Expensive offers: collective bargaining and the need to negotiate

By Stephen Wyeth
3PB Barristers

Review of the Supreme Court decision: Kostal UK Ltd v Dunkley and others [2021] UKSC 47

Introduction

1. I have heard it said several times that if you put five specialist employment practitioners in a room and asked them the same employment law question it would result in at least six different answers. In the first case of its kind to reach the Supreme Court, when five of our most senior Judges of the land were required to determine how s145B Trade Union & Labour Relations (Consolidation) Act 1992 should be interpreted, on this occasion there were at least two different conclusions. Ultimately however, the Justices of the Supreme Court all agreed that the employment tribunal reached the right result at first instance (despite that decision being overturned by the Court of Appeal along the way).

2. This case is a salutary lesson to employers who deal with a recognised union or a union seeking recognition. Indeed, Kostal UK Limited's decision to bypass the recognised trade union, Unite, and offer its workers a package that it considered very beneficial ended up costing the company close to half a million pounds in compensation (not to mention the legal fees incurred in an extensive appeal process that it ultimately lost).

The Law

3. Section 145B prohibits inducements relating to collective bargaining. It states:

> "(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—
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> (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.

(4) Having terms of employment determined by collective agreement shall not be regarded for the purposes of section 145A (or section 146 or 152) as making use of a trade union service.

(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.

4. Section 145D of the 1992 Act provides some assistance in determining what an employer's sole or main purpose is for making any offer (see S145B(1)(b)). The relevant parts of that provision state:

"….

(2) On a complaint under section 145B it shall be for the employer to show what was his sole or main purpose in making the offers.

(3) On a complaint under section 145A or 145B, in determining any question whether the employer made the offer (or offers) or the purpose for which he did so, no account shall be taken of any pressure which was exercised on him by calling, organising, procuring or financing a strike or other industrial action, or by threatening to do so; and that question shall be determined as if no such pressure had been exercised.

(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."

5. If an employer is found to have breached s145B then each claimant to whom any offer is made is entitled to an award of a fixed sum, currently £4,341, each. Multiple contravening offers will result in corresponding multiple awards.

6. These provisions were inserted in to the legislation in 2004 by the then Labour Government in response to the ECHR ruling in *Wilson and Palmer v United Kingdom* [2002] IRLR 568 in which the Strasbourg Court decided that the UK's domestic law contravened employees' rights under article 11 of the European Convention on Human Rights (freedom of assembly and association).

Findings of fact and decision of the Employment Tribunal

7. Following a ballot of the workforce in November 2014 which showed significant support in favour of recognising Unite for the purpose of collective bargaining, the company entered into a Recognition and Procedural Agreement with the union on 16 February 2015. Pay negotiations commenced in October later that year. After two preliminary meetings, on 24 November 2015 the company tabled a pay offer comprising: 2% increase in basic pay; an additional 2% increase for those earning less than £20,0000 (payable from 1 April 2016) and a Christmas bonus of 2% to be paid in December 2015. In return, the company sought a reduction in sick pay for new starters, a reduction in the Sunday overtime rate and consolidation of two separate 15-minute breaks into a single 30-minute break (complying with the Working Time Regulations).

8. The representative for the company, Mr Johnson told Unite official, Mr Coop, that the Christmas bonus had to be paid in December 2015 as it could and would not be paid subsequently. Thus, the bonus would be lost if agreement was not reached in time.

9. The alteration of breaks appeared to be a sticking point and Mr Coop indicated that he could not recommend the offer and would give members a 'free vote'. A ballot of Unite members took place on 3 December 2015 with an 80% turn out. 78.4% voted to reject the offer. In response, on 9 December 2015, Mr Johnson wrote to Mr Coop indicating his intention to "*write to each and every employee*" of the company to, in essence, repeat the offer, warning that if it was not accepted, time will run out to accept the Christmas bonus. He went on to state that anyone who rejected the pay offer would not receive the bonus even if subsequent agreement was reached between the union and the company. On the same day, Mr Johnson issued a 'General Notice' on various notice boards in the workplace in similar terms to the email he sent to Mr Coop.

10. As indicated, letters were sent out to employees on 10 December 2015. These were the first offers relied upon by the claimants in this case. By mid-December 2015 around 77% of the workforce (including trade union representatives and members) had accepted the offer according to a notice issued by the Company.

11. Notably, at the point at which the offer letters were sent out, the parties were still at Stage Four of the dispute resolution process provided for under the Recognition Agreement entered in February, namely reference to ACAS for conciliation.

12. On 29 January 2016, the company wrote to all those employees who had not accepted the pay proposal. They were invited to a meeting on 2 February 2016 or to return the current letter accepting the terms no later than 4 February 2016. At the conclusion of the letter the company stated that if agreement could not be reached then this may lead to notice being served in respect of the employee's contract of employment (nothing was said about re-engagement on new terms). The company offered to pay a 4% pay increase backdated to 1 January 2016 if the terms were accepted. Nothing was said about the Christmas bonus. The claimants relied upon the letter of 29 January 2016 as a further offer that contravened s145B.

13. On 3 November 2016 after industrial action in the form of an overtime ban, a collective agreement was reached which, save for the Christmas bonus, endorsed the pay proposals put forward by the company the previous year together with the three changes to terms and conditions.

14. The ET held at first instance that irrespective of the subsequent agreement reached in November 2016, this did not alter that fact that the individuals who had accepted one or other of the offers had already had their terms determined on the basis of the individual agreement rather than the considerably later collective agreement. It was not permissible in the ET's view for an employer to abandon collective negotiation when it does not like the result of a ballot and "*approach 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. ….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.*"

15. The ET went on to reject the company's further defence that its main purpose was one of ensuring the payment of the Christmas bonus. It was disingenuous for the company to

say an offer was made to avert a threat of its own making. There was subsequent evidence that December was not a necessary deadline for the bonus. Furthermore, by the offer in January 2016, the Christmas bonus deadline had passed. It found that the company (absent any union hostility) had nevertheless made a conscious decision to bypass further meaningful negotiations and contact with the union.

16. The ET made two awards for the mandatory sum in respect of each offer made to the claimants, resulting global damages against the company of £421,800.

The arguments before the Supreme Court

17. In essence, the company argued that there was no breach of s145B because the agreements reached on an individual basis did not contract out of collective bargaining or seek to remove those matters agreed upon from future collective bargaining. The employees' rights to be represented by Unite in negotiations over pay and conditions and to receive the benefit of any collective agreement were unaffected. Indeed, the changes to the terms agreed were the subject of further collective bargaining in November 2016. Furthermore, had the 2016 agreement been more favourable than the terms the workers had previously agreed to, they would have received those more favourable terms.

18. In contrast, the claimants argued that the wider interpretation accepted by the ET and the majority of the EAT was the correct one. They argued it is enough to bring an offer within the ambit of s145B that, if the offer is accepted, at least one term of employment would be directly and not collectively agreed, at least for the time being and until the term is subsequently varied or replaced by one negotiated through collective bargaining.

The decision of the Supreme Court

19. Lord Leggatt (with whom Lord Briggs and Lord Kitchin agreed) rejected both of those arguments. He considered the matter to be one of causation which appeared to have been overlooked by focusing solely on the content of the offers made as each side had done. The focus, he said, should be on the potential practical result. Section 145B will not be contravened unless there is at least a real possibility that had the offer not been made and accepted, the employees' relevant terms of employment for the period would have been determined by a new collective agreement. That must ordinarily be assumed to be the case where there is an agreed procedure for collective bargaining in place which has not been complied with. If there was no possibility of that happening because, say, the collective bargaining process has been exhausted, then there will be no breach of s145B.

This was not the position in the present case. The company made offers while the collective bargaining process was continuing. Stage Four had not been concluded (or even commenced before the first offer) and as such the ET was right to conclude that the company was bypassing the collective bargaining process.

20. Whilst agreeing that the appeal against the Court of Appeal's decision should be allowed and the ET's decision restored, Lady Arden and Lord Burrows would have gone further than the majority in this case. They agreed with the interpretation by the ET and EAT (majority). In their judgment, s145B does not and should not allow employers to escape liability just because the collective bargaining process has been exhausted at the time any offer is made, referring in support of that proposition to the possibility of an employer deliberately thwarting any given procedure. They were satisfied that the 'sole or main purpose' defence (being a genuine business purpose) provided adequate protection, when necessary, against any finding of liability.

Lessons to be learned

21. Despite being in the minority, Lady Arden and Lord Burrows suggested that it would be useful always to have in mind the following two questions when it comes to liability under s145B:

    a. Is the employer, in form or substance, making an offer for the workers to contract out of collective bargaining whether in the future or on this occasion?

    b. Is the employer seeking to bypass the agreed (or, if the union is seeking recognition, the contemplated) collective bargaining procedures or does the employer have a genuine business purpose in making the individual offers?

22. Those questions concentrate the mind in terms of whether the conduct of an employer is likely to be in breach of s145B. Any employer who has a workforce covered by collective bargaining needs to tread extremely carefully when looking to abandon negotiations with the relevant union and approach individuals with offers directly. Section 145B applies just as much to offers made to two or more individuals (one of which is a trade union member) as it does to offers made to an entire workforce. In this case it seems that the company may have believed its pay deal was a generous and attractive offer that was being unreasonably refused by the union negotiating on behalf of the workforce and decided to take matters in to its own hands. That decision was at devastating cost. Employers should

think twice about the sense of making direct offers to any member of a workforce covered by a recognised union.

23. Finally, with regard to the causation point underpinning the decision of the majority of the Supreme Court, it was said that employers have two means of protection against risk. First, the employer should ensure that any collective bargaining agreement clearly defines and delimits the procedure to be followed. Second, if the employer genuinely believes that the collective bargaining process has been exhausted, it cannot be said that the purpose of making direct offers is to procure the prohibited result because under s145B(1)(b) that will not be the sole or main purpose in making the offer.

2 December 2021

Stephen Wyeth

Barrister
3PB Barristers

0330 332 2633
stephen.wyeth@3pb.co.uk

3pb.co.uk