants themselves).

6. The Claimants also seek to revive the approach of the EAT which was (in order to address the veto problem) to imply a test into s.145B of whether an employer could show that it was acting “reasonably and rationally for proper purposes” by making individual offers rather than trying to circumvent or undermine collective negotiations.<sup>4</sup> This has two flaws. First, an employer still has to take the huge financial risk that an ET agrees it has acted reasonably. Secondly it would involve an ET reviewing the tactics of the parties to the trade dispute and bring judges into the industrial arena contrary to the House of Lords’ longstanding approach in *Dupont Steel v Sirs* [1980] ICR 161 and *Express Newspapers v McShane* [1980] AC 672.
7. Parliament did not intend to outlaw all offers to vary a term (or terms) made directly to workers, but only those offers which were intended to reduce or remove collective bargaining rights. The EAT failed to achieve this result by applying s.145B to all offers and then trying to exclude some offers by adding some ‘proper or reasonable purpose’ test into the statute. The simple and correct solution is that s.145B only applies to offers that employment terms *will no longer* be collectively bargained by a recognised union in the future. It does not apply to terms that *will not* now be so agreed. The mischief at which s.145B was aimed was inducements to take future determination of employment terms out of the collective arena.
8. The Court of Appeal was correct in concluding that the EAT’s approach did not remove the effective union veto over contractual changes. Every offer that an employer made without the union’s collective agreement would be fraught with danger. Although the Claimants protest that there is no veto – this has been the industrial reality in major industries since the *Kostal* judgment. Trade unions quite rightly use all the industrial levers open to them to secure a better deal for their members. The threat of a multi-million pound s.145B claim if the employer does not secure collective agreement is a very powerful lever indeed. Hence the reason why the Claimants’ appeal has been brought to the Supreme Court and why the outcome is so critical to unions and industry alike.

### *Background*

9. The factual background is set out in the Statement of Facts and Issues. The Respondent is a German owned company employing about 700 workers at its electronics factory in

---

<sup>4</sup> EAT/62 at G-H [182]

Rotherham. The Claimants are 57 members of Unite which has collective bargaining rights in respect of all the Respondent's workers<sup>5</sup> and over all their terms and conditions of employment<sup>6</sup>.

10. It is common ground that neither the First or Second Offers altered the scope or effect of the Recognition and Procedure Agreement ('RPA')<sup>7</sup> or varied the collective bargaining rights of Unite or the workers in any way.
11. The RPA provided that normally collective bargaining would commence in October and conclude in time for changes to be implemented on 1 January<sup>8</sup>. Negotiations were requested and commenced in October 2015 and concluded with a final offer being rejected by a consultative ballot of the 57 Unite members on 3 December 2015 (not 9 December as in the Chronology [118]<sup>9</sup>). The First Offer was made on 10 December 2015 and the Second Offer on 29 January 2016. The parties attempted to resolve the dispute using the agreed resolution procedure. The dispute was later resolved in subsequent collective bargaining when Unite agreed broadly what had been offered in November 2015 and that was implemented for all workers in a collective agreement dated 3 November 2016<sup>10</sup>.
12. The statutory framework is set out in the Statement of Facts and Issues<sup>11</sup>. 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".<sup>12</sup> The EAT upheld the decision of the ET. The Court of Appeal reversed that and held:
  - a. (uncontentiously) that "will not" applied to unions seeking recognition (CA/50),
  - b. (again uncontentiously) that "will no longer" applied to recognised unions (CA/51), and
  - c. (at the core of this appeal) that "will not" was not also intended to apply to a recognised union (CA/52-54).

---

<sup>5</sup> [268]

<sup>6</sup> [272]

<sup>7</sup> [267]

<sup>8</sup> clause 7.2 [272].

<sup>9</sup> ET findings of fact at paras 5.11 and 5.12 at [147].

<sup>10</sup> ET/5.26 [151].

<sup>11</sup> SFI/14-18 [111-113].

<sup>12</sup> ET/8.2 [158].

13. The Respondent adopts the approach and reasoning of the Court of Appeal. The Respondent's Case addresses the arguments broadly in the order of the five agreed issues<sup>13</sup>:
- a. The correct construction of the prohibited result having regard to:
    - i. the admissible tools of statutory construction including the *Wilson v UK* context, the government consultation response, the explanatory notes, Hansard, the wording of the draft Bill, the Method of Collective Bargaining Order 2000 and the heading of the section itself.
    - ii. The statutory language including the use of two future tenses in s.145B: "would" and "will not (or will no longer)".
  - b. Whether s.145B is concerned with offers which affect the scope of collective bargaining and the arrangements for collective bargaining or offers which merely vary terms of employment.
  - c. Why the Court of Appeal did not and should not have interpreted "prohibited result" separately or differently when it appears in s.145B(1)(a) - the 'effect' sub-section and in s.145B(1)(b) - the 'purpose' sub-section.
  - d. Why the Claimants' interpretation affords a trade union a practical veto preventing an employer making offers that are not collectively agreed by a union.
  - e. The impact of Article 11 ECHR.

*Correct Construction: Pre-enacting History of s.145B*

14. The mischief that Parliament intended to remedy by enacting s.145B can be derived from the pre-enacting history, the admissible Parliamentary materials (including the draft Bill) and the heading of the section itself.

*(1) Wilson v UK*

15. The key element in the enacting history is *Wilson and Palmer v United Kingdom* [2002] IRLR 568. Both parties agree that identifying the ambit of the right identified in this case is key to the correct interpretation of s.145B. Both appellate tribunals agreed that s.145B was enacted to bring domestic law in line with Article 11 ECHR<sup>14</sup>.
- a. *Wilson* held that it was unlawful and contrary to Article 11 to offer "inducements" to workers to "relinquish" collective bargaining (*Wilson*, para 47)<sup>15</sup>;

---

<sup>13</sup> SFI/37 [117].

<sup>14</sup> EAT/38 [185-186] and CA/28 [129-130].

<sup>15</sup> [622]

- b. Individualised contracts which reduce the scope and application of collective bargaining prevent trade union having a right to be heard in respect of those workers. An offer which reduced or restricted collective bargaining stops them having a place at the negotiating table and thereby “effectively to undermine or frustrate a trade union’s ability to strive for the protection of its members’ interests” (*Wilson*, para 48)<sup>16</sup>;
- c. *Wilson* is consistent with other Article 11 cases decided by the ECtHR. The Article 11 right is a right to *attend* collective bargaining, be *informed and consulted* at collective bargaining, to *negotiate* at collective bargaining, to *strive* for members during that bargaining and for the union’s voice *to be heard* during that bargaining.<sup>17</sup> Article 11 does not involve any restriction on an employer striving for its own interests during collective bargaining or on making any contrary decision having listened or any compulsion on an employer to adhere to collective bargaining.

16. The section was enacted because English law was inadequate to secure workers’ rights under Article 11 ECHR – in particular the “freedom of association with others, including the right to form and to join trade unions for the protection of his interests”<sup>18</sup>.

17. The Court of Appeal correctly analysed the mischief identified in *Wilson* as the fact 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.”<sup>19</sup>

18. *Wilson* identified the anti-trade union discrimination as refusing substantial pay rises to “employees who were not prepared to renounce a freedom that was an essential feature of union membership”<sup>20</sup> – that is to renounce collective bargaining. It held that “such conduct constituted a disincentive or restraint on the use by employees of union membership to

---

<sup>16</sup> [622]

<sup>17</sup> See below at paras 86-93 [100-104] for a summary of the ECtHR case law.

<sup>18</sup> ECHR Art.11.1 [351]

<sup>19</sup> CA/29 [130-131].

<sup>20</sup> [2002] IRLR 568 at 575, para 47 [622].

protect their interests”<sup>21</sup> – because a union cannot protect members’ interests if it has no right to be heard in collective bargaining.

19. The crucial passage in the *Wilson* judgment is that:

“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”.<sup>22</sup>

20. That makes it clear what Parliament intended by s.145B. It intended to render unlawful inducements to relinquish the right to collective bargaining. Parliament intended to protect the union’s right to be heard, but there is no suggestion anywhere in the enacting history that it intended to go further than Article 11 and impose any restriction on an employer making any other type of offer outside of collective bargaining.

21. The mantra that is repeated throughout the Appellants’ Case is that Article 11 is infringed where it is possible for “an employer effectively to undermine or frustrate a trade union’s ability to strive for the protection of its members’ interests”.<sup>23</sup> The fundamental flaw in the argument is that *Wilson* (and indeed the other ECtHR cases) makes clear that this is undermined or frustrated only where the right to collective bargaining is removed – where the union no longer has a right to be heard. Article 11 would only be engaged if the Respondent had refused to permit Unite to strive for the protection of its members’ interests. It did not. Unite and the Respondent engaged in collective bargaining between October and December as envisaged by the RPA. Unite was afforded the right to be heard and the right to strive<sup>24</sup>. Having done so, the union rejected the Respondent’s offer as it was free to do. The fact that it did not prevail and the Respondent offered to the workers something less than what Unite was demanding was no breach of Article 11.

22. In short, the Article 11 “ability to strive” is not frustrated where the employer will not agree to the union’s demands in collective bargaining. It is not frustrated where an employer

---

<sup>21</sup> Para 47 [622].

<sup>22</sup> Para 47 [622].

<sup>23</sup> See *e.g.* Appellants’ Case paras 41 [46-47], 42 [47], 43 [47-48], 48 [49-50], 77 [56], 79 [56-57], 84 [58], 129 [70].

<sup>24</sup> The Union had the opportunity to accept or reject the very offer that was subsequently (following the union’s rejection) made to the workers individually.

gives the union a right to be heard and then agrees different terms to those sought by the union. It is only frustrated where the offer (if accepted) removes or reduces the scope of collective bargaining in future – so that the union cannot be heard and cannot strive in relation to some aspect of the contract and/or some workers.

23. *Wilson* concluded: “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.”<sup>25</sup> This is the loophole that s.145B was enacted to close. The prohibited result must be that important union rights are surrendered when the workers accept the offer – hence “will no longer”. The Respondent’s workers surrendered no union rights when they accepted the offers. They simply secured a pay rise in return for changes to sick pay, overtime and breaks. Their union rights to be represented in accordance with the RPA were entirely unaffected by the offer or its acceptance.

(2) *The 2003 Government Consultation Response*

24. The same mischief is identified in the Government's response to the public consultation on a review of the Employment Relations Act 1999.<sup>26</sup> Both parties rely on this as part of the legislative history. The Respondent agrees that it is admissible for the reasons in the Appellants’ Case<sup>27</sup>.

25. The opening line makes clear that the government intended s.145B to “prohibit inducements or bribes being made to trade union members to forego union rights”<sup>28</sup>. It correctly points out that this was what gave rise to the *Wilson and Palmer* cases “and they should be made unlawful”. This reiterates that s.145B is aimed at an offer which causes a member to forego union rights which echoes the language of the ECtHR in interpreting Article 11 that members should not ‘surrender’ rights. That language of an offer that removes rights is found again in the next sentence; “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

---

<sup>25</sup> [2002] IRLR 568 at 575, para 48 [622].

<sup>26</sup> [303-313] at 3.9 [311] and 3.12 [312]

<sup>27</sup> Para 50 [50]

<sup>28</sup> Para 3.12 [312].

activities or the proposed right to use union services.”<sup>29</sup> Such offers go beyond the facts of *Wilson* but are comparable circumstances and as such were also enacted in s.29 Employment Relations Act 2004<sup>30</sup> (adding s.145A to TULRCA 1992).

26. The next sentence helps to explain the parliamentary intention behind s.145B: “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”. Parliament was not proposing to make offers unlawful which determined certain terms of employment outside collective bargaining as the Claimants now argue. It was proposing to make unlawful an offer to induce workers to accept that their terms *should be* determined outside collective agreed procedures. Accepting the offer would take future determination of those terms outside the collective procedures, foregoing/relinquishing the right to be heard if and when those terms were next determined.
27. The consultation paper refers to the offer taking the terms “outside the framework set by any existing collective bargaining arrangements”. It states that it is lawful where “the inducement is unconnected with the aim of undermining or narrowing the collective bargaining arrangements”. These references to ‘arrangements’ support the argument (made below) that the offer needs to result in a detrimental change to the collective bargaining arrangements – not just a change to the worker’s contract. They “will no longer” be determined according to those arrangements.
28. The Claimants argue<sup>31</sup> that the words ‘in addition’ indicate that the government intended to go beyond inducements to forego union rights. Those addition measures are in s.29-32 Employment Rights Act 2004<sup>32</sup> which added s.145A TULRCA 1992, amended s.146 TULRCA 1992 to include workers and union services and amended s.152 TULRCA 1992. The words do not indicate that the government intended s.145B to apply to anything other than inducements relating to collective bargaining to close the *Wilson* loophole.

---

<sup>29</sup> Para 3.12 [312].

<sup>30</sup> [353 - 354]

<sup>31</sup> Appellants’ Case para. 46 [49].

<sup>32</sup> [352-363]

29. Secondly the Claimants argue that the consultation response is not consistent with the analysis of the Court of Appeal that “s.145B restricts only the permanent exclusion of collective bargaining in respect of any particular term(s)”<sup>33</sup>. The reference to ‘permanent exclusion’ appears to be a straw man (taken from the ET judgment) which both sides agreed at the EAT was not relevant<sup>34</sup>. *Wilson* did not refer to any ‘permanent’ surrender of rights as the Appellants’ Case suggests. The straw man appears again<sup>35</sup> in the Appellants’ Case, where the Claimants suggest that if “offers are only unlawful when the employer withdraws from collective bargaining arrangements permanently (or for a lengthy defined period), then the obligation of the Courts pursuant to s. 3 HRA to safeguard the rights articulated in *Wilson* and *Demir* will not be met”. That is not an argument made by the Respondents and is not part of the ratio of the Court of Appeal. The Court of Appeal correctly applied s.145B to an offer which resulted in any term being excluded from the scope of collective bargaining or any withdrawal from collective bargaining for whatever period. The question is not for how long the term will be removed from the scope of collective bargaining – or whether the right is relinquished temporarily or permanently. The question is whether the workers’ rights are, to any extent, excluded/foregone/surrendered/relinquished or whether the union has the same rights as it ever had ‘to be heard’ and ‘to strive’ whenever that term of employment next comes up to be determined.
30. The Claimants rely on the EAT majority finding<sup>36</sup> that “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”. With respect to the EAT majority, this sentence is simply illogical. If someone forgoes a right, they lose that right from that moment and thereafter. The concept of losing something in future is implicit. The other flaw with this aspect of the EAT judgment is that it does not identify what ‘union right’ was forgone or relinquished by the workers of the Respondent when they accepted their pay rise and change in terms.
31. The Claimants argue<sup>37</sup> that the prohibited result is where “the offers... undermine or narrow the scope and efficacy of the collective bargaining process” which is “precisely the situation

---

<sup>33</sup> Appellants’ Case para. 47 [49].

<sup>34</sup> EAT/52 [142].

<sup>35</sup> Appellants’ Case para. 86 [59].

<sup>36</sup> EAT/56 [194].

<sup>37</sup> Appellants’ Case para. 49 [50].

which the ET found [ET/8.2-8.3]”. That wrongly and inelegantly conflates two propositions - where the offer is:

- a. to ‘narrow the scope’ of collective bargaining and
- b. to ‘undermine the efficacy’ of the collective bargaining process.

32. Despite the Claimants’ submissions, it is clear that the ET did not find that the Respondent’s offers had the effect or purpose of ‘narrowing the scope’ of collective bargaining. That was its error (and that of the EAT) – it did not regard s.145B as requiring the scope of collective bargaining to be narrowed. Narrowing the scope of collective bargaining removes some terms from the RPA – reduces the number of terms that will *any longer* be determined by the collective bargaining arrangements. That is a correct interpretation of s.145B and consistent with the pre-enacting history.

33. In fact, the Claimants’ argument is that s.145B should be interpreted so that the offer is unlawful if it merely ‘undermines the efficacy’ of collective bargaining. They argue that “will not” applies to recognised unions even where terms *will not* (or are not) on one occasion determined directly. This is a theme which we address below<sup>38</sup> and which is echoed by commentators such as Bogg and Ewing who criticise the English law approach to collective bargaining and advocate for a German or Canadian approach<sup>39</sup> whereby the collective bargaining process is given real teeth and employers are not permitted to undermine the union’s position of strength by making an offer if they are not willing to agree to the trade union’s collective demands.

34. The pre-enacting history and the scope of Article 11 makes it clear that the mischief of s.145B is not to prevent employers from undermining the efficacy of the union’s position in the collective negotiations. The employer is free to strive for its own interests just as the unions are free to strive for their members. The mischief is only to prevent the employer from removing any terms from the scope of the collective bargaining arrangements.

### (3) *The Explanatory Notes*

35. The Explanatory Notes to the Employment Relations Act 2004<sup>40</sup> summarised the *Wilson* mischief which s.145B was designed to address: “the law did not prevent the employer from

---

<sup>38</sup> At para.55 [91]

<sup>39</sup> *Bogg & Ewing*, Pages 430–458 at page 440 [640] and 453-454 [653-654].

<sup>40</sup> [299-302].

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”<sup>41</sup> (emphasis added). The crucial question in s.145B is again highlighted – whether the employer’s offer results in any collective representation being ‘surrendered’ – whether they “will no longer” be determined by bargaining.

36. The Claimants<sup>42</sup> highlight the line that 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.” This has already been addressed in relation to the Consultation Response. It is accepted and common ground that s.29-32 of the 2004 Act<sup>43</sup> went beyond the mischief of *Wilson* as they enacted s.145A and amended s.146 and s.152 which were all comparable circumstances to the facts of *Wilson*. The Explanatory Notes contain very strong indications that Parliament intended the interpretation as held by the Court of Appeal as s.145B is the only section that could be referred to as “prevent[ing] the employer from offering inducements to the employees in the group to persuade them to surrender their collective representation”. That is again consistent with “will no longer” applying to recognised unions and “will not” applying only to unions seeking recognition.

#### (4) *Hansard*

37. The Claimants have referred to *Hansard* in explaining that the penalty for a breach of s.145B is intended to be a ‘significant deterrent’ for ‘abuses’ which are ‘unacceptable’. They do not make any submissions about the *Pepper v Hart*<sup>44</sup> admissibility of *Hansard*. The Respondent’s primary submission is that the meaning of the legislation is clear when construed in the context of the enacting history and the mischief that the section seeks to address. However, the Court of Appeal held that the Claimants’ construction is possible as a matter of ‘literal interpretation’<sup>45</sup> and therefore it is accepted that clear ministerial statements may assist in resolving any ambiguity in the application of the words “will not”.

---

<sup>41</sup> para. 193 [301-302].

<sup>42</sup> Appellants’ Case para. 44 [48].

<sup>43</sup> [352-363]

<sup>44</sup> [1993] AC 593

<sup>45</sup> CA/40 [140].

38. The Minister's statement quoted by the Claimants describes s.145B as a deterrent to 'inducements' – using the language of the Consultation Response and Explanatory Notes. This confirms that s.145B is not intended to render unlawful a pay rise or bonus offered in return for employees' work, as is this case. The section is not intended to cover inducements *to work*. It is only intended to cover inducements *relating to collective bargaining* - specifically an inducement to reduce the scope of collective bargaining and the union rights of the workers.

39. *Pepper v Hart* requires the Court to consider all the parliamentary material necessary to understand ministerial statements and their effect. The other relevant statements by the Minister must be considered. He gave a clear statement of what the words "will not (or will no longer)" were intended to cover. He said <sup>46</sup>:

"Proposed new section 145B deals with *inducements to forgo collective union entitlements*. It creates a right for members of *recognised unions* not to be offered inducements by their employers with the sole or main purpose of ensuring that any or all their terms of employment *will no longer be determined by collective agreement*. The new section deals with the circumstances that gave rise to the *Wilson and Palmer* cases, in which Mr. Wilson and others employed by Associated Newspapers were offered £1,000 to enter individualised contracts that could not be negotiated by their union." (emphasis added)

40. This clear statement confirms that the section is intended to cover inducements for the workers to 'forgo' collective bargaining – echoing the language of *Wilson* and the other pre-enacting history referred to above. It also links the words 'will no longer' to the right of members of 'recognised unions'.

41. The words 'will not' were added by amendment to ensure that unions seeking recognition were also covered by s.145B:

"The Joint Committee on Human Rights has drawn attention to the fact that new section 145B, which would be inserted by clause 28, provides rights to the members of recognised unions only. It considers that, in cases where a union is seeking recognition, new section 145B needs to provide comparable protections to ensure that members have the right not to be offered inducements by the employer for the purpose of securing that their terms *will not be determined by collective agreement* in the future. (emphasis added)

---

<sup>46</sup> Employment Relations Bill HC Standing Committee, 5 February 2004, Hansard c103 [282].

“Having looked at the arguments put forward and having consulted the stakeholders, we concluded that the Joint Committee's analysis is correct. So to ensure our compliance with the judgment of the European Court of Human Rights, we believe that the scope of new section 145B should be extended. Lords amendments Nos. 34, 35 and 38 make the necessary changes to clause 28.”<sup>47</sup>

42. The clear ministerial statement accords with and confirms the conclusion of the Court of Appeal that “will no longer” applies to recognised unions and “will not” only applies to unions seeking recognition<sup>48</sup>.

(5) *The Draft Bill*

43. The conclusion drawn from this Hansard reference is confirmed beyond doubt by the original wording of the Employment Relations Bill 2003. The clause of the Bill inserting s.145B before the amendment referred to above read<sup>49</sup> as follows:

Inducements relating to collective bargaining

(1) A worker who is a member of an *independent trade union which is 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 no longer* be determined by collective agreement negotiated by or on behalf of the union. (*emphasis added*)

44. It can be seen that when Parliament intended s.145B to apply only to recognised unions, it was proposing to use the words “will no longer”. Only when the Bill was amended to apply also to unions seeking recognition were the words “will not” added to the definition of the prohibited result. This provides further support for the Court of Appeal's conclusion that “will not” was not intended to apply to members of recognised unions (as in this claim). The Claimants' argument falls at this hurdle.

---

<sup>47</sup> HC Deb, 16 September 2004, c1478 [287].

<sup>48</sup> CA/50-53 [142].

<sup>49</sup> [293]

(6) *Method of Collective Bargaining Order*

45. The Claimants' interpretation is inconsistent with Schedule 1 of the Trade Union Recognition (Method of Collective Bargaining) Order 2000 which anticipates and provides for failures to agree in the course of collective bargaining. The Preamble<sup>50</sup> to the Schedule says:

“The fact that the CAC has imposed a method does not affect the rights of individual workers under either statute or their contracts of employment. For example, it does not prevent or limit the rights of individual workers to discuss, negotiate or agree with their employer terms of their contract of employment, which differ from the terms of any collective agreement into which the employer and the union may enter as a result of collective bargaining conducted by this method.”

The Preamble indicates that the intention of Parliament was that it was still lawful for workers to agree terms individually with their employer even after collective bargaining had been imposed.

46. The Claimants argue<sup>51</sup> that s.145B cannot be construed as imposing “obligations on employers to abide by their collective bargaining processes which were, inter alia, below the minimum levels prescribed by paragraph 17”. This argument is wrong for two reasons:

- a. the Preamble makes clear that “This specified method is *not designed to be applied as a model for voluntary agreements* between employers and unions. Because most voluntary agreements are not legally binding and are usually concluded in a climate of trust and co-operation, they *do not need to be as prescriptive as the specified method*” (emphasis added). The specified method is not a minimum level but a more prescriptive level as it “has effect as if it were a legally binding contract between the employer and the union(s).”
- b. Secondly paragraph 17 states that: “The employer shall not vary the contractual terms affecting the pay, hours or holidays of workers in the bargaining unit, unless he has first discussed his proposals with the union.” The use of the word ‘discussed’, not ‘agreed’, makes clear that the Parliament’s intention was for the union to put and discuss its case, but explicitly stopped short of giving the union a right to prevent any variation once there had been discussion. It is once again consistent with the Article 11 right to be heard and not to prevail. If it is not content with the outcome of the bargaining process, the union can call for industrial action.

---

<sup>50</sup> [366]

<sup>51</sup> Appellants’ Case para 37 [45].

47. The whole CAC jurisdiction and approach to compulsory recognition of trade unions would be affected if the Claimants' interpretation was upheld. The advantage of obtaining recognition would not simply be 'the right to be heard' but would involve the right to exert control over the contractual relationship between employers and employees (as argued for by Bogg and Ewing – addressed below).

(7) *Section Heading*

48. The heading for s.145B gives final confirmation that the Court of Appeal's interpretation is correct. The offer is not intended to be an offer relating to the terms and conditions of employment. The unlawful offer must be an offer relating to collective bargaining and in particular an inducement to forgo some or all of those rights to collective bargaining.

49. Headings are an admissible tool of statutory construction (*R v Montila*<sup>52</sup>):

“Account must, of course, be taken of the fact that these components were included in the Bill not for debate but for ease of reference. This indicates that less weight can be attached to them than to the parts of the Act that are open for consideration and debate in parliament. But it is another matter to be required by rule of law to disregard them altogether. One cannot ignore the fact that the headings and sidenotes are included on the face of the Bill throughout its passage through the legislature. They are there for guidance. They provide the context for an examination of those parts of the Bill that are open for debate. Subject, of course, to the fact that they are unamendable, they ought to be open to consideration as part of the enactment when it reaches the statute book.”

50. The reference to s.145B offers as “inducements relating to collective bargaining” is “part of the contextual scene” and of assistance because “the starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used.”<sup>53</sup> The significance of this point to the correct interpretation of the prohibited result has already been addressed above in relation to:

- a. *Wilson*,<sup>54</sup> (“inducements” to workers to “relinquish” collective bargaining);
- b. The 2003 Government Consultation Response which shows it is to “prohibit inducements or bribes being made to trade union members to forego union rights”;

---

<sup>52</sup> [2004] 1 WLR 3141 para. 34 [509]

<sup>53</sup> *R v Montila*, para. 36 [509-510].

<sup>54</sup> para. 47 [622].

- c. The Explanatory Notes<sup>55</sup> “offering inducements to the employees in the group to persuade them to surrender their collective representation”;
- d. The Ministerial statements that “s.145B deals with inducements to forgo collective union entitlements”<sup>56</sup>.

*The Statutory Language*

51. The Court of Appeal’s interpretation also correctly reflected the use of two future tenses in the section. The errors of the EAT majority and ET was to interpret "prohibited result" as meaning that one or more terms of the workers’ contract are - immediately on acceptance by the worker - agreed directly rather than by collective bargaining. The proper interpretation is whether the terms *after acceptance* by the worker will not (or will no longer) (*i.e. in future*) be determined by collective agreement negotiated by or on behalf of the union.
52. The ordinary and natural meaning is revealed by the use of the future and not the present tense in the words “will not (or will no longer)”. The EAT majority erred by dismissing the detailed analysis of the language of the section by saying this made “too much” of the future tense<sup>57</sup>. That failed to recognise that:
- a. acceptance of the offer...would have the prohibited result in s.145B(1)(a) – *would* directs the focus to the moment of acceptance;
  - b. “The prohibited result is that the workers’ terms... will not (or will no longer) be determined by collective agreement...” in s.145B(2) – *will not or will no longer* focuses on the state of affairs after the moment of acceptance.
53. The Court of Appeal’s interpretation means that “will no longer” is given proper effect. The Claimants’ approach interprets s.145B(2) as if it said “are not (or are no longer)” determined by collective bargaining if the offer is accepted. The Court of Appeal’s interpretation means that the question is – at the moment of acceptance – how *will* terms of employment be determined? Will they be determined by collective agreement or not? The EAT’s incorrect interpretation meant that – at the moment of acceptance – the question becomes how have these terms of employment been determined?

---

<sup>55</sup> para. 193 [301-302].

<sup>56</sup> Employment Relations Bill HC Standing Committee, 5 February 2004, Hansard c103 [282].

<sup>57</sup> EAT/50 [191].

54. The Claimants’ construction renders the words ‘will no longer’ superfluous as every offer and acceptance would be covered by the words ‘will not’. Yet ‘will no longer’ were the words in the original draft Bill. As discussed above, the words ‘will not’ were added by amendment to cover unions seeking to be recognised. The Court of Appeal’s difficult third type of case<sup>58</sup> was never intended: ‘will no longer’ applies only to recognised unions, while ‘will not’ applies only to unions seeking recognition.

55. The EAT suggested that the Respondent’s interpretation required it to read additional words into s.145B(2) – namely “will no longer *in the future* (or will not *in the future*)”<sup>59</sup>. No additional words need to be read in. ‘Will not’ or ‘will no longer’ mean ‘will not in the future’ or ‘will no longer in the future’ as a matter of ordinary language.

#### *Scope of the Collective Bargaining*

56. It is difficult to ascertain what parts of the Appellants’ Case are directed at the issue in SFI 37.2<sup>60</sup> as the ‘scope of collective bargaining in future’ is not expressly addressed. The Claimants accept<sup>61</sup> that the prohibited result is where “the offers... undermine or narrow the scope and efficacy of the collective bargaining process”. As addressed above, it is the Respondent’s case that s.145B covers offers which ‘narrow the scope’ of collective bargaining process. The assertion that the “efficacy” of the collective bargaining process is undermined appears to be an attempt by the Claimants to elide the union’s power within the bargaining process with the efficacy of the process itself. Undermining union leverage does not necessarily undermine the efficacy of the process.

57. The Claimants accept that offers affecting the scope of the collective bargaining arrangements are a key part of Parliament’s intention in enacting s.145B because those words are underlined or highlighted in their Case<sup>62</sup> (“terms of employment determined outside the framework set by any existing collective bargaining arrangements” and “undermining or narrowing the collective bargaining arrangements”). They appear to agree and adopt the Respondent’s submissions in saying that the aim of the legislation was to make unlawful employers’ offers which take the negotiation of terms of employment “outside the framework set by any existing

---

<sup>58</sup> CA/52 [142].

<sup>59</sup> EAT/52 [192].

<sup>60</sup> SFI p.10 [117].

<sup>61</sup> Appellants’ Case para. 49 [50].

<sup>62</sup> Appellants’ Case para. 45 [48-49].

collective bargaining arrangements” unless the main purpose of the offer was not that of “undermining or narrowing [those] collective bargaining arrangements”.<sup>63</sup>

58. That is precisely the Respondent’s argument and the conclusion of the Court of Appeal. Only where the offer removes a term or terms from the scope of collective bargaining or takes it outside the arrangements for collective bargaining does s.145B apply. Where the offer determines pay or hours but leaves collective bargaining arrangements concerning pay and hours unaffected – there is no breach of s.145B.
59. The Claimants argue<sup>64</sup> that s.145D(4)(a) envisages the employer’s purpose being assessed having regard to evidence not only that it “had recently changed” collective bargaining *arrangements*, but also, when the employer had “sought to change, or did not wish to use, *arrangements* agreed with the union for collective bargaining”. The phrases “sought to change” and “did not wish to use” are simply evidence that the employer opposes collective bargaining or has (as the ET put it) union hostility<sup>65</sup>. If its offer has the effect of reducing the scope of collective bargaining, it is likely to have intended that result if there is evidence that it is hostile to the union arrangements.
60. The Respondent submits that the repeated use of the word ‘arrangements’ in s.145D is a clear indicator that the prohibited result must involve some reduction or removal of those arrangements. The factors are aimed at determining when an employer wants to change the ‘arrangements’. Where the effect of the prohibited result is a change in the arrangements for collective bargaining – such as a reduction in the scope of collective bargaining – s.145D becomes relevant as that change will be unlawful unless the employer can show that it was not its purpose to achieve that result. If there was evidence that the employer was seeking to change the ‘arrangements for collective bargaining’ or did not wish to enter into ‘arrangements proposed by the union’ then that factor points to an unlawful intention. On the other hand, evidence that the employer is introducing performance related pay to reward “high level of performance” could show a lawful purpose where the employer had taken pay out of the scope of collective bargaining.

---

<sup>63</sup> Appellants’ Case para. 47 [49].

<sup>64</sup> Appellants’ Case para. 66 [53-54].

<sup>65</sup> ET/8.3 [159] “Looking at any evidence we might have in the category of section 145D(4), Mr Brittenden has fairly accepted that a ease of union hostility has not been made out.”

61. The Court of Appeal’s interpretation is further confirmed when the position of a union seeking recognition is analysed. Section 145B encompasses not only where a union is already recognised as in the instant case, but also where a union is not recognised, but is seeking recognition by the employer. In relation to such a worker, s.145B reads:

“A worker who is a member of an independent trade union which is... 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.”

62. The union is not yet recognised so none of the terms are yet determined by collective agreement. The offer must not have the ‘prohibited result’. The ‘prohibited result’ can only refer to the future scope of or arrangements for collective bargaining when the union comes to be recognised. The ‘prohibited result’ cannot mean how the terms are determined at the moment of acceptance (as the Claimants contend). It must refer to an offer which takes a term or terms out of the scope of collective bargaining in the future when the union is recognised and starts collective bargaining.

63. The ‘prohibited result’ must have the same meaning whether applied to a recognised union or a union seeking to be recognised. That conclusively shows that ‘will not’ must apply only to unions seeking recognition and must mean ‘will not in the future. It is only regulating offers which affect the scope of collective bargaining.

*The Court of Appeal confused the Prohibited Result with the Main Purpose Issue*

64. There was no confusion. The Court of Appeal was entitled, indeed compelled, to examine the meaning of ‘prohibited result’ in the light of the purpose test as the same concept appears in two places in s.145B – both the effect and purpose must be the ‘prohibited result’. As the EAT explained:

“... the words used in section 145B are the starting point and must be given their ordinary, natural meaning. Where relevant offers are made it is necessary to consider what effect they would have if accepted (subsection (1)(a)) and the employer’s purpose in making the offers (subsection (1)(b)). The offers must have the relevant effect and the employer must have the relevant purpose, each condition being necessary but neither being sufficient on its own. Further both questions require consideration of the same “prohibited result” – would it be the effect of acceptance?

And is achieving that result the employer's sole or main purpose? It must mean the same in relation to both question"<sup>66</sup>.

65. The 'prohibited result' is used in two places and so must be construed in both those two places. The Court of Appeal was entirely correct to examine the ordinary and natural meaning of the 'prohibited result' having regard to the purpose sub-section as well as the effect sub-section.
66. When the 'prohibited result' is examined in the context of the purpose test, the flaw in the Claimants' interpretation is revealed. This is because it will always be an employer's main purpose in making an offer that it should be accepted. On the Claimants' interpretation any offer that results immediately in new terms agreed directly and not through collective negotiations achieves the 'prohibited result'. But it will always be the employer's purpose to get those new terms agreed directly. The employer will always hope and intend that the offer will be accepted. It will always know that the consequences of acceptance will be that the term will be agreed directly and not by collective agreement. Its purpose in making the offer will be to achieve that direct agreement. Its purpose in making the offer will always be to achieve the 'prohibited result'.
67. That is exactly the way that the Claimants pleaded this claim<sup>67</sup>. They alleged that the employer's purpose was "to achieve the outcome identified in paragraph 9...". Paragraph 9<sup>68</sup> stated "the effect of accepting the offer was those clauses relating to SSP, Sunday overtime, breaks and pay which were previously determined by collective agreement negotiated by or on behalf of the union would no longer be. Instead, they would be determined by individual agreement negotiated directly with the individuals themselves". There was no pleading of any intention to reduce collective bargaining arrangements or that the employer intended to take those terms out of the scope of bargaining. The purpose was pleaded as to achieve the result.
68. The Claimants' interpretation makes it practically impossible for an employer to defend any s.145B claim where they have made an offer outside collective bargaining – even if there is a benign reason behind its purpose in making the offer. The employer would always lose the

---

<sup>66</sup> EAT/49 [191].

<sup>67</sup> ET1/17 [253].

<sup>68</sup> [252]

case as its immediate purpose would always be to achieve the change, whatever motivations lay behind that purpose.

69. The EAT majority attempted to avoid this obviously nonsensical result. It accepted that s.145B is intended to prevent employers taking “one or more terms outside the collective agreement process”<sup>69</sup>. It held that s.145B does not intend to stop “cases where employers can show genuine business reasons (unconnected with collective bargaining) for approaching workers directly outside the collective bargaining process”<sup>70</sup>. It added a gloss to the statute saying that where an employer has a “proper purpose” for making offers directly to workers, there is nothing to prevent such offers being made<sup>71</sup>.

70. The first difficulty with this analysis is that there is no proper or reasonable purpose test in the statute and it is not permissible to insert one. Secondly, even then, the employer’s immediate purpose would be to achieve the prohibited result – to change the contractual terms. Even if its underlying motivation was (as Simler J put it) to “act reasonably and rationally for proper purposes” or for “a genuine business purpose”<sup>72</sup> its immediate purpose would be to change the terms – to achieve the ‘prohibited result’. It is difficult to see how the EAT’s gloss on the statute was proposed to work in practice.

### *Effective Veto*

71. The Claimants make the ambitious contention that a Court of Appeal which included two prominent employment law experts did not understand the industrial relations context. On the contrary, they had a complete understanding of the context. The Claimants’ union Unite would not be representing its members properly if it did not deploy the post-*Kostal* spectre of a s.145B claim worth millions or tens of millions of pounds when negotiating with the largest employers in the UK.

72. The veto concern is no way illusory - it is a very real and present issue in industrial relations since the *Kostal* decision<sup>73</sup>. Assume a hypothetical employer with 5,000 unionised workers

---

<sup>69</sup> EAT/57 [195].

<sup>70</sup> EAT/61 [197].

<sup>71</sup> EAT/62 [197].

<sup>72</sup> EAT/62 [197].

<sup>73</sup> John Bowers QC ‘*Response to Bogg and Ewing, ‘Collective Bargaining and Individual Contracts in Kostal UK Ltd v Dunkley for the Twenty-First Century’*, Industrial Law Journal, 22 February 2021\* comments at p.124 [670]: “Unions would in effect hold the section 145B sword of Damocles over the employers’ heads to dissuade them from imposing a pay increase if collective agreement cannot be reached”.\*Published 16/4/21 March 2021 Volume 50, No.1, March 2021

is negotiating an annual pay deal with its union. The dispute in collective bargaining is between the union's pay demand of 2% and the employer's final offer of 1%. The difference could be a cost of about £1.5million a year assuming a mix of full time and part time workers on UK average salaries. Assume that agreement cannot be reached and rather than persist with collective bargaining the employer decides to offer the 1% pay rise directly. On the Claimants' interpretation that employer thereby takes a £21million risk.

73. This is because 5,000 members could claim £4,341 each (£21,705,000) and the burden rests on the employer to show that it had (in the EAT's words) a reasonable and proper purpose to make the direct offer. If an ET decided that the employer cut bargaining short too early or was using an unreasonable tactic, then it would be liable for over £21million – all over a £1.5million p.a. difference. No employer could sensibly take that risk and hope that an ET agrees with its purpose in making the offer. The employer would either have to capitulate and pay some or all of the extra £1.5million or withhold any pay rise from its workforce and suffer the industrial discontent that would cause.

74. The point is also made by the hypothetical used by the Court of Appeal<sup>74</sup>. The Claimants concede<sup>75</sup> that “acceptance of such an offer would have the prohibited result” on their interpretation. They contend that “there is nothing in the hypothetical scenario to suggest that the workers would be able to show that the employer's main purpose was to achieve that result”. This is to overlook that the burden is on the employer under s.145D(2) and not on the workers. It also overlooks that what an employer calls an ‘impasse’, a union will characterise as employer's ‘bullying intransigence’. The purpose of the offer would be claimed by the union to be a ‘conscious decision to bypass further meaningful negotiations’ and ‘to circumvent the collective bargaining process’ (exactly as the ET accepted in this claim<sup>76</sup>).

75. The Claimants say<sup>77</sup> the employer could rely on its “business imperative of ensuring that manufacturing occurs over the Bank Holiday”. In reality this would be characterised as a device or a ‘bargaining tool’ by the union in the same way as the Claimants dismissed the Respondent's reason that its German parent company required Christmas bonuses to be paid

---

<sup>74</sup> CA/41 [140-141].

<sup>75</sup> Appellants' Case para. 120 [66].

<sup>76</sup> ET/8.3 [159].

<sup>77</sup> Appellants' Case para. 121.3 [67].

before the financial year end<sup>78</sup>. The union would no doubt argue that collective bargaining was ongoing, as in this case (even though strictly collective bargaining ended when the union refused the Respondent's final offer).

76. No union worth its salt would allow this hypothetical company to get away with undermining its negotiating position by making a direct offer when collective bargaining could have been continued. A s.145B claim would be made on precisely the same basis as in this claim and the employer would be risking a huge award. It could not sensibly do so. It would either have to agree to the union's demand for triple time or make no changes and lose its opportunity to offer bank holiday work on enhanced rates. That is precisely the veto in action.

77. The Claimants submit that the hypothetical scenario differs from the instant case because the employer had sought to negotiate with the trade union. However, the Respondent did negotiate - at three meetings - but its collectively bargained offer was rejected by the union. That same collectively bargained offer was put directly to the workers following an impasse, just as in the hypothetical. The Respondent had no union hostility, just as in the hypothetical.

78. The ET's response to the veto problem was ill-conceived yet appears to be endorsed (at least in a lukewarm way) by the Claimants<sup>79</sup>. The ET suggested that in the event of "such an impasse the way forward for the employer would be to terminate employment on the current terms and immediately engage on the new terms". The ET overlooked that:

- a. 'fire and re-hire' an industrially controversial strategy which is normally regarded as an employer's last resort; and
- b. any offer to engage immediately on new terms would also be an offer outside of collective bargaining to the same workers and so would be unlawful on exactly the same basis (on the Claimants' interpretation of s.145B).

The Claimants do not address this obvious flaw in the ET's reasoning.

79. The EAT's response to the veto problem was imaginative and involved re-writing the statute. The Claimants suggest that "the EAT did not say that an employer who has acted 'reasonably

---

<sup>78</sup> The veto risk is well demonstrated by the facts of this case. The Respondent took its chance in the ET and ended up with a finding that it was 'disingenuous' to claim a business need to implement the bargaining and pay the bonus before the year end (even though that was what the RPA provided).

<sup>79</sup> Appellants' Case para. 124 [68].

and rationally’ will not be liable”.<sup>80</sup> The Claimants then quote paragraphs 61 and 62 in which the EAT uses those words. The highlighted passages include where an employer acts *reasonably and rationally* and has evidence of a genuine alternative purpose, ETs are likely to be slower to infer an unlawful purpose” (*i.e.* employers will not be liable). The EAT said “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” without explaining how an ET was to assess whether an employer’s purpose was a proper one or not in the midst of the white heat of an industrial dispute.

80. The Claimants do not try to address the fundamental flaw in the EAT’s suggested test of “employers who act reasonably and rationally for proper purposes”. Nor do Professors Bogg and Ewing who refused to engage despite a lively academic riposte in the *Industrial Law Journal*<sup>81</sup> from John Bowers QC pointing out the omission in their analysis<sup>82</sup>. The reality of the proper purpose test is that an ET will be faced with having to resolve an industrial dispute such as the one suggested by the Claimants<sup>83</sup>:

- a. the employer saying that it had (in the Claimants’ words) a “proper ... genuine business purpose” for only offering 1% and
- b. the union saying that its refusal to accept 5% was wrong and its offer was an underhand tactic to (also in the Claimants’ words) “undermine or frustrate” the union’s mandate or its collective bargaining power or the bargaining framework.

81. On the Claimants’ interpretation ETs would be placed in the invidious position of determining whether an employer’s or union’s negotiating positions were “reasonable and rational” or not. That would be a departure from long-standing practice, as the Court of Appeal observed. In *Express Newspapers v McShane* [1980] AC 672 the House of Lords put an end to judicial attempts to investigate the rights and wrongs of collective disputes. As Lord Scarman

---

<sup>80</sup> Cf. CA/43 [141].

<sup>81</sup> *Bowers, supra*, comments at p.123: “In an industrial world where unions and employers habitually accuse each other of bad faith, intransigence and refusing to negotiate in a ‘meaningful’ way—it would always be a factual minefield for a tribunal to determine.” [669].

<sup>82</sup> In ‘Can a union veto changes in terms by failing to negotiate or agree?’ *Law Quarterly Review* 2020, 136 (Apr.) pp186-190, at 190 John Bowers QC writes of the EAT’s test: “This importation of a test of reasonableness is unfortunate, as tribunals are usually constrained to avoid adjudicating on the reasonableness of the parties’ approach to matters of collective bargaining. This reflects the principle of abstention or *collective laissez faire*, popularised by Sir Otto Kahn Freund especially in his seminal work, *Labour and the Law*, 3rd edn (1983) (edited by Professors Davies and Freedland).” [662].

<sup>83</sup> Appellants’ Case para. 129 [70].

commented<sup>84</sup> “It would be a strange and embarrassing task for a judge to be called upon to review the tactics of a party to a trade dispute”. He did not think “that Parliament intended to allow the courts to act as some sort of a backseat driver in trade disputes”. A further last-ditch attempt by Lord Denning to interfere with what he regarded as an unjustified trade dispute was overturned by the House of Lords in *Dupont Steel v Sirs* [1980] ICR 161 with Lord Scarman warning against interpretations that “will bring the judges inevitably into the industrial arena... which can damage confidence in the administration of justice”<sup>85</sup> .

82. Parliament cannot possibly have intended that employment judges would have to go into the industrial arena to decide whether an employer’s purpose in making a particular offer was a negotiating tactic to undermine the union’s mandate or a proper business reason. This would be particularly acute in some of the bitter industrial disputes of recent times where unions have fiercely and publicly attacked employers such as British Airways and British Gas for failing to continue with protracted collective negotiations and resorting instead to direct offers to workers to vary terms of employment or face dismissal and re-engagement (‘fire and re-hire’). The ET would be in the invidious position contemplated by *Dupont Steel* of assessing the employer’s purpose in making a direct offer which is at the heart of a highly contentious national trade dispute.

83. The Claimants’ real aim in this litigation is revealed by its reliance on the *Bogg and Ewing* argument. Their article criticises the Court of Appeal for “the maximal preservation of managerial prerogative”<sup>86</sup>. They suggest that an Article 11 interpretative approach but suggesting not only the right to be heard but even suggesting some form of right of compulsion. They criticise the Court of Appeal’s conclusion on the basis that there “would be no incentive on the part of the employer to comply with procedures voluntarily entered into”<sup>87</sup>. They seek a legal regime whereby “recognition of a trade union is a serious and solemn commitment to joint regulation which alters the nature of the employment relationship in the enterprise” saying:

---

<sup>84</sup> *Express Newspapers*, p.694 [482].

<sup>85</sup> *Dupont Steel*, p. 172C [406]

<sup>86</sup> *Bogg and Ewing*, p.437. The article suggests the Court of Appeal’s concern was “to provide carte blanche to the managerial prerogative and the employer’s freedom to contract individually” p.450 [650] and their approach to s.145B “provided the only meaningful statutory constraint on managerial prerogative in the circumstances of *Kostal*” p.455 [655].

<sup>87</sup> *Bogg and Ewing*, p.455 [655]

“It is true that we do not prohibit individual bargaining under our collective bargaining regime in this country. Such conduct is often deemed in the USA and Canada to be an unfair labour practice, given its tendency to undermine the exclusivity of the collective bargaining representative. But although it does not prohibit individual bargaining in a collective bargaining environment, section 145B nevertheless appears to permit it only in exceptional circumstances such as individualised merit pay or where the bargaining procedures have been exhausted.”<sup>88</sup>

84. It is indeed true that English law does not adopt the US or Canadian models of legally binding collective agreements – indeed the opposite is presumed in English law (s.179 TULRCA 1992). By adopting this approach, the Claimants seek to interpret s.145B so as to bind or compel employers to abide by the collective arrangement and not just as a provision to close the *Wilson* loophole. The *Bogg and Ewing* article promote the benefits of “the German codetermination model”:

“a wide range of social matters are subject to ‘codetermination’ by the works council. Codetermination means that ‘management cannot take any decisions without the consent of the works council’. The veto is enshrined in the institutional structure of the enterprise. It contrasts with the jealous protection of the managerial prerogative in English law, a legal value that suffuses the common law and which in *Kostal* shaped the entire process of statutory interpretation”.<sup>89</sup>

85. It is submitted that it is for Parliament to reform collective bargaining to adopt any codetermination model or the Canadian “autonomous legal framework”<sup>90</sup> or to move away from the present English law “jealous protection of managerial prerogative”. There is no hint in any of the pre-enacting history that Parliament had any such intent in 2004. There is no call for the courts to intervene in what its essentially a political decision which falls within the Article 11 margin of appreciation of each member state to the ECHR (as explained below).

### *Article 11*

86. Article 11 confers the right to “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 ECtHR in *Demir and Baykara v Turkey* [2009] IRLR 766 established that this be interpreted as including the right to permit, and make possible, the right to

---

<sup>88</sup> *Bogg and Ewing*, p.454 [654].

<sup>89</sup> *Bogg and Ewing* p.454 [654].

<sup>90</sup> *Bogg and Ewing* p.441 [641]. As *Bowers* points out at p.120 “The idea that the Article 11 right is more extensive is I respectfully suggest wishful thinking on the part of the authors. of the Note.” [666].

collective bargaining and to enter into collective agreements. It should be borne in mind that the extreme facts giving rise to *Demir* were that a trade union representing civil servants had not been permitted to engage in collective bargaining, and its collective agreement had been annulled and the right to enter into a collective agreement with their public sector employers had been removed. The Respondent is a private sector company and its workers were free to, and did, engage in collective bargaining and enter into collective agreements. Both rights considered in *Demir* were satisfied in this case (the eventual collective agreement having been concluded subsequent to the allegedly unlawful offers).

87. The Article 11 right is the right for the union to be heard by the employer: not the right necessarily to prevail in the bargain as the Court of Appeal correctly observed<sup>91</sup>.
88. The references to the “right to be heard” reflects the definition of collective bargaining in s.178(1) TULCRA 1992: “collective bargaining” means *negotiations* relating to or connected with one or more of those matters.” Negotiations are, of course, discussions which may or may not result in an offer that is capable of acceptance.
89. The Respondent and Unite engaged in negotiations. The meeting on 29 October 2015 set out the respective positions on the pay negotiation; on 12 November 2015 both sides met and discussed a number of points and on 24 November 2015 they met again to discuss the formal offer which had been put forward by the Respondent following the negotiations.
90. By the end of 24 November, negotiations had occurred. An offer was made and it was open for acceptance or rejection. The union balloted internally and the proposal was rejected. At that point collective bargaining had taken place. The compulsory procedural stages in RPA had been complied with. Neither side was obliged to hold further negotiations. As it happened, further collective bargaining commenced and continued through 2016 and eventually agreement was reached with Unite on all the changes.
91. For these reasons the Claimants’ assertion that making offers after collective bargaining rights had been exercised amounts to the same evil that the ECtHR were addressing in *Wilson* is unsustainable. The cases are diametrically different.

---

<sup>91</sup> CA/42 [141].

92. The ECtHR cases on the scope of Article 11 are summarised in the judgment of Underhill LJ in *PDAU v Boots Management Services* [2017] IRLR 355, paras 29-47. The key points are:

- a. "...the members of a trade union have a right, in order to protect their interests, that the trade union should be heard. Article 11 para. 1 certainly leaves each State a free choice of the means to be used towards this end. While the concluding of collective agreements is one of these means, there are others. What the Convention requires is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests": *Swedish Engine Drivers Union v Sweden* (1979–80) 1 EHRR 617 at paras. 38-41.
- b. Article 11 gives rise to positive obligations on the State to secure the effective enjoyment of those rights: *Wilson* para. 41.
- c. "...collective bargaining... is not indispensable for the effective enjoyment of trade union freedom. Compulsory collective bargaining would impose on employers an obligation to conduct negotiations with trade unions. The Court has not yet been prepared to hold that the freedom of a trade union to make its voice heard extends to imposing on an employer an obligation to recognise a trade union. The union and its members must however be free, in one way or another, to seek to persuade the employer to listen to what it has to say on behalf of its members. In view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and the wide degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how trade union freedom may be secured." (*Wilson*, para. 44).
- d. *Demir v Turkey* (2009) 48 EHRR 54 reconsidered *Swedish Engine Drivers* and held in light of the evolution of Article 11 (and international instruments including the ILO Convention, the European Social Charter and the EU Charter of Fundamental Rights) "the right to bargain collectively with the employer has, in principle, become one of the essential elements of the 'right to form and to join trade unions for the protection of [one's] interests' set forth in Article 11 of the Convention". *Demir* (para. 158) makes clear that it was not deciding whether to impose "on the authorities an obligation to enter into collective agreements with civil servants' trade unions". It merely decided that it was unlawful for the Turkish state to annul a collective agreement freely made between the parties.

- e. In *Unite the Union v UK* [2017] IRLR 438 the ECtHR rejected the argument that the abolition of the Agricultural Wages Board amounted to an interference with its right to engage in collective bargaining and fell outside the margin of appreciation. Following *RMT v UK* [2014] IRLR 467 at para 86, it held that “the social and political issues involved in achieving a proper balance between the interests of labour and management are of a sensitive nature. The starting point is, therefore, that the United Kingdom enjoys a wide margin of appreciation in determining whether a fair balance has been struck between the protection of the public interest in the abolition of the AWB and the applicant's competing rights under Article 11 of the Convention.”
- f. At para 53 of *Unite v UK* the ECtHR summarised the relevance of Article 11 as “In substance, it affords members of a trade union *the right for their union to be heard* with a view to protecting their interests and requires national law to enable trade unions, in conditions not at variance with Article 11, *to strive for the protection of their members' interests*” (emphasis added).
- g. The ECtHR went on in *Unite v UK* para 65 to say: “The applicant remains free to take steps to protect the operational interests of its members by collective action, including collective bargaining, by engaging in negotiations to seek to persuade employers and employees to reach collective agreements and it has the right to be heard”.
- h. As Underhill LJ concluded in *PDAU v Boots Management Services* (para 45) the *Unite v UK* decision is based on three elements:
- (1) “that the UK has an effective system for giving effect to the results of voluntary collective bargaining;
  - (2) that the UK has a machinery under TULRCA 1992 for imposing compulsory collective bargaining, and that, although the minimum numbers threshold means that that machinery is not in practice available to agricultural workers, there was no reason to believe that that restriction was unjustifiable;
  - (3) that the union retained the right to advance its members' interests because it had the “right to be heard” – this harks back to the language of the *Swedish Engine Drivers* and *Wilson* cases...”

93. This confirms that the Article 11 right is only to be heard. If the union has been heard, but an employer does not listen and does not agree, the workers' remedy is for the union "to ballot their members for industrial action"<sup>92</sup>. The Court of Appeal's conclusion is supported by the passage from *Wilson* that the Claimants themselves cite<sup>93</sup> that "there were other measures available to the applicant trade unions by which they could further their members' interests. In particular, domestic law conferred protection on a trade union which called for or supported strike action 'in contemplation or furtherance of a trade dispute' (*Wilson*, [45])".
94. The Claimants rely on the EAT's somewhat unrealistic example<sup>94</sup> that the "consequence of the Respondent's 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".
95. That criticism misunderstands the scope of Article 11. If the employer maintains recognition and bargains with the union each year, then the workers are fully exercising their Article 11 right to be heard. The fact that the employer does not listen does not "reduce the scope of s.145B" at all. The collective bargaining arrangements are intact and the workers' union rights are fully preserved – the exact intent of s.145B. If the workers seek to prevail then they can exercise their right to take industrial action as mentioned in *Wilson* (as Unite did in this case by calling for an overtime ban).
96. If, on the other hand, the employer only expresses an intention to bargain, but does not enter into negotiations and bypasses the collective bargaining process entirely, then an ET could readily infer the offers were achieving the 'prohibited result' and that was the employer's hidden purpose. As with discrimination claims, employment tribunals are adept at drawing adverse inferences from all the circumstances – particularly where the burden lies on the employer to prove its purpose (in a similar way to how an employer can be inferred to have discriminated in certain circumstances and must prove its innocent

---

<sup>92</sup> CA/54 [142].

<sup>93</sup> Appellants' Case para. 127 [69].

<sup>94</sup> EAT/55 [194].

motivation). In this second scenario, the workers could bring a claim on the basis that an implied term of the offer was for the employer to ignore bargaining in future just as it had in the past.

97. The similarities between s.145B claims and discrimination claims also provide a complete answer to the contention that the Court of Appeal's interpretation is "unworkable" in light of the 3 month time limit in s.145C(1). The time limit 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"<sup>95</sup>. The time limit for discrimination or whistleblowing cases starts from the date of the discriminatory or detrimental act. At the start of that time limit the worker will know whether the offer had the prohibited result (indeed it will be obvious if it has reduced his collective bargaining rights). He will know that the employer then has to prove that it did not intend to reduce his collective bargaining rights. As in discrimination or whistleblowing cases, a claimant cannot "know" the employer's reason (whether within the 3 month time limit or even later), but can readily infer it in order to bring a claim. In s.145B (as with discrimination and whistleblowing) the statute places the burden of proof on the employer to show its purpose. It is no more or less unworkable than any other employment claim based on an employer's reason or motivation.

98. It is clear that the essential freedom of Article 11 in relation to collective bargaining rights remains the same now as it was when *Wilson* was decided: that the law should ensure that a trade union has a right to be heard. It does not extend any further and does not amount to a right to prevail as *Bogg and Ewing* suggest might be desirable. The Court of Appeal's interpretation is therefore entirely consistent with Article 11.

### ***Summary***

99. The Respondent invites the Supreme Court to dismiss the Appeal:

- (1) The admissible tools of statutory construction point towards the Respondent's interpretation of s.145B, as does a plain reading giving proper effect to the future tenses.
- (2) Parliament intended to outlaw an employer from making inducements to its workers to surrender, forego or relinquish collective bargaining rights in respect of any of the

---

<sup>95</sup> EAT/54 [193].

terms of their contract – *i.e.* to alter the scope or arrangements for collective bargaining. Reading the section with a union seeking recognition in mind proves this.

- (3) The use of the ‘prohibited result’ in the ‘purpose’ subsection s.145B(1)(b) is only consistent with the Respondent’s interpretation particularly in the light of s.145D’s references to ‘arrangements’.
- (4) The correct interpretation of s.145B addresses the mischief in *Wilson* and gives full effect to Article 11 ECHR rights without going further than the ‘right to be heard’.
- (5) Where an offer is made directly to workers after collective bargaining has taken place and that offer has been rejected by the union, that offer does not amount to an offer to surrender or reduce union rights.
- (6) It would be wrong in principle to imply a test of acting “reasonably and rationally for proper purposes” into s.145B. This would not eliminate the veto problem and bring courts into the industrial arena to adjudicate on trade disputes.
- (7) There is no justification for interpreting s.145B in a way that promotes the ‘co-determination’ approach to collective employment relationships in other jurisdictions or which seeks to bring about a radical alteration of collective bargaining practices in the law of England and Wales.

100. These all point to the interpretation of the Court of Appeal of s.145B(2) being correct. The appeal should be dismissed.

**13 April 2021**

(paginated 19 April 2021)

**ANDREW BURNS QC**  
**GEORGINA HIRSCH**  
**DEVEREUX CHAMBERS**