Appeal No. UKEAT/0108/17/RN
UKEAT/0109/17/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 14 & 15 November 2017
Handed down on 13 December 2017

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE

PRESIDENT

MS K BILGAN

MISS S M WILSON

KOSTAL UK LIMITED — APPELLANT

MR D DUNKLEY & OTHERS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANDREW BURNS QC (One of Her Majesty's Counsel) and MS GEORGINA HIRSCH (Of Counsel) Instructed by Gunnercooke LLP 53 King Street Manchester M2 4LQ
For the Respondent	MR STUART BRITTENDEN (Of Counsel) Instructed by Thompsons Solicitors Coverdale House 15 East Parade Leeds LS1 2BH

SUMMARY

Section 145B of the 1992 Act

1. The two appeals raise three essential issues:

(i) what is the proper interpretation and reach of s.145B of the 1992 Act;

(ii) if the Employment Tribunal erred in law in its construction of the "prohibited result", whether the Employment Tribunal erred in law in finding that the Respondent's sole or main purpose in making the offers was to achieve the prohibited result;

(iii) in relation to remedy, whether on a proper construction of the Respondent's conduct and/or the legislation the Tribunal was wrong to make two awards of £3,800 each as opposed to a single award of £3,800 to the affected Claimants in this case.

2. The appeals were dismissed. The prohibited result occurs where offers, if accepted, result in new terms agreed directly and not through collective negotiations, whatever else is agreed through collective bargaining. There is no warrant for reading in a requirement that the terms will not *in the future* or will no longer *in the future* be determined collectively.

3. The Employment Tribunal made no error of law in interpreting the prohibited result and accordingly, no error in determining the Respondent's sole or main purpose in making the offers.

4. Nor was there any error of law by the Employment Tribunal in making two awards of £3,800 each to those Claimants who received two unlawful offers.

THE HONOURABLE MRS JUSTICE SIMLER

1. These appeals concern the reach of s.145B of the Trade Union and Labour Relations Consolidation Act 1992 ("the 1992 Act"), a provision not previously considered at appellate level. Put broadly the section prohibits offers made to workers (who are members of a recognised trade union, or one seeking recognition) by their employer, if acceptance of the offer would have "the prohibited result" and the employer's sole or main purpose in making the offers is to achieve that result. For these purposes "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".

2. Kostal UK Ltd (the Appellant but referred to as the Respondent for ease of reference) appeals against judgments of the Sheffield Employment Tribunal (comprised of Employment Judge Little, Mr Harker and Mr Priestley) on liability and remedy, promulgated on 10 January 2017 and 13 March 2017 respectively. The Tribunal upheld claims made by 55 Claimants who were members of a recognised union, Unite the Union ("Unite") that two offers made by the Respondent (the first by letter dated 8 December 2015 but sent on 10 December, and the second by letter dated 29 January 2016) breached their rights under s.145B of the 1992 Act. The Tribunal awarded the mandatory fixed award of £3800 under s.145E(2)(b) in respect of each unlawful inducement offer it found to have been made.

3. The Respondent's Notice of Appeal in respect of the liability decision is discursive and difficult to follow. It appears to take issue with certain facts found by the Tribunal but no perversity challenge is advanced and the Respondent realistically accepts that it cannot go behind the Employment Tribunal's findings of fact. Moreover as the Respondent makes clear

in any event, there is really only one ground of appeal raised in relation to liability: it is that the Employment Tribunal erred in law in construing the "prohibited result" in s.145B(2) to mean that if direct agreement between workers and employer was reached in relation to one or more terms which would as a result no longer be determined by collective agreement, that is sufficient to constitute the prohibited result. The error is also said to infect the Employment Tribunal's conclusion that the Respondent's sole or main purpose was to achieve that result but if the Respondent is wrong in relation to its construction argument, there is conceded to be no freestanding challenge to the finding as to purpose. There is also a remedy appeal challenging the decision to make two awards in respect of the two unlawful inducement offers made to certain Claimants.

4. The two appeals accordingly raise three essential issues:

(i) what is the proper interpretation and reach of s.145B(2) of the 1992 Act;

(ii) if the Employment Tribunal erred in law in its construction of the "prohibited result" whether the Employment Tribunal erred in law in finding that the Respondent's sole or main purpose in making the offers was to achieve the prohibited result;

(iii) in relation to remedy, whether on a proper construction of the Respondent's conduct and/or the legislation the Tribunal was wrong to make two awards of £3,800 each as opposed to a single award of £3,800 to the affected Claimants in this case.

5. We have had the benefit of clear, focused submissions both in writing and orally from Mr Andrew Burns QC and Ms Georgina Hirsch for the Respondent (neither of whom appeared below) and from Mr Stuart Brittenden for the Claimants who did. We are grateful for their assistance.

The Tribunal judgments

6. Liability and remedy were directed to be heard separately. At the liability hearing it is common ground that the Tribunal correctly identified the liability issues as whether (i) the Respondent made offers to the Claimants the acceptance of which would have the prohibited result and (ii) if such offers were made, whether the prohibited result was the Respondent's sole or main purpose in making the offers. Further the Tribunal observed that the essential matter for the Tribunal was the analysis of the reach of the legislative provision.

7. The facts are set out in some detail by the Tribunal and are merely summarised here by reference to the Tribunal's findings.

8. The Respondent is concerned with the development and production of technically advanced electronic, electromechanical and electronic products. The Claimants are all members of Unite and employed as shopfloor or manual workers. In November 2014, there having been little or no union activity prior to that, there was a ballot with significant support in favour of recognising Unite. Subsequently a Recognition and Procedural Agreement was concluded between the Respondent and Unite, signed by both sides by 16 February 2015, and giving Unite "sole recognition and bargaining rights": clause 2.1. It is common ground that the Recognition Agreement is binding in honour only, rather than legally binding. Subject to that, the Recognition Agreement identifies a common objective in using the processes of negotiation and meaningful consultation to achieve beneficial results for both sides (clause 3.4); and establishes a framework for consultation and collective bargaining. Clause 7 "Negotiating and Consultation Committee", provides:

> **"7.1 Formal negotiations will take place between the parties on an annual basis. At this time the company and union will also agree to a member verification check with ACAS prior to negotiations commencing.**

7.2 Negotiations will commence normally in October and with a normal effective date of 1st January.

7.4 Any matters related to proposed change of terms and conditions of employment will be negotiated between the Company and the Union."

9. Appendix 1 contains a Disputes and Resolution of Collective Grievances Procedure with four procedural stages, the last of which provides that in the event of a failure to agree at stage 3, the matter may by joint agreement be referred to ACAS for conciliation. The Procedure provides that:

"(b) During the procedural process, there will be no sanctions of any kind applied nor change imposed by either party…".

10. Having achieved recognition earlier in the year, in October 2015 Unite requested a meeting so that formal pay negotiations could commence. The Tribunal described preliminary meetings during October and November (on 29 October and 12 November), with a first proposed pay offer for 2016 tabled by Mr Johnson for the Respondent at a meeting on 24 November. The offer was for a 2% increase in basic pay, a lump sum of 2% of basic pay to be paid in December as a Christmas bonus, and an additional 2% for those earning less than £20,000 payable with effect from 1 April 2016. In return the Respondent requested a reduction in sick pay for new starters, a reduction in Sunday overtime and consolidation of two individual 15 minute breaks into a single 30 minute break.

11. The offer was considered and discussed in the meeting. There were minutes of this and other meetings available provided by the Respondent, though these were not agreed minutes. The Tribunal found among other things that Mr Coop on behalf of Unite asked what would happen to the Christmas bonus if the deal was rejected and was told by Mr Johnson that the Christmas bonus had to be paid in December from 2015 profits and

> **"if this was not paid in December, it could not and would not be paid in 2016, therefore it would be lost to employees and they would be left with either the 2% on basic or 4% on basic depending on whether their basic salary was greater or less than £20K…"**

Mr Coop then stated that he could not recommend the offer, and would give his members a 'free vote', neither recommending acceptance nor rejection, in a forthcoming ballot.

12. The ballot (described as a consultative ballot) took place on 3 December 2015 and had an 80% turnout with just under 80% voting to reject the proposal, and just over 20% voting to accept. The Respondent was disappointed by this result and by email dated 9 December 2015 Mr Johnson told Mr Coop that:

> **"Therefore, I am writing to inform you that I now intend to write to each and every individual employee at Kostal UK in order to offer the company pay increase and term and condition changes.**
>
> **I am doing this because otherwise we will run out of time to pay a "Christmas bonus" prior to Christmas in December's pay. Please be aware that any employee who rejects the pay offer will not receive the Christmas bonus and it cannot be paid at a later date even if we subsequently achieve an agreement between us".**

13. Furthermore, on 9 December 2015 Mr Johnson issued a General Notice entitled "Pay Negotiations 2015" which was displayed on notice boards in the workplace summarising the Respondent's pay offer and its proposed changes to terms and conditions. The Notice stated that "the 2015 Pay Negotiations have been conducted with the Unite Trade Union Representatives" and that the Respondent had "subsequently made its final offer on the 2015 negotiations ...". The Notice set out the offer tabled with Unite and continued:

> **"Unfortunately, the above offer was rejected by a ballot of Trade Union members.**
>
> **Therefore, the Company has made the decision to write to every individual employee of Kostal UK in order to offer the above to each person directly.**
>
> **We are doing this due to the short timeframe in order to pay a Christmas Bonus, which can and will only be paid in December's pay.**
>
> **Therefore…failure to sign and return [by no later than 18 December 2015] will lead to no Christmas bonus and no pay increase this year."**

14. Letters dated 8 December 2015 were sent out to employees by the Respondent on 10 December 2015. These were the first offers relied on by the Claimants as breaching their statutory rights. The Tribunal referred to a sample letter to an employee called Nigel Jones which began by referring to the rejection of the pay offer in the trade union ballot and continued:

> **"However, the company does wish to reward our employees for their efforts in 2015 and therefore wish to offer the pay increase to each individual employee."**

15. The letter went on to set out the terms of the offer and to explain that if the offer was not accepted by 18 December 2015, the employees would not receive the Christmas bonus element of the pay offer which "cannot be paid at a later date." The letter also set out the proposed changes to terms and conditions.

16. There was a pay negotiation meeting on 14 December 2015. At the beginning of the meeting Mr Coop was noted as having said: "You sent a letter out to all employees – you are bypassing the collective bargaining agreement". The note records Mr Johnson's confirmation that:

> **"he had distributed a letter on Friday 11 December 2015 to all our employees because the pay offer had been rejected by TU members…".**

Mr Coop made a proposal that if the Respondent took out the provision about changing breaks he would guarantee to get the pay offer through. There was a discussion about a further ballot of the membership which subsequently took place. The Respondent did not accept this proposal.

17. Later in December 2015 the Respondent issued a further General Notice stating that the pay offer had been made to all:

> **"individual employees directly because we wanted to give the majority of employees the opportunity to be paid the Christmas bonus in their December pay. 77% of employees have already signed their acceptance including Trade Union representatives and members…"**

The Notice urged employees to agree to the changes by 18 December and reminded them that they would not receive their bonus if they failed to do so.

18. Meanwhile in relation to the dispute resolution process under the Recognition Agreement, the Employment Tribunal found that by the end of December 2015 the parties were at stage 4 of the process (reference to ACAS for conciliation). In anticipation of that, both sides set out their cases in writing. The Respondent's case (as set out by Mr Johnson within his prepared document) described the decision to write to individual employees as being for two particular reasons: first he said that the Respondent had no idea how many employees were trade union members and was not therefore aware whether the trade union was speaking on behalf of the majority. Secondly he said that the Respondent wanted its employees to have the opportunity to receive the Christmas bonus. Towards the end of his document Mr Johnson said:

> **"However, my final point is to quote the Unite letter – 'Mr Johnson needs to listen to the voice of the workers' – I believe that I have and that 91% of them have spoken, perhaps the Trade Union should follow their own advice and listen to the majority and not the minority."**

19. By letter dated 14 January 2016 Mr Coop put Mr Johnson on notice that he believed that letters had been sent directly to employees because, following collective consultation, Unite had rejected the Respondent's proposal and this appeared to breach s.145B of the 1992 Act.

20. Mr Johnson responded by letter dated 29 January 2016 rejecting that contention. He said:

> **"The relevant circumstances are, in summary, that negotiations forming part of collective bargaining, reached stage 3 in December last year with no agreement. We have made it clear that our parent company in Germany insists that payment of any Christmas bonus happens in December, and cannot be carried over into the New Year. This has been the case for many years. Therefore, we decided to write to the employees directly, clarifying that if they did not sign to accept their new terms, they would not be able to take the benefit of a Christmas bonus…**
>
> **In my letter dated 15 January 2015, I made it clear that it was never the company's intention to induce people to opt out of collective bargaining. The only reason for making the offer to**

> **members was so that the Christmas bonus would be payable before the end of the year. If it was not accepted, the bonus would not be payable at a later date. There was absolutely nothing in the offer to staff that stated, or even implied, that acceptance of the offer would involve an agreement that there would no longer be subject to collective bargaining".**

21. At paragraph 5.24 the Tribunal found as follows in relation to the second letter relied on by the Claimants as having been made in breach of their statutory rights:

> **"Also on 29 January 2016 the Respondent wrote letters to those employees who had as of that date not accepted the pay proposal. A sample of such a letter appears at pages 106 to 107. The letter noted that "unfortunately you rejected our offer". Reference was made to the three proposed changes to terms and conditions and an explanation was given as to why those were considered to be necessary. The recipients were invited to a meeting on 2 February 2016 with an HR officer or alternatively invited to return the then current letter accepting the offer no later than 4 February 2016". The letter went on to state as follows:**
>
> ***"Please be aware that the proposed changes will not be implemented without your express agreement and the consultation process will be full and open. However you should be aware that in the event that no agreement can be reached between the parties, this may lead to the company serving notice on your contract of employment".***
>
> **No reference was made to that action being followed immediately by re-engagement on the new terms.**
>
> **The letter went on:**
>
> ***"In consideration for your agreement to the proposed changes, the company is willing to pay a 4% increase in your basic salary backdated to 1 January 2016".***

22. Following a ballot for industrial action, Unite called for an overtime ban. This took place. The Tribunal found that eventually, on 3 November 2016, a collective agreement was reached as to pay and amended terms and conditions. The Tribunal held:

> **"save for the by then irrelevant issue of the Christmas bonus, the collective agreement endorsed the pay proposals which the Respondent had put forward in November 2015 together with the three changes to terms and conditions".**

23. However, 57 workers brought claims in the Employment Tribunal, alleging that their rights under s.145B of the 1992 Act had been infringed on two occasions, by the letters of 10 December 2015 and 29 January 2016.

24. As the Employment Tribunal recorded at page 9 of the judgment, there was no dispute at the liability hearing that two offers were made to a number of Claimants by the Respondent. The Employment Tribunal found that the offers were similar, but that the Christmas bonus offer did not feature in the second offer (paragraph 8.1).

25. Having set out the relevant provisions of the 1992 Act, the Employment Tribunal dealt with its interpretation of s.145B at paragraph 8.2 in the context of addressing the effect of acceptance of the offers that were made.

26. It took account of the legislative history and the Explanatory Notes to the Employment Relations Act 2004. It took the view that the starting point must be the plain words of the statute. It identified that one of the prohibited results is that the workers' terms of employment will not (or will no longer) be determined by collective agreement. A further prohibited result is that any of the workers' terms of employment will not (or will no longer) be determined by collective agreement. The Tribunal observed that it was the second of these prohibited results which was relied on here.

27. At paragraph 8.2 the Tribunal referred to a submission on behalf of the Respondent that the statutory wording connoted a degree of permanence and agreed that the prohibited result was about terms being changed permanently to the extent that the word determined is used. It accordingly accepted that a permanent solution rather than a temporary one had to be achieved. The Tribunal held that on the facts this had occurred because the recipient of the offer was agreeing that he would accept the pay offer set out in the letter and from the date of acceptance his terms with regard to Sunday overtime, daily breaks and pay would be governed by that bargain. That achieved a permanent rather than a temporary solution.

28. The Tribunal concluded that leaving aside the question of purpose,

> **"it is not permissible for an employer to abandon collective negotiation when it does not like the result of a ballot, approach the employees individually with whom it strikes deals and then seek to show its commitment to collective bargaining by securing a collective agreement which is little more than window dressing – having destroyed the union's mandate on the point in question in the meantime. In other words, if there is a Recognition Agreement which includes collective bargaining, the employer cannot drop in and out of the collective process as and when that suits its purpose.**
>
> **It follows that we prefer the interpretation of the provision sought by the Claimants which has the result that both the December 2015 and January 2016 offers would, when accepted have the prohibited result."**

29. The question of purpose is addressed at paragraph 8.3. The Tribunal held as follows:

> **"Although the burden of proof has not been debated in detail before us we take the approach that the Claimants need to establish a prima facie case that the employer had an unlawful purpose and if they do that the provisions of section 145D(2) come into play so that it is for the employer to show what his sole or main purpose in making the offers was. On the basis of our conclusions above we are satisfied that a prima facie case has been established.**
>
> **It was common ground before us that section 145D(4) was not felicitously drafted or, as Mr Brittenden put it was "a bit of a hash". For one thing it is not entirely clear which way evidence of the three matters referred to might point.**
>
> **The Respondent's case is that their sole or main purpose – at least in relation to the December 2015 offer – was to ensure that employees did not lose their Christmas bonus. As Mr Brittenden points out, that is the only reason pleaded in the ET3 and we cannot discern any other reason from the Respondent's evidence. It follows that in relation to the second offer – made at a time when the recipients of that letter would already have "lost" their Christmas bonus the Respondent has not shown any benign reason.**
>
> **With regards to the Christmas bonus reason, it has to be borne in mind that that was introduced into the negotiations by the Respondent, that is as a bargaining tool. In those circumstances we consider that it is somewhat disingenuous for the Respondent to say that it made an offer to save the relevant employees from the consequences of a threat which it had made. We also bear in mind that whilst Mr Johnson's evidence was consistently that under no circumstances would be parent company allow the Christmas bonus to be paid other than within December of the relevant year, we note from the General Notice introduced on day two of our hearing that because of concerns about the outcome of these proceedings the Respondent indicated that it might not be in a position to determine pay or bonus entitlements in either December or January – therefore indicating that December was not a deadline.**
>
> **Looking at any evidence we might have in the category of section 145D(4), Mr Brittenden has fairly accepted that a case of union hostility has not been made out.**
>
> **Although the pay negotiation with which we are concerned was the first under the relevant recognition agreement we do not think that that circumstance comes within section 145D(4)(a) as that speaks of recent changes to arrangements agreed with the union for collective bargaining rather than the introduction of a collective bargaining regime.**
>
> **As far as section 145D(4)(b) is concerned we find that even accepting the Respondent's explanation for Mr Johnson's statement that "the offer will be the offer" that does not indicate a lack of willingness to enter into meaningful negotiations. It says no more in our judgment than simply 'we do not want protracted negotiations.'**

It is however significant that the contemporaneous correspondence shows that the making of the first offer was an immediate reaction to the rejection at ballot of the Respondent's proposal.

Further we agree with Mr Brittenden that the Respondent's true intentions can be gleaned from its publication via general notices of the percentage of employees who had already signed their acceptances "including trade union representatives and members"(page 81).

On the facts before us it is plain that having found the ballot result "disappointing if not unexpected" (Mr Johnson's email to Mr Coop of 9 December 2015 page 79) the Respondent took the conscious decision to by-pass further meaningful negotiations and contact with the union in favour of a direct and conditional offer to individual employees who were members of that union. We therefore agree with Mr Brittenden that it was "exceptionally improbable" that the Respondent did not intend to circumvent the collective bargaining process when it made the offers.

It follows that we find that both the December 2015 and January 2016 offers if accepted had the prohibited result and that that was the main purpose of the Respondent making those offers."

30. So far as remedy is concerned, the Tribunal referred to its earlier findings that there were two offers, that they were different and that both were unlawful. Accordingly it concluded that it was not now open to the Respondent to invite the Tribunal to make different findings and to find that the two offers should be viewed as part of a sequence or that the second offer should not be regarded as an unlawful offer because it was "lesser". The Tribunal referred to the natural meaning of the words used in s.145E(2)(b) of the 1992 Act. It referred to two inducement offers made to the majority of the Claimants. It said that the awards were to penalise the way in which the Respondent went about its purpose and the result was that the Claimants who received two offers should receive two awards:

The relevant legislative framework

31. Section 145B provides

145B Inducements relating to collecting bargaining

(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.

(3) It is immaterial for the purposes of subsection (1) whether the offers are made to the workers simultaneously.

(4) Having terms of employment determined by collective agreement shall not be regarded for the purposes of section 145A (or section 146 or 152) as making use of a trade union service.

(5) A worker or former worker may present a complaint to an employment tribunal on the ground that his employer has made him an offer in contravention of this section.

Accordingly, the right is conferred on a worker who is a member of a recognised independent trade union (or one seeking recognition). The worker is not protected if he or she is the only recipient of the offer. There must be other workers (at least two) targeted by the offers.

32. Section 145B must be read with s.145D which provides relevantly:

145D Consideration of complaint

(1) …

(2) On a complaint under section 145B it shall be for the employer to show what was his sole or main purpose in making the offers.

(3) On a complaint under section 145A or 145B, in determining any question whether the employer made the offer (or offers) or the purpose for which he did so, no account shall be taken of any pressure which was exercised on him by calling, organising, procuring or financing a strike or other industrial action, or by threatening to do so; and that question shall be determined as if no such pressure had been exercised.

(4) In determining whether an employer's sole or main purpose in making offers was the purpose mentioned in section 145B(1), 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.

33. In the event of a successful claim, the Employment Tribunal must award compensation pursuant to s.145E(3) as follows:

145E Remedies

> **(1) Subsections (2) and (3) apply where the employment tribunal finds that a complaint under s.145A or 145B is well-founded.**
>
> **(2) The tribunal –**
>
> **(a) shall make a declaration to that effect, and**
>
> **(b) shall make an award to be paid by the employer to the complainant in respect of the offer complained of.**
>
> **(3) The amount of the award shall be [£3,830] (subject to any adjustment of the award that may fall to be made under Part 3 of the Employment Act 2002).**
>
> **(4)…**
>
> **(5)…**
>
> **(6)…**

34. There is no statutory basis upon which an employment tribunal can reduce the award whether on just and equitable or any other grounds.

35. These provisions were introduced at least in part in response to a ruling by the European Court of Human Rights in **Wilson/Palmer v United Kingdom** [2002] IRLR 568. The case concerned the offering of inducements to employees to opt out of collective bargaining altogether. Employees and their respective trade unions complained that UK law failed to secure their rights by reference to the existing provisions on detriment relating to union membership and activities (s.146) under Article 11 of the Convention, which provides:

> **"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.**
>
> **2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary to a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others…"**

36. Although the judgment and reasoning is tailored to the particular facts under consideration in that case, the mischief identified by the Strasbourg Court at paragraphs 41, 47 and 48 was as follows:

> **"41. The Court observes at the outset that although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of**

> **the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights. In the present case, the matters about which the applications complain – principally, the employers' de-recognition of the unions for collective bargaining purposes and offers of more favourable conditions of employment to employees agreeing not to be represented by the unions – did not involve direct intervention by the State. The responsibility of the United Kingdom would, however, be engaged if these matters resulted from a failure on its part to secure to the applicants under domestic law the rights set forth in Article 11 of the Convention (see the Gustafsson v Sweden judgment of 24 April 1996, Reports of Judgments and Decisions 1996-11, para. 45)…**
>
> **47. In the present case, it was open to the employers to seek to pre-empt any protest on the part of the unions or their members against the imposition of limits on voluntary collective bargaining, by offering those employees who acquiesced in the termination of collective bargaining substantial pay rises, which were not provided to those who refused to sign contracts accepting the end of union representation. The corollary of this was that United Kingdom law permitted employers to treat less favourably employees who were not prepared to renounce a freedom that was an essential feature of union membership. Such conduct constituted a disincentive or restraint on the use by employees of union membership to protect their interests. However, as the House of Lords judgment made clear, domestic law did not prohibit the employer from offering an inducement to employees who relinquished the right to union representation, even if the aim and outcome of the exercise was to bring an end to collective bargaining and thus substantially to reduce the authority of the union, as long as the employer did not act with the purpose of preventing or deterring the individual employee simply from being a member of a trade union.**
>
> **48. Under United Kingdom law at the relevant time it was, therefore, possible for an employer effectively to undermine or frustrate a trade union's ability to strive for the protection of its members' interests. The Court notes that this aspect of domestic law has been the subject of criticism by Social Charter's Committee of Independent Experts and the ILO's Committee on Freedom of Association. It considers that, by permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention. This failure amounted to a violation of Article 11, as regards both the applicant unions and the individual applicants."**

37. In other words, the Strasbourg Court held that states have positive obligations to secure effective enjoyment of Article 11 rights; and if direct offers outside the collective bargaining process can be made and would lead to less favourable treatment of workers who do not accept, that acts as a disincentive to the exercise of Article 11 rights and allows employers to undermine or frustrate a trade union's ability to strive for protection of its members. For that reason, the UK had failed in its positive obligation to secure enjoyment of Article 11 rights in that case.

38. Section 145B was enacted to bring domestic law in line with Article 11 following **Wilson and Palmer**. As indicated, that case involved extreme facts: the permanent surrender of all

collectively bargained terms. In the Explanatory Notes to the Employment Relations Act 2004, at paragraph 193, the Government explained:

> **"193. In July 2002 the European Court of Human Rights delivered its judgment in the case of Wilson & the National Union of Journalists, Palmer, Wyeth & the National Union of Rail, Maritime & Transport Workers, Doolan & others v United Kingdom [2002] IRLR 568 ("Wilson and Palmer") (a summary of the judgment can be found at http://www.echr.coe.int/Eng/Press/2002/july/WilsonandOthersjudepress.htm). The Court concluded that UK trade union law was incompatible with Article 11 of the European Convention on Human Rights (freedom of association) in that where a trade union was recognised by an employer for the purposes of collective bargaining about the terms and conditions of a group of employees, the law did not prevent the employer from offering inducements to the employees in the group to persuade them to surrender their collective representation and have their terms settled instead by negotiations between each individual employee and the employer. The Government believes that the principle underlying the decision of the Court extends beyond the facts in Wilson and Palmer and is applicable to a number of other comparable circumstances. The purpose of sections 29 to 32 is therefore to secure that these provisions deal not only with the facts in Wilson and Palmer but also with the other circumstances considered by the Government to be comparable."**

39. As part of the enacting history of the legislative provision with which we are concerned, we have also been referred to the Government's Response to the Public Consultation reviewing the Employment Relations Act 1999, published on 2 December 2003. At paragraph 3.12 the Response states:

> **"3.12. The Government also confirms that the law should explicitly prohibit inducements or bribes being made to trade union members to forego union rights. These were the particular employer behaviours that gave rise to the Wilson and Palmer cases, and they should be made unlawful. The Government intends to make it unlawful for an employer to make an offer to an individual with the main purpose of inducing that person to relinquish rights to belong (or not to belong) to a union, rights to engage in trade union activities or the proposed right to use union services. In addition, offers should be made unlawful whose main purpose is to induce a group of workers, who belong to a recognised union, to accept that their terms of employment should be determined outside collectively agreed procedures. The result is that it would be unlawful for an employer to offer an inducement to the union members in such a group to have their terms of employment determined outside the framework set by any existing collective bargaining arrangements. This limits the scope of employers to offer individualised contracts. To avoid inflexibility however, the law should allow employers to make offers where the sole or main purpose of the inducement is unconnected with the aim of undermining or narrowing the collective bargaining arrangements. In particular, the law should give room for employers and individuals to enter individualised contracts designed to reward or retain key workers."**

Parliamentary Materials

40. Although before the Tribunal neither side suggested that resort could be made to Hansard under the rule in **Pepper v Hart** [1993] AC 593, in arguing its appeal, the Respondent does seek to refer to and rely on Parliamentary material as an aid to construction. It is common

ground that such reference to Parliamentary material is permissible only where (i) the legislation in question is ambiguous or obscure or a literal interpretation leads to absurdity; (ii) the Hansard material relied on consists of one or more statements by a Minister or other promoter of the Bill together, if necessary, with such other Parliamentary material as might be necessary to understand such statements and their effect; and (iii) the effect of such statements is clear and addresses "the very issue" that is in contention.

41. Mr Burns relies on the following passages from Hansard in which he contends that the Minister made clear statements as to what the words "will not (or will no longer)" were intended to cover as follows:

(i) During the Employment Relations Bill Deb, 5 February 2004, c102 the Minister, Mr Sutcliffe said:

> **"Proposed new section 145B deals with inducements to forgo collective union entitlements. It creates a right for members of recognised unions not to be offered inducements by their employers with the sole or main purpose of ensuring that any or all their terms of employment will no longer be determined by collective agreement. The new section deals with the circumstances that gave rise to the Wilson and Palmer cases, in which Mr Wilson and others employed by Associated Newspapers were offered £1,000 to enter individualised contracts that could not be negotiated by their union."**

(ii) Further reliance is placed on a passage where Mr Sutcliffe accepted amendment to the Bill (HC Deb, 16 September 2004, c1478):

> **"The Joint Committee on Human Rights has drawn attention to the fact that new section 145B, which would be inserted by clause 28, provides rights to the members of recognised unions only. It considers that, in cases where a union is seeking recognition, new section 145B needs to provide comparable protections to ensure that members have the right not to be offered inducements by the employer for the purpose of securing that their terms will not be determined by collective agreement in the future.**
>
> **"Having looked at the arguments put forward and having consulted the stakeholders, we concluded that the Joint Committee's analysis is correct. So to ensure our compliance with the judgment of the European Court of Human Rights, we believe that the scope of new section 145B should be extended. Lords amendments Nos. 34, 35 and 38 make the necessary changes to clause 28."**

Issue one: the proper interpretation of s.145B of the 1992 Act

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42. Mr Burns contends that there are two possible competing constructions of the 'prohibited result' as defined by s.145B(2) and in particular the underlined phrase in "the worker's terms of employment, or any of those terms will not (or will no longer) be determined by collective agreement …". He accepts that those words can be read as meaning (as a matter of ordinary language) that the prohibited result occurs where the offer, if accepted, results in new terms agreed directly and not through a collective agreement, whatever else is agreed through collective bargaining. However, it is the Respondent's case that the more natural meaning is that the prohibited result only occurs where the offer takes future determination of terms out of the collective arena (whatever its immediate effect). In other words, the question is whether acceptance of the offer means that in future the terms will not be determined by collective-bargaining, not how they have been determined by the acceptance itself. The offer must be to not collectively bargain those terms in future. When pressed as to how far in the future it is necessary to go, Mr Burns contends that one must look at least to the next collective-bargaining round. He submits that if the former construction is correct the statute would have used the words "are no longer determined…". That Parliament chose to use the future tense ("will not be determined") supports the latter construction. Mr Burns submits that further support for his construction comes from the three factors in s.145D(4) which a tribunal must take into account when determining whether an employer's purpose is to achieve the prohibited result. The Respondent submits that those factors make sense with its preferred construction whilst their relevance is very limited if the former construction is correct.

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43. Mr Burns makes clear however that the prohibited result is not about whether the terms of employment will change temporarily or permanently as the Respondent argued below and the Tribunal accepted, but whether those terms would "no longer" be determined by collectivebargaining if accepted. The Respondent's defence was that it never intended to cease

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collective bargaining, and collective bargaining did not cease – it continued throughout on the facts as found.

44. Mr Burns relies on the enacting history as important material in ascertaining Parliament's intention in relation to this provision. In particular he relies on the Strasbourg Court's judgment in **Wilson and Palmer** as identifying the mischief subsequently addressed in s.145B of the 1992 Act. The right engaged by Article 11 is the right to be represented in negotiations and to be heard. Article 11 does not however require collective bargaining nor is there a right to be heard in full or a right to prevail. At paragraph 48 the particular mischief is identified, namely the use of financial incentives to induce employees "to surrender important union rights", and Mr Burns submits that s.145B was enacted to stop employers preventing or ending collective-bargaining and not to afford unions a veto on any further changes to employment terms.

45. Mr Burns also relies on the passage in the Government's Response to the review (set out at paragraph 39 above) and in particular the words "offers should be made unlawful whose main purpose is to induce a group of workers… to accept that their terms of employment should be determined outside collectively agreed procedures" and "… it would be unlawful for an employer to offer an inducement to the union members in such a group to have their terms of employment determined outside the framework set by any existing collective-bargaining arrangements." Although this does not answer the questions at issue on this appeal, the tenor he submits is to do with forgoing union rights in future.

46. Mr Burns submits that the Explanatory Notes to the 2004 Act are not part of the enacting history and do not assist either way. In any event the passage relied on (at paragraph 193) does not assist because the reference to extending the law beyond the facts in **Wilson and Palmer**

A and making it applicable to a number of other comparable circumstances is a reference to the new rights created by s.145A. The comparable circumstances referred to in the Explanatory Notes are cases of inducements to relinquish rights to belong (or not to belong) to a union, rights to engage in trade union activities or the proposed right to use union services, all found in s.145A. Therefore they do not indicate that the intention was to secure broader protection for circumstances considered by the Government to be comparable to the mischief identified in **Wilson and Palmer** when enacting s.145B of the 1992 Act.

47. Mr Burns submits that given the possibility of two competing constructions, there is potential ambiguity. He contends that the Hansard material satisfies the rule in **Pepper v Hart** and shows that the way in which the words of s.145B(2) should be interpreted is that it is intended for situations where the offer is to "forego" or "surrender" collective rights and where terms will not be determined by collective agreement "in the future". Finally, Mr Burns also submits that the interpretation adopted by the Claimants and the Tribunal undermines other legislation by allowing trade unions a veto. For example the Trade Union Recognition (Method of Collective Bargaining) Order 2000 anticipates and provides for failures to agree in the course of collective bargaining. The preamble to Schedule 1 expressly provides that an imposed method "does not prevent or limit the rights of individual workers to discuss, negotiate or agree with their employer terms of their contract of employment, which differ from the terms of any collective agreement" between employer and the union. Further, s.17 of The Specified Method (referred to in the Schedule to the 2000 Order) provides "the employer shall not vary the contractual terms affecting the pay, hours or holidays of workers in the bargaining unit, unless he has first discussed his proposals with the union." He submits that the use of the word 'discussed' rather than 'agreed' makes clear Parliament's intention for unions to be heard but

stops short of giving unions a right to veto new terms and conditions proposed by the employer to employees.

The Employment Appeal Tribunal's analysis

48. Despite substantial deliberation and discussion the Appeal Tribunal has regrettably not been able to come to a unanimous view as to the proper interpretation of s.145B(2) of the 1992 Act. The majority does not accept the arguments advanced by Mr Burns. Our reasons follow.

49. We agree that the words used in s.145B are the starting point. They must be given their ordinary, natural meaning. Where relevant offers are made it is necessary to consider what effect they would have if accepted (subsection (1)(a)) and the employer's purpose in making the offers (subsection (1)(b)). The offers must have the relevant effect and the employer must have the relevant purpose, each condition being necessary but neither being sufficient on its own. Further both questions require consideration of the same 'prohibited result' – would it be the effect of acceptance? And is achieving that result the employer's sole or main purpose? It must mean the same thing in relation to both questions.

50. We consider, in agreement with Mr Brittenden, that too much is made in Mr Burns' argument of the use of the future tense in the phrase 'will not or will no longer' and that he seeks to create a false dichotomy in advancing the two competing constructions referred to above. It is self-evidently the case that an offer once made can only be accepted subsequently so that any acceptance viewed at the point of an offer being made is in the future. We consider that this explains the use of the future tense in s.145B(2).

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51. Two broad species of prohibited result are envisaged by s.145B(2). The first is that the entirety of the workers' terms of employment will not (or will no longer) be determined by collective bargaining and addresses the situation in **Wilson and Palmer.** The second is that 'any of those terms', in other words, one or more terms of employment will not or will no longer be determined by collective bargaining and addresses a situation where even just one of many collectively bargained terms would not if offers are accepted, be determined by collective agreement, even if the vast majority would continue to be negotiated on a collective basis.

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52. This appeal concerns the second of those two situations. We consider that on a straightforward reading of the words of the subsection, if as a matter of fact, acceptance of direct offers to workers means that at least one term of employment will or would as a consequence of acceptance be determined by direct agreement whenever that occurs, and not collectively (even if other terms continue to be determined collectively) that is sufficient. That term if accepted, would no longer or would not be determined collectively, at least until a further change is negotiated, agreed or imposed. The fact that the result is temporary (in the sense of being a one-off direct agreement following acceptance of the offers) rather than permanent does not affect this question, as both sides agree. There is nothing in s.145B that deals with the duration of the effect, or requires a permanent surrender of collective bargaining for the future. We can see no warrant for reading into s.145B (2) a requirement that the terms if accepted will no longer *in the future* (or will not *in the future*) be determined collectively, still less a requirement that *future* here is to be understood as Mr Burns contends, as 'at least at the next collective bargaining round'. If that was Parliament's intention, it would have been easy to say so.

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53. On this basis, we consider that the s.145B (1)(a) question will usually be a straightforward question of fact about the effect acceptance of the offers would have and is to be judged at the date when relevant offers are made. We do not agree with Mr Burns that this question can only be judged when offers have been accepted or rejected. The conditional tense in s.145B(1)(a) makes that clear because the offers need not be accepted at all.

54. Moreover, this is consistent with the three month time limit in s.145C(1) for claims in the employment tribunal, which begins with "the date when the offer was made" or in the case of a series of similar offers "the date when the last offer was made". Following the enactment of s.145B offers are less likely to state expressly what effect their acceptance would have on collective bargaining. In those circumstances, it must be possible for a worker to determine what the effect of acceptance would be within the time limit prescribed. The approach we adopt allows that and creates a coherent scheme. On the other hand, absent an express statement as to the effect of acceptance of the offers on collective bargaining, if the effect of acceptance is only to be judged at some future unidentified date such as the next collective bargaining round, the time limits are unworkable (and not merely difficult, as Mr Burns concedes). On Mr Burns' construction, the worker would have to put in a complaint before necessarily knowing the outcome of the next bargaining round (which could be a year away) and therefore without knowing what effect acceptance would have. As Mr Burns put it, the worker would have to decide whether the unexpressed intention (and effect) of the offer if accepted would be for one or more terms of employment to be determined outside collective bargaining in the next collective bargaining round, irrespective of the immediate effect of acceptance on terms of employment. That to our minds is unworkable.

55. Furthermore, we agree with Mr Brittenden that the consequence of Mr Burns' construction is that each year the employer could table offers or inducements directly to employees to accept changed rates of pay or varied terms whilst at the same time maintaining union recognition and an expressed intention to bargain with the union about some or all of these matters in the next bargaining round, or in subsequent years. That seems to us to reduce the scope of s.145B almost to vanishing point.

56. We consider that there is nothing in the enacting history or in the Government's Response that leads to a different conclusion. In the majority's view, the enactment of s.145A is no answer to the indication that the Government's intention was to introduce legislation to address situations beyond the facts in **Wilson and Palmer** and applicable to other comparable circumstances. The principle underlying the decision in **Wilson and Palmer** is not addressed by s.145A. It is applicable where conduct of an employer can operate to "undermine or frustrate a trade union's ability to strive for the protection of its members interests" by making offers of inducements for dealing directly with the employer in relation to some terms that lead to differential terms being made available and act as a disincentive to the exercise of Article II rights or undermine the mandate of the union. That is precisely what happened with the Christmas bonus on the Employment Tribunal's findings. Paragraph 3.12 of the Response underscores the wider intention of the Government in this regard. It makes no reference to foregoing union rights in future. We read the references to terms being determined outside collectively agreed procedures or outside the framework set by any existing collective-bargaining arrangements as consistent with the approach we have adopted and certainly not inconsistent with it. Moreover, this paragraph refers to the new legislation as limiting the scope of employers to offer individualised contracts but makes clear that where the sole or main

purpose of the offer is unconnected with the aim of undermining or narrowing the collective-bargaining arrangements, such offers remain lawful.

57. That is important because the terms of s.145B make clear that it does not prevent employers from making offers that would merely have the prohibited result; the employer must also have as his sole or main purpose an unlawful purpose, namely achieving the prohibited result. Under s.145B (1)(b) (which is likely to be more difficult to determine) the question is whether the employer's sole or main purpose in making the offers is (or was) to achieve the result that if accepted, one or more of his workers' terms will no longer (or will not) be determined collectively. A plain reading of the words of s.145B(1)(b) shows that if reaching agreement directly takes one or more terms outside the collective agreement process and is (at least) the main purpose of making direct offers, it is unlawful.

58. The legislation does not limit or qualify the purpose in any way as it could have done by seeking to identify the employer's future rather than immediate purpose. The employer's purpose must be distinguished from the effect acceptance of the offers would have; in many cases they are different. Purpose connotes an aim, object or desire which the employer subjectively seeks to achieve, whatever the effect of the offers involved. Again this is essentially a factual question to be assessed by reference to any evidence that sheds light on the employer's sole or main purpose and any inferences that can properly be drawn from that evidence and the findings of fact properly made. We can see no warrant for interpreting the purpose in a way that restricts an employment tribunal's consideration to the next collective bargaining round or ignores the immediate effect of acceptance of offers in the context of considering the employer's aims or purpose.

59. The burden of showing what the sole or main purpose is, is on the employer: s.145D(1) and (2). By analogy with **Yewdall v Secretary of State for Work and Pensions** [2005] All ER (D) 149 (EAT) and **Serco Ltd v Dahou** [2017] IRLR 81, it is for the complainant to raise a prima facie case, and if that is made out, the employer must prove on balance of probabilities that it had an alternative, proper purpose which was either its only purpose, or at least an equally important purpose in making the offers.

60. There are three mandatory factors in s.145D(4) to be considered in determining purpose: two pointing towards a purpose designed to achieve the prohibited result; and the third pointing in the opposite direction. Contrary to Mr Burns' contention, we consider that these factors underline the fact sensitive nature of the question posed by s.145B(1)(b), including the need to consider and assess the employer's attitude towards collective bargaining and its past dealings in that regard. We do not agree that these factors are more consistent with Mr Burns' construction of s.145B(2) than the one we have adopted. To the contrary, they focus on the circumstances that exist when the offers are made by the employer and underline the fact sensitive nature of the enquiry required by the legislation as we have described.

61. There is an infinite spectrum of facts that might have to be considered in a s.145B case: at one end of the spectrum there may be cases where the employer has sought to change collective bargaining arrangements and then, without entering into collective negotiations or acting precipitately in the midst of such negotiations, and absent some pressing business aim, makes offers that would have the effect that all employment terms will be agreed directly if accepted. At the other end of the spectrum will be employers who have engaged in lengthy and meaningful collective consultation and reached an impasse before considering making direct offers; or who can demonstrate a strong history of operating collective bargaining arrangements

with the union and/or have no wish to avoid entering into such arrangements when the offers are made; and there will be cases where employers can show genuine business reasons (unconnected with collective bargaining) for approaching workers directly outside the collective bargaining process. There may also be difficult cases in the middle where the employer has mixed aims or objectives it seeks to achieve, or the evidence is unclear. The question in each case is a question of fact and degree. As with other detriment cases, where an employer acts reasonably and rationally and has evidence of a genuine alternative purpose, tribunals are likely to be slower to infer an unlawful purpose than in cases where the employer acts unreasonably or irrationally or has no credible alternative purpose.

62. This does not, as Mr Burns submits, give trade unions a veto over changes to terms and conditions that an employer seeks to make with employees or allow trade unions to block changes simply by failing to agree. If collective bargaining breaks down, to the extent that the employer has a proper purpose for making offers directly to workers, there is nothing to prevent such offers being made. What the legislation seeks to prevent is an employer going over the heads of the union with direct offers to workers, in order to achieve the result that one or more terms will not be determined by collective agreement with the union if offers are accepted. Mr Burns complains about the risk an employer must take on this approach, in making direct offers to workers in circumstances where these arguments are open to the union. He submits that even if there is no veto as a matter of law, in effect the trade union has a practical veto. We disagree. Although inevitably in cases that depend on questions of fact and degree there is less certainty as to the outcome and more risk, we consider that employers who act reasonably and rationally for proper purposes and are able to demonstrate that their primary purpose in making individual offers is a genuine business purpose, retain the ability to make offers directly to their workforce without fear of contravening s.145B.

63. We have reached our conclusions without regard to the Parliamentary material relied on by Mr Burns. We have concluded that the legislation is not ambiguous. Moreover, the "very issue" here is the meaning of the words "will not or will no longer". We do not consider that Mr Sutcliffe addressed this issue in the passages on which Mr Burns relies. There is no clear and definitive statement setting out the parameters or the reach of s.145B(2). References to foregoing rights do not assist because they do not address the question of the duration for which those rights are to be forgone – is it as a result of acceptance then and there, or for one bargaining round or is it for a longer period into the future? Furthermore, although the words relinquish and forego are used, in the context of collective bargaining which generally takes place at periodic intervals, there is nothing objectionable in the use of those words in considering whether collective bargaining will be forgone or relinquished if offers are accepted directly in the current bargaining round, as occurred in this case. So far as the final passage in the Hansard material is concerned, it seems to us that this clearly addresses the amendment proposed to what became s.145B to ensure protection for a trade union seeking recognition where no bargaining rights exist. In such a case by definition the only collective bargaining arrangements that could be affected are future collective bargaining arrangements. We do not read the Minister's statement as signifying any more than that. Accordingly, had we been persuaded that the Hansard material could properly be referred to, the majority takes the view that it provides no support for the construction advanced by the Respondent on this appeal in any event.

64. Finally we do not accept that our interpretation undermines or is inconsistent with other legislation as Mr Burns submits. Section 145B does not act as a veto preventing direct offers to workers as we have already stated and for the reasons we have given. Indeed Mr Burns

appeared to accept as much by contending that the practical as opposed to the legal effect of the construction we have adopted is to create such a veto.

65. The minority member of the Appeal Tribunal (Ms Wilson) accepts the arguments advanced by Mr Burns as we have summarised them above. She considers that Parliament cannot have intended that s.145B would prevent an employer by law from implementing changes to terms and conditions directly, when there is a failure to agree. She considers that the prohibited result concerns whether in future, terms will be negotiated by collective bargaining and finds support for this conclusion in both the Government's Response and the Hansard material.

Issue two: the application of s.145B(2) to the facts found in relation to sole or main purpose

66. Since the majority has rejected the Respondent's construction of the "prohibited result", it follows that the argument that the Tribunal erred in law in its determination of the Respondent's sole or main purpose in making the offers cannot succeed. Mr Burns advances no freestanding challenge to the Tribunal's findings of fact in relation to this question. He is correct in our judgment, not to do so.

67. The burden was on the Respondent to establish its sole or main purpose. The only reason advanced by the Respondent to explain why it made offers directly to employees was that it wished to avoid a situation where employees would lose out on their Christmas bonus, and as the Employment Tribunal explained at paragraph 8.3 it could discern no other reason from the Respondent's evidence. It follows that in relation to the second offer, made at a time when

recipients of that letter would already have lost their Christmas bonus, the Respondent advanced no alternative proper aim or purpose for making direct offers to the workforce.

68. In considering the Respondent's purpose in making the offers, the Tribunal was entitled to make findings of fact based upon direct evidence or reasonable inferences drawn from the evidence. The Respondent could simply have paid Christmas bonuses. Instead, it introduced the Christmas bonus into the collective negotiations with Unite and in the circumstances, the Tribunal was entitled to find that it was "somewhat disingenuous" for the Respondent to say that it made an offer to avert the consequences of a "threat which it had made". Furthermore, the timing of the first offer was significant. It was made right in the middle of pay negotiations, immediately after the ballot rejecting it, and at a time when a further meeting was due to take place with Unite very shortly, on 14 December.

69. Moreover, the Tribunal rejected the Respondent's stated purpose in making the first offer. At paragraph 5.27 it referred to the General Notice produced by the Respondent in the subsequent collective bargaining round, dated October 2016, informing staff that it might not be in a position to determine bonus in December 2016 or January 2017. The Employment Tribunal returned to this at paragraph 8.3 where it found:

> **"We also bear in mind that whilst Mr Johnson's evidence was consistently that under no circumstances would the parent company allow the Christmas bonus to be paid other than within December of the relevant year we note from the General Notice…because of concerns about the outcome of these proceedings the respondent indicated that it might not be in a position to determine pay or bonus entitlements in either December or January – therefore indicating that December was not a deadline."**

In other words the evidence about the absolute inability to make payments of the Christmas bonus at any time other than in December of the relevant year, was not accepted by the Employment Tribunal.

70. It is also clear from paragraph 8.3 that the Employment Tribunal did not simply conclude that because it rejected the Respondent's pleaded case on purpose, liability automatically followed. The Tribunal had regard to all the evidence and reached conclusions about the surrounding circumstances and the context in which the offers were made from the facts found. It had regard to the mandatory factors in s.145D(4) and accepted that no hostility towards Unite or towards collective bargaining in general had been demonstrated. However, it made positive findings of particular relevance as follows:

(i) the Tribunal considered it significant that the contemporaneous correspondence showed that the making of the first offers on 10 December 2015 was "an immediate reaction to the rejection at ballot of the Respondent's proposal": paragraph 8.3.

(ii) The Tribunal accepted the Claimants' contention that the Respondent's true intentions could be gleaned from the General Notices published which included the percentage of employees who had already signed acceptances, "including trade union representatives and members:": see paragraphs 5.16 and 5.22. This must have been intended to weaken Unite's negotiating position.

(iii) The Tribunal regarded it as plain that having found the ballot result disappointing if not unexpected, the Respondent took the conscious decision to bypass further meaningful negotiations or contact with the union in favour of a direct and conditional offer to individual employees. That led the Tribunal to view as exceptionally improbable the possibility that the Respondent did not intend to circumvent the collective bargaining process when it made the offers.

71. Those are conclusions that the Employment Tribunal was entitled to draw having regard to all the facts and the context: this was the first collective negotiation process between this

employer and this union. There was an ongoing collective negotiation process that was not proceeding in the way the Respondent wished it to proceed (see 5.17 and 5.19 and 5.20). The dispute resolution provisions in the Recognition Agreement had not been exhausted as they could have been. Instead, the Respondent adopted direct approaches to individual workers in a way that the Tribunal plainly considered to be unreasonable and designed to undermine Unite's mandate.

Issue three: the remedy appeal

72. The Notice of Appeal identifies three grounds of challenge to the Remedy decision of the Employment Tribunal making two financial awards to each Claimant in receipt of two offers in this case. The short point made by the Respondent is that the two offers were essentially the same – they were not just similar as the Employment Tribunal decided. They were repeated offers to accept the pay deal which the Tribunal found was the prohibited result. The Respondent submits that the fundamental issue is that on the Employment Tribunal's wrong analysis, the Respondent made an offer to achieve the prohibited result and then made that offer again to achieve that same result. The purpose of the award is to penalise an employer for making an offer to achieve the prohibited result. If that offer is made on multiple occasions that amounts to one course of unlawful conduct and can only result in one penalty. The Tribunal's judgment on remedy however, punishes the Respondent twice for one unlawful course of conduct. That offends against the principle of totality in imposing court penalties.

73. Although we have some sympathy for the position in which the Respondent found itself, we do not accept these submissions. Our decision in respect of remedy is unanimous.

74. We take each of the grounds advanced in the Notice of Appeal in turn, but do not accept Mr Brittenden's submission that the challenge is not open to the Respondent because the fact that there were two offers was conceded at the liability hearing so could not be reopened in relation to remedy. We have seen nothing to suggest that the point was conceded in that way, though we accept that it was not advanced at the liability hearing, perhaps understandably in the circumstances.

75. The first ground contends that a single offer which was repeated on a second occasion does not constitute two separate offers, but was a single offer giving rise to a single liability to pay the sum set out in s.145E(3) of the 1992 Act. We disagree and accept Mr Brittenden's arguments. The Tribunal made findings of fact in the liability judgment that two offers were made. The two offers were different. It was not a single offer. There is nothing in s.145B to preclude a worker from bringing a complaint that multiple offers have been made. Nor is there anything to suggest that offers made over a period of time are to be treated (as a matter of law) as a single offer. Rather, on each occasion that an offer is made which has the prohibited result, the right in s.145B not to have 'an offer' made is infringed. We can see nothing to suggest that each infringement of that right is not actionable. Moreover, s.145E(2)(b) requires employment tribunals to make an award "in respect of the offer complained of" and not in respect of each complaint. In the circumstances, where more than one offer is the subject of a complaint, the natural meaning of those words supports the conclusion that tribunals must make awards in respect of each such offer unless there is some proper basis for doing otherwise.

76. Secondly the Respondent contends that there was a series of two offers in the same or substantially the same terms and this therefore gives rise to a single liability. This argument ignores the findings of fact made by the Tribunal. The Tribunal found that two different offers

were made. The first made provision for payment of a Christmas bonus, whereas the second did not. The second offer communicated a threat of dismissal if the offer was not accepted, whereas the first did not. In the circumstances there can be no basis for challenging the Tribunal's conclusion that these two offers "were different": see paragraph 16.2 of the Remedy judgment. We can see that if an identical offer is repeated on a number of occasions that might well be viewed as a single offer (albeit repeated) although we express no final view. That however, is not what the Employment Tribunal found. There is no factual basis in either judgment for suggesting that the two offers were identical offers and should therefore have been treated as a single offer or a repetition of an earlier offer.

77. The third ground of challenge contends that under s.145E(3) liability to pay an award is limited to a single award in a single set of proceedings. Again, we disagree. The words of the statute are clear. Section 145E distinguishes clearly between complaints that are well founded in subsection (1), and the obligation to make an award to the complainant "in respect of the offer complained of" in subsection (2)(b). Where a tribunal finds two distinct offers are made that are separate and different, and where the complaint relies on those two offers having been made, we can see nothing to prevent a tribunal from making an award in respect of each offer.

78. To the extent that this conclusion results in injustice to the Respondent, in the absence of some statutory means for reducing the award which is required to be made by a tribunal where a complaint is well-founded, and is made by way of penalty, we consider this to be a matter for Parliament.

Conclusion

79. Accordingly, despite the forceful submissions advanced on behalf of the Respondent by Mr Burns, both appeals fail. The Employment Tribunal made no error in construing the "prohibited result". It made unassailable findings of fact and neither judgment is flawed by error of law. The appeals are accordingly dismissed.