



## Final offers and the end of the collective bargaining process

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*The EAT has upheld a tribunal decision in Ineos that two companies within the same group had made unlawful inducements relating to collective bargaining under TULR(C)A s.145B, giving helpful guidance to employers and unions in the first appellate decision to post-date the Supreme Court's decision in *Kostal*.*

While *Kostal* was a welcome decision for employers in the sense that the court confirmed that offers could be made directly to employees where the collective bargaining process had been exhausted, this decision is indicative of the level of scrutiny that tribunals are likely to apply to statements to that effect, and gives some helpful tips about some of the pitfalls employers might face.

### **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 the worker's terms and conditions of employment '(or any 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 £4,554, 'in respect of the offer complained of'.

In *Kostal*, the Supreme Court held that a key question is what is the result of making the offer (ie a test of causation)? If the collective bargaining procedure has been followed and exhausted, a subsequent offer made directly to the employees would not give rise to the prohibited result and therefore would be a breach of s.145B as the terms would not have been determined by collective agreement if the offers had not been made and accepted.

In other words, the Supreme Court said, was it the result of the offer 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*.

In this case, Ineos recognised Unite at its Grangemouth site. The collective bargaining agreement was a 'simple' agreement covering collective bargaining in respect of pay, hours and holidays. It made reference to meetings between the parties for the purposes of collective bargaining but did not stipulate any minimum or maximum number. Protracted pay negotiations commenced in 2016.

In the end, the parties attended five negotiation meetings. At the last meeting, Ineos put forward a 'best and final' offer of 2.8% against Unite's position that it couldn't recommend anything below 3% to its members. Ineos was disappointed with the outcome of the discussions, with one of its witnesses giving evidence that the 'discussions had run its course', 'there was no life left in the union negotiations', and 'we had exhausted the CBA procedure'.

Ahead of an internal Ineos meeting, one of its executives, Mr Currie, emailed saying 'the only logical conclusion is that we have to engineer a way to get rid of Unite and replace them with a different representative body'. On 5 April 2017, Ineos sent a letter to its employees informing them that it would implement the 2.8% pay increase and that it had served notice on Unite to terminate the collective bargaining agreements as the negotiations have been 'very unsatisfactory'.

The tribunal upheld the employees' claims that Ineos had acted in breach of s.145B. The tribunal's decision pre-dated the Supreme Court's decision in *Kostal* and the appeal was sisted pending the outcome of the Supreme Court's decision.

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### **The EAT's decision**

The EAT upheld the tribunal's decision that Ineos had breached s.145B when it sent the letter communicating its intention to increase pay.

### **Was there an offer?**

Ineos argued that the pay increase in the letter did not amount to an offer. Instead, it argued that it was a unilateral promise that didn't require the employees' acceptance, which fell outside the scope of s.145B. The EAT rejected Ineos's argument.

The letter was a statement of intention to vary the employees' contractual pay, which was accepted by those employees who continued to work. The EAT considered that the tribunal's view was fortified by the express language of the letter, which stated Ineos's intention 'to implement our pay increase as described in our latest *offer* backdated to 1 January 2017'. The plain reading of the letter is consistent with an implementation of an offer already made with the result that the employees' contractual pay would be varied.

It will be interesting to see how this decision sits alongside the decision of a different division of the EAT in *Scottish Borders Housing*. In that case, which was primarily concerned with limitation periods, Lord Summers held (at para 25) that:

'[The unilateral imposition of terms] is not a contractual offer ... [instead it] constitutes an anticipatory breach of contract. That in turn entitled the claimants to rely on that breach for the purpose of any claim they wished to state. An employee who decided to accept the position would normally be said to have "accepted" the repudiation.

But such an acceptance could not be regarded as contractual acceptance but acceptance of the repudiation. In that situation the party accepts the breach not the offer. The effect of acceptance is that the employee relinquishes any right to assert breach of contract. But as I understand it acceptance of a repudiation does not create a contract. It rather bars the party from relying on the breach of contract ...

In my judgement an employer that intimates its determination to unilaterally impose new terms cannot be said to offer new terms under s.145B.'

These decisions would certainly appear to be inconsistent at first blush and could well give rise to further litigation going forward.

### **Did the offer achieve the prohibited result?**

Ineos argued, among other things, that the offer did not achieve the prohibited result because at the time the offer was made, negotiations had come to an end, and therefore there was nothing impermissible in making the offer. The EAT also rejected this argument. There was no express dispute resolution process, unlike *Kostal*, and so the tribunal was tasked with determining whether the collective bargaining process was truly at an end.

The tribunal concluded at para 62: 'Viewed objectively, the parties were close to agreement' and '[t]he 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.'

These findings were unchallenged by the parties and were entirely consistent with the test enunciated by the Supreme Court in *Kostal*. It was open for the tribunal to decide that objectively speaking, the collective bargaining negotiations had not concluded by 5 April 2017 and the offer, implicitly accepted by the employees continuing to work when there was 'no other realistic way to proceed', had the result that their contractual pay were not, or no longer, determined by collective bargaining.

Ineos sought to argue that the fact that there had been a 'fifth and final meeting' and a 'final and best offer' (which had been rejected) meant that the bargaining process was effectively at an end. In addition, Ineos said that it had a genuine belief that negotiations were at an end, whether or not that was objectively the case.

However, the EAT disagreed:

'The reference to the "final meeting" is simply recording a fact – this was the last meeting before events took the course that they ultimately did. The "final and best offer" has to be looked at in the whole context of the unchallenged evidence, including findings that Mr Johnstone of the respondents felt that they were close to agreement (para 32), that "the difference was not worth falling out over" (para 88) and that the appellants (through their witness Mr Banham) accepted that the appellants' briefing note

***“this decision certainly lends support to the view that, post-Kostal, there is significant benefit in having a clearly defined dispute resolution procedure in the collective bargaining machinery”***

was misleading and “gave rise to an expectation” of escalation of the negotiations.

Mr McNally’s evidence recorded at para 49 reflected a subjective view which the tribunal concluded was not borne out by an objective analysis of the whole of available evidence which supported the conclusions set out at paras 101 and 106. Those were conclusions it was entitled to reach, and once again I can discern no error of law in their approach. In this context I also agree with the submission made by Mr Segal that it would be “anti-purposive” to hold that an employer could avoid its obligations under s.145B simply by stating that any particular offer was a “final” one.

Both parties were in agreement that where there is no structured agreement as in *Kostal*, the proper approach is to ascertain, objectively, whether or not negotiations were as a matter of fact at an end. I concur, and consider that this was the approach taken by the tribunal in this case when they concluded that parties were close to an agreement.

It follows that the tribunal had evidence before it to permit it to draw the conclusions that (a) looked at objectively, collective bargaining negotiations were not at an end at the time the offer of 5 April 2017 was made and (b) that the offer, implicitly accepted by the workers when there was “no other realistic way to proceed”, had the result that the workers’ terms and conditions as to pay were not, or no longer determined by collective bargaining when it was “more, rather than less, likely that agreement would have been reached by further collective bargaining”.’ (paras 64 to 65)

While the EAT did not expressly deal with the question as to whether Ineos did indeed have a genuine belief that negotiations were at an end, it appeared to reject the ‘subjective’ view of Ineos’s witness to this effect. It is possible that this will be further challenged on appeal.

#### **What was the sole or main purpose in making the offers?**

Ineos argued that the purpose of making the offer was for

business purposes and not to achieve the prohibited result. The tribunal had acknowledged that Ineos had engaged in meaningful consultation with Unite. However, it also found that Ineos did not want to use the arrangements it had agreed with Unite for collective bargaining, as evidenced by Mr Currie’s email, and by Ineos giving notice to terminate the collective bargaining agreement. There was therefore ample evidence to support the tribunal’s findings on this point.

The EAT therefore rejected Ineos’s appeal. Interestingly, it chose not to remit the case to a fresh tribunal, despite accepting that the tribunal below had applied the wrong test, because it held that the findings and decision were clearly consistent with the Supreme Court’s decision in *Kostal*.

#### **Comment**

The case will make an interesting case for practitioners for two reasons. The first is the apparent conflict between the decisions of the EAT in Ineos and *Scottish Borders Housing*, which could well give rise to further appellate authority as to whether a unilateral imposition of terms is an offer or an anticipatory breach of contract.

The second is the scrutiny which the tribunal (and the EAT) placed on the employer’s assertions that collective bargaining had been exhausted. This decision certainly lends support to the view that, post-*Kostal*, there is significant benefit in having a clearly defined dispute resolution procedure in the collective bargaining machinery.

Although employers may be reluctant to do so because they want to retain the ability to move nimbly, the shackles of s.145B now seem to make that a less realistic prospect, and it may be a case of choosing certainty over speed going forward.

#### **KEY:**

<i>Ineos</i>	<i>Ineos Infrastructure Grangemouth Ltd v Jones</i> [2022] EAT 82
TULR(C)A	Trade Union and Labour Relations (Consolidation) Act 1992
<i>Kostal</i>	<i>Kostal UK Ltd v Dunkley</i> [2021] UKSC 47
<i>Scottish Borders</i>	<i>Scottish Borders Housing Assoc Ltd v Caldwell</i> [2021] UKEAT 0084/21/2707