145B or not 145B, that is the question

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The Supreme Court handed down its long-awaited decision in Kostal on 27 October, determining the proper scope of s.145B TULR(C)A. In a landmark judgment, the court found in favour of the trade union members and held that they had been made offers unlawfully.

Background

TULR(C)A s.145B prohibits an employer from making a direct offer to a worker who is a member of a recognised trade union where the employer's sole or main purpose in making the offer is to achieve the 'prohibited result', ie acceptance of the offer would mean that any of the worker's terms and conditions of employment (or any one of the terms) 'will not or will no longer' be collectively bargained by the union.

Where s.145B is breached, each affected worker can accept or reject the offer and claim a mandatory award of compensation, currently £4,341, 'in respect of the offer complained of'. The financial consequences of falling foul of s.145B are therefore stark in a large unionised workforce where offers may be made to multiple employees.

The section was enacted to implement the decision of the ECtHR in *Wilson & Palmer*, which ruled that employees must not be disincentivised from joining a union or 'relinquish' union representation and collective bargaining. However, the precise scope of s.145B was unclear.

In particular, it was not clear to what extent it would apply in the (not uncommon) situation where collective negotiations over pay or terms and conditions have stalled. Can the employer go directly to employees, including trade union members, to make a direct offer? Or does that count as an offer designed to achieve the prohibited result that terms are no longer collectively bargained? If so, that would appear to mean that where negotiations reach an impasse, trade unions have an effective veto which would prevent the employer from implementing a pay increase or offering new terms and conditions to the workforce.

Against the backdrop of Covid-19, as a result of which a number of employers have sought to restructure and make changes to terms in difficult business environments, the outcome of *Kostal* has been much anticipated.

The facts

Towards the end of 2015, Kostal and union Unite began negotiations on pay in accordance with the provisions of the relevant recognition agreement.

Kostal offered a 2% increase in basic pay, together with a lump-sum Christmas bonus in return for a variation of some other terms. Unite did not recommend the offer, which was subsequently rejected by its members in a ballot. Kostal agreed to refer the dispute to Acas for conciliation.

Shortly afterwards, Kostal sent a letter directly to the employees offering the same package and stating that if they did not accept they would not receive a Christmas bonus. The following January, Kostal wrote to the employees who had not accepted, offering a further increase in basic pay if they agreed to the proposed package and threatening dismissal if they refused. Negotiations with Unite continued and collective agreement was eventually reached in November 2016. A group of employees brought a claim in the employment tribunal alleging that both the December and January offers infringed their rights under s.145B.

Decisions of the lower courts

The tribunal accepted the claimants' interpretation and held that both the December and January offers had been unlawful. The EAT dismissed Kostal's appeal, ruling that it had made two unlawful inducements for employees to cease collective bargaining. The EAT held that if acceptance of a direct offer would mean that only one term of employment would be determined by direct agreement, that was

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sufficient to amount to an unlawful inducement, even if the other terms continued to be determined collectively. The EAT stated that employers are entitled to make offers directly to employees where they have a proper purpose in doing so, but only where collective bargaining has broken down.

The Court of Appeal upheld Kostal's appeal. It identified two situations in which the 'prohibited result' would be achieved and would therefore be unlawful:

- where an independent trade union is seeking recognition and the employer makes an offer whose sole or main purpose is to achieve the result that the workers' terms of employment will not be determined by collective agreement; and
- where an independent trade union is already recognised, the workers' terms of employment are determined by collective agreement negotiated by the union, and the employer makes an offer whose sole or main purpose is to achieve the result that the workers terms (as a whole) or one or more of those terms will no longer be determined by collective agreement, ie on a permanent basis.

Where, as in this case, the employer's sole or main purpose of making the offer was to achieve the result that one or more terms would not, *on this particular occasion*, be determined by collective agreement, that would not give rise to the 'prohibited result' and therefore Kostal had not breached s.145B.

The court noted that it was never the intention for the courts to take sides in industrial disputes. It held that the construction contended for by the EAT would effectively give the trade union a veto over 'even the most minor changes in terms and conditions, with employers incurring a severe penalty for overriding the veto' (para 40, p.21) and go well beyond the mischief identified in *Wilson & Palmer* that the section was introduced to address.

The Supreme Court's decision

The Supreme Court allowed the employees' appeal, finding that the two pay offers were unlawful. The majority decision, led by Lord Leggatt, held that the parties had wrongly limited their focus to the content of the offer.

On the court's summary of the parties submissions, if the claimants' preferred interpretation were to be adopted, all that matters is whether the offer is to agree a change to a term or terms of the individual worker's contract of employment which has not been collectively agreed with the union. On Kostal's interpretation, all that matters is whether the offer requires the worker to contract out of any collective bargaining rights.

The court rejected both of these interpretations, and stated that the key focus should be on the result of making the offer, ie a test of causation. For the prohibited result to arise, there must be a 'real possibility that, if the offers were not made and accepted, the workers' relevant terms of employment would have been determined by a new collective agreement reached for the period in question' (para 129, p.57).

It is implicit in the definition of the prohibited result, the court held, that in order for an offer to be unlawful, that the result of acceptance of the offer must be '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 when they otherwise might well have been determined in that way*' (para 65, p.24).

According to the Supreme Court, 'an employer which has recognised a trade union for the purpose of collective bargaining and agreed to follow a specified bargaining procedure cannot be permitted with impunity to ignore or by-pass the agreed procedure, either by refusing to follow the agreed process at all or by being free to drop in and out of the collective process as and when that suits its purpose' (para 61, p.23).

If the collective bargaining procedure with the recognised trade union has been followed and exhausted, there is nothing to stop the employer from making a direct offer to its employees – this would not give rise to a breach of s.145B as the term(s) would not have been determined by collective agreement if the offers had not been made and accepted. Particular attention must therefore be paid to collective bargaining arrangements and to collectively agreed dispute resolution processes.

It was argued, in this case, that to focus on exhausting the collective bargaining process before an offer could be made would lead to considerable uncertainty as to when offers could lawfully be made. The court rejected these submissions.

It stated that employers had two principal means of protection. First, to make sure its procedures were clear as to

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when the collective bargaining process had been exhausted. Secondly, an offer that has the prohibited result will only be unlawful if the employer intends for it to have that effect. If the employer genuinely and, in good faith, believes its processes have been exhausted, 'it cannot be said that the purpose of making direct offers was to procure the result that terms will not be determined by collective agreement when that otherwise might well have been the case' (para 68, p.25).

On the facts of this case, Kostal had not exhausted its own collective bargaining procedure. The recognition agreement set out a series of steps, including a referral to Acas for conciliation if both parties agreed.

The agreement expressly stated that 'if the parties do not agree to refer the matter to Acas, the procedure is exhausted'. However, the parties had agreed to refer the matter to Acas and therefore the collective bargaining procedure was still ongoing at the time that the two offers were made, so the offers would have given rise to the prohibited result and were therefore in breach of s.145B.

Conclusion

Although the employer lost this particular case, this was a decision that was very much decided on its particular facts and the majority of the Supreme Court rejected the employees' broader arguments on collective bargaining. These would have effectively given trade unions a right to veto changes to terms and conditions when negotiations have failed.

The decision confirms that employers can legitimately make direct offers to employees so long as they first exhaust their collective bargaining processes, and provides useful clarity on when they can engage directly with the workforce on changing terms and conditions.

There will clearly still be risk to employers where collective bargaining processes are not clearly defined (as is common, particularly with longstanding, historic collective arrangements). Although the safest option would be to have a clearly defined dispute resolution process, it may not always be practicable, or desirable to amend long-standing arrangements that have worked well in practice. Arrangements may also be a combination of written agreements and informal practices that have built up over time, making them harder to define.

It will be important to keep a document trail of the process that has been followed and any internal decisions as to whether that process has been exhausted. This will help to evidence the employer's genuine belief that the collective bargaining process has been exhausted.

KEY:

Kostal	*Kostal UK Ltd v Dunkley* [2021] UKSC 47
TULR(C)A	Trade Union and Labour Relations (Consolidation) Act 1992
Wilson & Palmer	*Wilson v United Kingdom* [2002] ECHR 552