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UK Supreme Court Rules in Important Collective Bargaining Case

UK – October 2021

On 27 October, the UK Supreme Court gave its judgment in *Kostal UK Ltd v Dunkley & ors*, concluding that Kostal had breached s145B of the Trade Union and Labour Relations (Consolidation) Act 1992, which prohibits employers from inducing workers to opt out of collective bargaining, when it made a one-off pay offer to employees while the collective bargaining process was still ongoing.

This is the first time the Supreme Court has considered s145B and the circumstances in which it is unlawful for employers to make a pay offer without the agreement of a recognised trade union via collective bargaining. It is an important decision for employers with unionised workforces and makes it clear that they need to tread very carefully if they are thinking about trying to agree pay terms directly with their employees or making an offer directly to employees where collective bargaining has stalled.

Background

Kostal recognised Unite for collective bargaining purposes in 2015 and agreed to engage in formal annual pay negotiations with the union. Later that year, it put forward a pay offer providing a 2% increase in basic pay and a lump sum Christmas bonus in exchange for reductions in workers' Sunday overtime entitlements and the sick pay rights of new starters. Unite did not support this deal and 80% of its members rejected it following a ballot.

Kostal then wrote to its employees directly offering them the same terms. It said that it did this because otherwise it would run out of time to pay the Christmas bonus in December's pay. The letter made it clear that any employees who rejected this offer would not receive the Christmas bonus, even if a revised offer were to be agreed later with Unite. By the end of December, Kostal and Unite had reached stage 4 of the procedural process set out in the recognition agreement for resolving disputes between the parties and agreed to refer the matter to Acas. In January, Kostal sent out a second letter to those employees who had not yet accepted the pay proposal, informing them that if they did not agree, this could lead Kostal to serve notice to terminate their contracts of employment.

Fifty-five Kostal employees who were also Unite members brought Employment Tribunal claims, alleging that each of the letters constituted an unlawful attempt by Kostal to induce them to opt out of collective bargaining, contrary to s145B.

S145B provides that a worker who is a member of a recognised independent trade union 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 that 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. The "prohibited result" is that the workers' terms of employment (or any of those terms in isolation, such as salary and sick pay as in this case) will not be determined by collective agreement negotiated by or on behalf of the union.

At first instance, the Tribunal held that by offering the pay terms directly to its employees, Kostal had breached s145B. In fact, twice, since each of its letters amounted to a separate inducement. Kostal was ordered to pay £418,000 in compensation, the mandatory fixed amount at that time of £3,800 for each unlawful inducement offer (so £7,600 to each of the 55 claimants).

The Employment Appeal Tribunal (EAT) agreed with the Tribunal's reasoning and its interpretation of s145B. It said that if, as a matter of fact, acceptance of direct offers to workers meant that at least one term of employment would be determined by direct agreement and not collectively (even if other terms continued to be determined collectively), that was sufficient to constitute a breach of s145B.

The Court of Appeal, on the other hand, allowed Kostal's appeal and adopted a narrower construction of s145B, ruling that a one-off direct pay offer to employees did not amount to an unlawful attempt to bypass collective bargaining as a whole, provided that the employer remained committed to collective bargaining going forward in respect of all other matters covered in its union agreement.

The Court of Appeal's decision was seen by many as a sensible outcome, particularly where collective bargaining had reached an impasse. Otherwise, the employer is left with the unenviable decision of either making an offer to employees (by applying the pay offer it had made) or implementing no pay deal at all.

Supreme Court

The Supreme Court has now overturned the Court of Appeal's decision and held that, on the facts of this case, Kostal was in breach of s145B.

The judgment in this case runs to an impressive 57 pages and contains some very detailed and complicated analysis of particular words and phrases from the legislation, including a look at the background to the introduction of s145B. To complicate things further, while all five judges on the Supreme Court reached the same conclusion (that Kostal was in breach of s145B), they did not all arrive at that decision in the same way.

Three of the judges (Lord Leggatt giving the lead judgment) said that when you are considering whether there has been an unlawful attempt by an employer to induce trade union members to opt out of collective bargaining, contrary to s145B, the courts should focus on the potential practical consequences of the employer's conduct. In other words, was there a real possibility that, had the direct offer by the employer not been made and accepted, the workers' relevant terms of employment would have been determined by collective bargaining and an agreement between the employee and the union?

This conclusion means that where there is a recognised trade union, if the employer wants to make an offer directly to its workers in relation to a matter that falls within the scope of a collective bargaining agreement, it can do so provided that the employer has first followed and exhausted the agreed collective bargaining procedure. If that route has been exhausted and the parties have failed to reach an agreement, it could not then be said that when the employer's offer was made, there was still a real possibility that the matter would be determined by collective agreement if that offer had not been made and accepted. The Supreme Court said that what employers cannot do is what Kostal did here, namely make a direct offer to union member workers before the agreed collective bargaining process had been exhausted. This would be the case even if (as in the case of Kostal in respect of the Christmas bonus), employees may potentially lose out if an offer is not made directly to them; that is a matter to be determined by collective bargaining.

The two other Supreme Court judges (Lady Arden and Lord Burrows) took a stricter line, preferring the approach adopted by the original Tribunal and the EAT. They did not accept that an employer could be "let off the hook" (our expression, not theirs!) just because it had exhausted the collective bargaining process. They said that where an offer is made directly (i.e. not through collective bargaining) to trade union members that, if accepted, would change one or more terms of their employment, an employer should only avoid liability if it can show that its sole or main purpose in making the offer was not to achieve the "prohibited result" but was for some other "genuine business purpose". This purpose would be something unconnected to the collective bargaining; for example, there was credible evidence that the employer was making the offer only to particular workers to reward them for their high level of performance or to retain them because of their special value (examples given in s145D(4)(c)).

We, therefore, prefer the reasoning of the majority! Logically, if all else has failed, the employer must surely ultimately be able to go to its own workforce directly.

However, we are then left with subsidiary issues around the conduct of the collective bargaining. The union may string out the process to the point where the change is no longer viable, or an employer could force the pace by not properly considering proposals made by the union in order to reach as soon as possible the point where it can say that the collective bargaining process has ended. In addition, there seems to be no room for the employer to take the view that, although collective bargaining on a particular point is not formally finished, the vigour of the negative reaction to it when first proposed means that there is no realistic prospect of it being supported by the union or a majority of those workers at a later stage. You are then left with form over substance just to reach the end of the process when the employer can put the proposal directly to its employees. This outcome does, therefore, potentially risk tying employers into a long and expensive collective bargaining process, which both sides know will not lead to agreement without any means to short-circuit this process.

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Conclusion

Unionised employers are likely to be disappointed that the Supreme Court has not followed the more user-friendly decision of the Court of Appeal and adopted a narrow interpretation of s145B.

This decision does not mean that employers can never make direct offers to workers who are trade union members to change their terms and conditions of employment, but it does mean they need to tread very carefully when thinking about doing so, if this forms part of the collective bargaining process. In light of the Supreme Court's decision, employers should certainly not seek to bypass any agreed (or if the union is seeking recognition, any contemplated) collective bargaining procedures, as this will almost certainly amount to a breach of s145B. Kostal will place a premium on keeping collective bargaining processes as short and process-free as possible, limiting the number of stages and possibly not including an agreement to refer any dispute to Acas.

As highlighted by the length and complexity of the judgment in this case, this is a very complicated area of law and one that can have grave financial consequences for any employer that gets it wrong (£418,000 in Kostal's case, and that was scarcely 50 people). In addition, employees who accepted the offer were entitled to retain the value of that offer. We would always recommend that employers with recognised trade union representation seek specific legal advice if they are contemplating engaging directly with workers on changes to their terms and conditions of employment.

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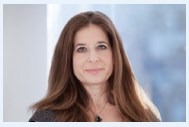

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