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One-off Direct Pay Offer Was Not Attempt to Bypass Collective Bargaining (UK)

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In *Kostal UK Ltd v Dunkley & ors*, the Court of Appeal has held that an employer can make a one-off pay offer direct to employees without breaching s145B of the Trade Union and Labour Relations (Consolidation) Act 1992, which prohibits employers from inducing workers to opt out of collective bargaining. This decision offers reassurance to employers with unionised workforces that, in certain circumstances, they can seek to agree pay terms directly with their employees without the risk of penalties, **provided** they remain committed to collective bargaining going forward.

Background

Kostal began recognising 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 free vote.

Kostal was disappointed with the result and 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 the pay offer would not receive the Christmas bonus, even if a revised offer was agreed with Unite later. It subsequently sent out a second letter to those employees who had not yet accepted the pay proposal informing them that if an agreement was not reached, this could cause the company 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 two letters constituted an unlawful attempt by Kostal to induce them to opt out of collective bargaining, contrary to s145B.

At first instance, the Tribunal held that by offering the pay terms directly to its employees, Kostal had indeed breached s145B. 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 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.

Court of Appeal

The Court of Appeal has now overturned the decisions of the Tribunal and the EAT. It said that a one-off direct pay offer to employees did **not** amount to an unlawful attempt to bypass collective bargaining. According to the court, s.145B covers two situations:

- Where a union is seeking to be recognised and the employer makes an offer whose **sole or main purpose** is to prevent the workers' terms of employment from being determined by a collective agreement
- Where a union is already recognised and the employer makes an offer whose **sole or main purpose** is to make the term or terms concerned outside the scope of collective bargaining **on a permanent basis** (our emphasis in each case)

It did not cover the situation (as was the case here) where an employer makes an offer whose sole or main purpose is that one or more of the workers' terms will not, **on this one occasion**, be determined by the collective agreement. It said that in this situation the employer was not seeking to get the workers to give up, even temporarily, their right to be collectively represented by the union via collective bargaining, which is the "mischief" that s.145B was introduced to deal with. The key issue, therefore, is the employer's purpose in making the offer to the workers directly.

The Court of Appeal said that it would not have been the intention of Parliament to provide recognised unions with a veto "over even the most minor changes in the terms and conditions of employment, with the employers incurring a severe penalty for overriding the veto".

In reaching its decision, the court noted that Kostal was not motivated by hostility to the trade union, the offers were made to the whole workforce and each individual (whether accepting or not, and whether a member of Unite or not) would continue to be represented by Unite under the collective agreement.

The court rejected Unite's arguments that such an interpretation of s145B would render unions powerless. It pointed out that in such circumstances it remains open to unions to ballot their members for industrial action, as Unite did in this case.

What Is the Effect of This Judgment?

Whilst there could be more fallout from this case (Unite has indicated an intention to appeal to the Supreme Court), the Court of Appeal's judgment should be welcomed by those employers with unionised workforces. Going forward, employers can be more confident that a one-off offer to employees to change terms and conditions will not result in their being penalised, provided there are good business decisions supporting this action and the employer is not seeking to circumvent collective bargaining on a permanent basis.

There must, ultimately, be a point where the employer's repeated making of ostensibly one-off changes will be read as actually showing an intention to lure people out of collective bargaining. However, it is hard to think that the Court of Appeal's logic could not apply more than once to the same employer, especially where the term concerned is not the same in each case.

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