Pay increase was an unlawful inducement

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Introduction

1. The EAT has handed down a decision on the rights of workers who complained when their employer unilaterally increased their pay.

2. ***Ineos Infrastructure Grangemouth Ltd v Jones and others and Ineos Chemicals Grangemouth Ltd v Arnott and others [2022] EAT 82*** is an appeal against a claim which argued that as collective negotiations had not yet come to an end, a unilateral pay increase undermined workers' rights to collectively negotiate for a better deal.

Background

3. The workers were employed by companies in the Ineos group and worked at Grangemouth in Scotland. They were members of Unite which was recognised by a collective agreement, and entitled to conduct collective bargaining in relation to pay.

4. Against a backdrop of disputes and industrial action, pay negotiations began in June 2016 and continued into 2017. The process is described as protracted and acrimonious: Ineos had asked that a particular individual was not involved in the negotiations, and later in the process, discussions became so heated they had to be ended.

5. By March 2017, Unite had moderated its' request for 3.25% down to a figure of 3%. Having had a previous 2.3% increase rejected, Ineos then set what it described as a 'final and best' offer at 2.8%. Unite presented this figure to members but did not recommend it for acceptance and did not put the matter to a vote. The workers asked their union to seek an improved offer.

6. Relations remained strained, and so rather than engage further, Ineos decided it had no choice but to impose the pay offer, without agreement.

7. On 5 April 2017, it wrote to workers stating that a pay increase would be awarded "*as described in our latest offer*". Ineos also explained in this letter that it was no longer able to work with Unite. It advised that it had served notice to terminate the relevant collective bargaining agreements, referencing the rude behaviour reported by management. Ineos confirmed that it was happy to negotiate with a works council or alternative union in the future, but not with Unite.

8. Imposing the 2.8% award was, said the workers, a breach of Section 145B TULRCA. They said the increase was an offer made with the purpose of bypassing collective bargaining, and as such it was unlawful.

S145B TULRCA

9. The Trade Union Labour Relations (Consolidation) Act 1992 (TULRCA) confers a range of protections on employees to join a union and enjoy collective bargaining. In particular, Section 145B 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–*
>
> *(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."*

10. Where a claim is brought under Section 145B TULRCA, it is for the employer to show what its sole or main purpose was (Section 145D(2), TULRCA). Section 145D(4) requires that 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."

11. It's worth adding that there is no minimum period of continuous employment required in order to qualify for the right – and the penalties for a breach of Section 145B are stiff. With effect from 6 April 2022 the current award is £4,554. It is in the nature of a penalty, and the individual does not need to prove loss.

Employment Tribunal

12. Workers made claims in the employment tribunal which alleged a breach of Section 145B. The claims asserted that the letter from Ineos of 5 April 2017 had been an offer, that negotiations had not ended, and as such the offer bypassed the ongoing collective bargaining structure.

Was there an offer?

13. In its defence Ineos had argued that the letter imposing the increase had amounted to a unilateral promise (permissible in Scots law), rather than an offer requiring acceptance.

14. The tribunal disagreed with this premise – it found that the word 'offer' should be given its ordinary meaning. It said the letter sent by Ineos was a statement of intention to vary employees' contracts with regards pay, and that this was accepted by the workers continuing to work. The tribunal supported its finding by reference to the wording in the letter which expressly recorded that Ineos was planning to implement the increase '*as described in our latest offer*'.

Were negotiations at an end?

15. Notably, while there was a collective agreement, it did not contain a prescribed process enabling an identification of the stage reached. There was also little in the way of notes or minutes of the talks which might have supported the conclusion that the process was over.

16. Given that, the tribunal determined that it needed to assess, objectively, whether the procedure had been exhausted. When the situation was looked at from that perspective,

the tribunal found that "*the respective positions of the two sides were sufficiently close that an observer would regard it as more, rather than less, likely that agreement would have been achieved by further collective bargaining".* There was evidence before the tribunal of *"an expectation on the part of both Unite and the Respondents that there would be a 'next stage' if the pay negotiations resulted in an impasse or failure to agree*".

17. The tribunal concluded that, based on the evidence it had before it, the collective bargaining process had not been exhausted at the time Ineos made its offer.

What was the sole or main purpose of making the offer?

18. The tribunal's next question was to understand the employer's purpose, considering Section 145D.

19. One of the factors that was fatal to Ineos' defence was the correspondence which led up to the imposition of the increase. Given the expressed desire to remove Unite and the announcement regarding the intention to bring the current collective bargaining agreement to an end, the tribunal found it an easy step to conclude that the intention of imposing the pay award was to undermine collective bargaining.

20. It found therefore that the purpose of the offer was to remove the union from the negotiations.

Decision

21. The tribunal concluded that there had been an offer, and that it was made before the collective bargaining process had concluded. In light of the evidence regarding Ineos' purpose, the tribunal determined that Section 145B was breached, and so awarded the complainants £3,830 each (that being the level of the mandatory award at the time).

Appeal

22. Ineos appealed the tribunal's decision to the Employment Appeal Tribunal (EAT). The appeal argued that: (i) the unilateral pay increase was not an "offer" (ii) collective bargaining had been exhausted at the point when Unite rejected Ineos' "best and final" offer and there was therefore no prohibited result and (iii) Ineos had genuine business reasons for making the pay award, rather than seeking to bypass collective bargaining.

23. As the tribunal's judgment had predated the Supreme Court's ruling in ***Kostal UK Ltd v Dunkley & ors [2021]*** *UKSC 47*, Ineos further argued that the decision should be overturned in light of that later ruling.

24. *Kostal* is a landmark decision concerning Section 145B. It addressed for the first time the proper approach to claims under that provision and made clear that a test of causation should apply when determining whether there had been a breach. Stephen Wyeth from 3PB's Employment and Discrimination Group wrote about the Supreme Courts' decision in December 2021, and his detailed article can be found here.

EAT Decision

25. In relation to ground (i) the EAT agreed with the tribunal that the unilateral pay increase constituted an "offer" for the purposes of Section 145B. It concluded that a term as fundamental as pay could be not varied unilaterally outside of the employment contract. An offer to vary the employment contract was made, and the workers had accepted it by continuing to work. The EAT said that it was "fortified" in reaching this conclusion by the fact that Ineos had expressly referred to implementing its "*latest offer*".

26. The EAT said that the correct application of *Kostal* requires an objective assessment of whether, as a matter of fact, negotiations were at an end. Based on the unchallenged evidence submitted to the tribunal, collective bargaining had not been exhausted at the time Ineos made the pay award: both parties had indicated that they were close to agreement and had contemplated further rounds of negotiation. Given that the parties anticipated further discussion, the finding that the process had not concluded was one that had been open to the tribunal. Accordingly, the appeal could not succeed in relation to ground (ii).

27. In consideration of arguments presented in relation to ground (iii), the EAT noted that the Supreme Court had found in *Kostal* that the correct legal test in respect of purpose is, as noted above, one of causation. For offers to be capable of having the prohibited result, there must be at least a real possibility that, if they were not made and accepted, the relevant terms would have been determined by a new collective agreement.

28. While the tribunal's decision had predated the Supreme Court's ruling in *Kostal*, nothing in its approach had been inconsistent with the findings made by that superior court. Indeed, the EAT noted that the language used by the tribunal in setting itself the relevant test had

been presciently consistent with *Kostal* and as such there had been no error of law in its approach.

29. The EAT also agreed with the tribunal's finding that Ineos' offer had achieved the prohibited result, and that the sole or main purpose had been to achieve that outcome.

30. The EAT noted that it would be 'anti purposive' if an employer could avoid its obligations by simply stating that any particular offer was 'final' and as such ending the process. Accordingly, an employer could not label an offer as final and then seek to argue that the collective bargaining process had ended.

31. Concluding that the tribunal had not erred in law in reaching its conclusions, the EAT such dismissed the appeal.

Conclusions and comment

32. When reading the facts of the case, and notably the content of the communications, this decision is not as remarkable as it might at first seem. The statutory provisions expressly require consideration of evidence that an employer intended to change or did not wish to use the collective arrangements for bargaining. Ineos could not have been clearer about the position on this point, given the communication to workers.

33. One of the key take-aways from the decision is that the EAT expressly noted that an employer cannot designate the end of discussions of its own volition, as to do so would undermine the aims of the legislation.

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