EMPLOYMENT TRIBUNALS

Claimant:	**Mr D Dunkley & Others**
Respondent:	**Kostal UK Limited**
Heard at:	**Sheffield** **On: 21 and 22 November 2016**
	In Chambers: 5 December 2016
Before:	**Employment Judge Little**
Members:	**Mr G Harker**
Representation	**Mr L Priestley**
Claimants:	Mr S Brittenden of Counsel (instructed by Thompsons Solicitors)
Respondent:	Mr C Bourne of Counsel (instructed by Hill Dickinson LLP)

RESERVED JUDGMENT

1. The unanimous Judgment of the Tribunal is that the complaints of all Claimants in respect of the "first offer" are well founded and the complaints of those Claimants who also received the "second offer" are also well founded.
2. Unless the parties are able to reach agreement in the meantime, there will be a hearing on 24 February 2017 (time allocation three hours) so that the Tribunal can determine the appropriate award for each Claimant.
3. Pursuant to the Employment Tribunal's Rules of Procedure 2013 Rule 76(4) a Costs Order is made whereby the Respondent will reimburse to the Claimants the issue and hearing fees which they have been required to pay.

REASONS

1. **The complaint**

   Each of the Claimants brings a complaint under the Trade Union and Labour Relations (Consolidation) Act 1992 section 145B. Accordingly each Claimant contends that his or her right not to have an offer made to him or her by his employer which, if accepted would have "the prohibited result" has been breached. The result which the section prohibits is that:

"the worker's 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".

In fact some of the Claimants contend that two such offers were made to them.

2. **The issues**

These were discussed and agreed at a Case Management Hearing conducted on 15 July 2016 to be as follows:

2.1. Did the Respondent make offers to the Claimants, the acceptance of which would have the prohibited result?

2.2. If such offers were made, was the prohibited result the Respondent's sole or main purpose in making the offers?

3. **Evidence**

Evidence for the Claimants has been given by Philip Parr, who is one of the Claimants and is also a workplace representative for Unite the Union ('Unite') at the Respondent; Mr S T Coop who is a full-time Regional Officer for Unite and Mr R Bedford who is also a Regional Officer for the Union. The Respondent's evidence has been given by Mr B Johnson HR executive manager of the Respondent.

4. **Documents**

The Tribunal have had before them a bundle comprising 154 pages.

5. **The relevant facts**

We were told by Counsel at the beginning of the case that the facts were largely agreed. In the words used in Mr Brittenden's skeleton argument the essential matter for the Tribunal was "the analysis of the reach of the legislative provision".

5.1. The Respondent company is concerned with the development and production of technically advanced electronic, electro mechanical and mechatronic products – as far as we understand it for the automotive industry.

5.2. The Claimants are all members of Unite and although we are not aware of the Claimant's precise job descriptions we understand them to be shop floor/manual employees of the Respondent.

5.3. Prior to 2014/15 there had for some time been little or no union activity within the Respondent.

5.4. However in November 2014 the workforce were balloted with regard to trade union recognition. The Respondent employs approximately 700 people of whom 690 voted in that ballot; 532 voted in favour of Unite being the recognised union.

5.5. In anticipation of a recognition agreement being concluded, at some point pre-February 2015 ACAS conducted a verification exercise.

5.6. Subsequently a Recognition and Procedural Agreement was concluded between the Respondent and Unite. That document was signed on behalf of the Respondent on 19 January 2015 and on behalf of Unite on 16 February 2015. A copy appears in the bundle at pages 50 to 57. One of the objectives of that agreement is recorded as being:

"The purpose of this Agreement is to establish trade union recognition and representation within the Company and establish a framework for consultation and collective bargaining" (page 51).

When describing the scope of the agreement, clause 2.4 explains that it does not inhibit management's right to communicate directly with it's employees (see page 52).

Under the heading "Negotiating and Consultation Committee" the following are among the clauses:

"7.1. Formal negotiations will take place between the parties on an annual basis. At this time the Company and the Union will also agree to a member verification check with ACAS prior to negotiations continuing".

"7.4. Any matters related to proposed change of terms and conditions of employment will be negotiated between the Company and the Union" (page 55).

5.7. On 15 October 2015 Mr Coop, Regional Officer wrote to Mr Johnson the Respondent's Human Resources Executive Manager. A copy of that letter is at page 67 in the bundle. Mr Coop was writing to request a meeting so that formal pay negotiations could commence.

5.8. On 29 October 2015 a meeting took place between Mr Johnson, Mr Coop, Mr Parr (in his capacity as senior TU rep) and four other internal TU representatives. Another manager was also present, Mr M Clay. Notes of that meeting taken by the Respondent appear at pages 68 to 69 in the bundle. These notes were not subsequently agreed with the union – and that applies to the notes of various other similar meetings which subsequently took place. This meeting has been described as one in which the respective sides stated their positions regarding the anticipated pay negotiation . It was anticipated that there would be a further member verification check involving ACAS on 12 November 2015. However as ACAS were not available on that date the check did not take place.

5.9. There was a further pay negotiation meeting on 12 November 2015 with essentially the same attendees. The note of that is at pages 70 to 71. In a list of bullet points recording matters put forward by Mr Johnson at that meeting he noted that the company would pay what it could afford and was not interested in a protracted negotiation process. The note records "the offer will be 'the offer'".

5.10. A further meeting took place on 24 November 2015 and a copy of the notes of it is at pages 73 to 75. At this meeting Mr Johnson set out the proposed pay offer for 2016. It was proposed that all employees would receive:

- a 2% increase of basic pay payable from the beginning of January 2016.
- 2% of basic pay to be paid in a lump sum in Decembers pay as a bonus – paid from 2015 profits.
- For any employee earning £20,000 or less, a further 2% of basic pay from 1 April 2016.

However in return and by what was described as an exchange the Respondent wished to change some of the terms and conditions of employment. Those proposed changes were as follows:

- Sick pay for the first 12 months of employment for all new starters would be at the Statutory Sick Pay rate.
- Sunday overtime would be reduced from double time to time and a half.
- That there would be a consolidation of the then current two 15 minute breaks into one 30 minute break.

In response and following an adjournment so that he could discuss the offer with his trade union representatives, Mr Coop suggested various amendments to the proposed pay increase. The note goes on to record that Mr Coop stated that if the company could accept his suggested amendments then he would make a recommendation that the three changes to the terms and conditions should be accepted. However when giving evidence before us Mr Coop denied that he had stated that. There was a further adjournment of that meeting and on the meeting reconvening Mr Coop is recorded as saying that the pay offer was not a problem if there were no "strings attached", but he would not be able to recommend the offer with the proposed changes to terms and conditions. Subsequently Mr Coop refined his position to indicate that he had no objection to the sick pay change, but the changes to overtime and breaks was a problem with the former being regarded as "an erosion to terms".

The note goes on to record that Mr Johnson gave an explanation as to why the proposed changes to terms and conditions and in particular the change to the breaks was considered necessary.

Towards the end of the meeting Mr Coop enquired what would happen to the Christmas bonus if the deal was rejected. Mr Johnson's reply was that the Christmas bonus had to be paid in December from 2015 profits and if it was not so paid then it would be lost. Mr Coop stated that he could not recommend the offer as it was and he would give his members what was described as a free vote, neither recommending acceptance or rejection, in a proposed forthcoming ballot.

5.11. This ballot – described as a consultative ballot - was organised by ACAS and appears to have taken place on 3 December 2015. A copy of the ballot paper is at page 75(a).

5.12. On 9 December 2015 Mr Coop sent an email to Mr Johnson. A copy is at page 79. He gave Mr Johnson the result of the ballot. The turnout had been 80%. Those voting to accept the offer were 20.8% and those rejecting 78.4%.

5.13. Mr Johnson replied to Mr Coop on the same day. A copy of that email is also at page 79. He described the ballot result as being "disappointing if not unexpected". He considered that there had been very little chance of acceptance without union recommendation and he went on to write:

".....even with a recommendation our history has been for our TU members to reject any offer in a ballot".

Mr Johnson continued -

"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".

5.14. Also on 9 December 2015 Mr Johnson on behalf of the Respondent issued a General Notice. It was entitled "Pay Negotiations 2015". A copy appears on page 78. The notice was, we were told, displayed on a notice board and it may have been sent to the employees individually. It summarised the Respondent's pay offer and it's proposed changes to terms and conditions. It referred to the offer having been rejected in the trade union members ballot. It indicated that the company therefore intended to write to all the individual employees "to offer the above to each person directly". It was pointed out that recipients of those letters had to return a copy signed if they wished to accept and that had to be done no later than 18 December 2015. The notice concluded in these terms:

"Please be aware that failure to sign and return will lead to no Christmas Bonus and no pay increase this year".

5.15. On 10 December 2015 the Respondent wrote to all it's employees. The letter in question it appears was dated 8 December 2015. A sample is at pages 76 to 77. The letter begins by referring to the rejection of the pay offer in the trade union ballot. It then continues:

"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".

The letter then goes on to set out the terms of the offer. It was pointed out to the recipients that if they did not accept the offer by 18 December 2015 they would not receive the Christmas bonus and that could not be paid at a later date.

The letter went on to set out the proposed changes to the terms and conditions.

The Claimants contend that this was the first offer which breached their relevant statutory right.

5.16. On an unknown date later in December 2015 the Respondent issued a further General Notice about the pay negotiations. A copy is at page 81. On this occasion the notice was signed by Mr Sanders, the Respondent's Interim Managing Director and Dr Zender, Managing Director. The notice referred to the threat of industrial action and indicated that the Respondent believed that it's pay offer was very competitive. The notice went on to say that the pay offer had been made to all individual employees directly because the Respondent wanted to give the majority of those employees the opportunity to be paid the Christmas bonus. It was said that 77% of the employees had already signed their acceptances and that included trade union

representatives and members. The notice concluded by urging any employees who had yet to sign their letters to do so by the 18 December deadline and it reminded them that they would not receive their bonus if they failed to do so.

5.17. There was a further pay negotiation meeting on 14 December 2015 and the note of that is at pages 82 to 83. At the beginning of that meeting Mr Coop observed, according to the note -

"You sent a letter out to all employees – you are bypassing the collective bargaining agreement".

The note records that Mr Johnson confirmed that the letter had been sent because the pay offer had been rejected by TU members.

Subsequently in the meeting Mr Coop indicated that if the Respondent took out the provision out about changing breaks then he could guarantee he would get the pay offer through. According to the note Mr Coop suggested that the change to the break could be imposed later. It was noted that there was going to be a further consultative ballot as to whether there should be industrial action. The note goes on to record that Mr Coop said that the two questions that would be put to the membership was firstly whether they accepted the pay offer and if not whether they were prepared to take industrial action. Mr Coop indicated that if the vote was 'no' in respect of each of the questions then he, Coop, would sign the agreement by default.

5.18. The ballot paper prepared for the next vote appears at page 84(a). The questions actually put were firstly whether the member was prepared to take part in strike action and secondly whether they were prepared to take part in industrial action short of a strike. However the ballot paper concluded:

"If you are not prepared to take part in any industrial action this will result in the acceptance of the original offer by default".

In cross-examination it was put to Mr Coop that he had broken his promise as to what would be contained in this ballot. However he reminded us of the passage which we have just quoted and explained that he already knew from the first ballot that the vast majority of the union members had rejected the pay offer.

5.19. Under the Recognition Agreement there was a procedure to deal with cases where collective issues unresolved could lead to a dispute between the parties. The procedure is set out in Appendix 1 to the agreement (page 57). The procedure indicates that during the process there would be no sanctions and no change imposed by either party.

5.20. By the end of December 2015 parties were at Stage 4 of the procedure whereby the issue could be referred to ACAS for conciliation. In anticipation of that both sides set out their cases in writing. Mr Johnson set out the Respondent's position in a lengthy email of 21 December 2015 to a Martha Logan of ACAS (see pages 90 to 92). Within this document Mr Johnson described the decision to write to individual employees as being for two particular reasons. Firstly Mr Johnson stated that the Respondent had no idea how many employees actually were trade union members and therefore were not aware whether the trade union was speaking on behalf of the majority.

The second reason was that the Respondent wanted it's employees to have the opportunity to receive the Christmas bonus. Towards the end of his email Mr Johnson wrote the following:

"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".

5.21. In email correspondence between ACAS and Mr Coop ACAS noted that Mr Coop had said that he did not want ACAS to show information regarding what was described as a recent membership check. Mr Coop explained to us that the reason for that was concern that the Respondent might make further direct contact with union members.

5.22. On 14 January 2016 Mr Coop wrote to Mr Johnson. A copy of that letter is at page 98. Mr Coop referred to the letters which had been sent directly to employees and he believed that that was because following collective consultation the union had rejected the proposal. Mr Coop put Mr Johnson on notice that it appeared that section 145B of the 1992 Act had been or would be breached by the Respondent's actions.

5.23. On 29 January 2016 Mr Johnson wrote to Mr Coop (page 103). He did not accept that there had been a breach of the 1992 Act. He said that it was never the company's intention to induce people to opt out of collective bargaining and the only reason for making the offer individually was so that the Christmas bonus would be payable before the end of the year. There had been nothing in the offer to suggest that acceptance would mean an agreement "that there would no longer be subject to collective bargaining (sic)".

5.24. 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".

The relevant Claimants contend that this letter amounted to a second offer in breach of their statutory rights.

5.25. On 25 February 2016 there was a ballot for industrial action and we understand that that led to an overtime ban.

5.26. It was not until 3 November 2016 that a collective agreement was reached in respect of pay for 2015. A copy of that document is at pages 122a to 122b. 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.

5.27. In a further General Notice which the Respondent issued to its workforce, it seems in October 2016, it was noted that the Respondent would not be in a position to make any decisions as to pay rises or bonuses until the outcome of these proceedings were known. In those circumstances the Respondent noted that it might not be in a position to determine pay or bonus entitlements in either December or January. This document which is now at page 154 in the bundle was put in by the Claimant on the second day of our hearing.

6.1 The Claimant's submissions

Mr Brittenden had prepared an outline opening skeleton argument and at the end of the case he made further oral submissions.

Within the skeleton argument he set out the genesis of what is now section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992. He therefore referred us to the case of **Wilson and Another v United Kingdom and Palmer and Others v United Kingdom** [2002] IRLR 568 – Judgments delivered by the European Court of Human Rights. The Court had found that the United Kingdom Government had failed in its positive obligation to secure the enjoyment of Article 11 rights (freedom of association including the right to form and to join trade unions) because the law as it then stood was held to have permitted an employer to effectively undermine or frustrate a trade union's ability to strive for the protection of it's members interest. Although Wilson and Palmer's cases had involved the permanent surrender of collective bargaining terms, Mr Brittenden contended that that had not been the sole driver for the change effected by the Employment Relations Act 2004. He quoted from the Explanatory Notes to that Act and in particular the passage which read:

"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".

In determining the reach of the legislative provision we were asked to bear in mind that the heading to section 145B is "Inducements relating to

collective bargaining". Mr Brittenden contended that the use of the words "relating to" meant "about" collective bargaining. It was therefore, he said, cast far wider than inducements simply relating the cessation of collectively agreed terms. Accordingly for the section to be breached it was not necessary for there to be a permanent cessation of collective bargaining.

We were also reminded that section 145B(2) applies to both a workers terms of employment or any of those terms. That again indicated that it was not necessary for there to be a complete cessation. We were invited to take what Mr Brittenden described as a "granular approach" as to which terms had effectively been taken out of the sphere of collective bargaining. It would be sufficient if just one of very many collectively bargained terms would not be determined by collective agreement.

The Respondent's key defence was characterised as being that it never intended to cease collective bargaining on a permanent basis. However if that was accepted a coach and four would be driven through the legislative provision. If accepted it would permit an employer to table direct offers to employees with regard for instance to rates of pay in a given year but avoid censure at the same time saying that it intended to bargain with the union about some or all of those matters in subsequent years.

The argument goes on to note that it was not in dispute that the Respondent had made two offers to workers. As to the stated purpose for those offers, the only pleaded purpose in the ET3 was to ensure that staff received their Christmas bonus before the year end. The Claimants did not accept that that was the true purpose.

When considering the agreed facts the skeleton argument contended that this was a Respondent who did not particularly relish the concept of bargaining with the union. At the 12 November 2015 meeting a reference had been made to "the offer will be the offer". However in his closing submissions Mr Brittenden accepted that as far as allegations of union hostility were concerned the high point was the correspondence between Mr Bedford and Mr Johnson (pages 36 to 41 in the bundle). There was also the disputed evidence as to whether Mr Coop had been told by Mr Johnson that Mr Bedford would be barred from the site (Mr Johnson's evidence was that on Mr Bedford's replacement by Mr Coop Mr Johnson had done no more than indicate that in future his dealings would be with Mr Coop).

The first offer had been made whilst the Respondent was apparently in the process of engaging in collective bargaining and that bargaining was not exhausted until the Stage 4 meeting with ACAS on 14 January 2016. The Recognition Agreement provided that no changes could be implemented before the process had been exhausted and yet the Respondent had, as Mr Brittenden's skeleton argument puts, it ridden roughshod over that part of the agreement. It was submitted that this was because they plainly did not wish to comply with the procedures it had recently agreed with the union and this was a relevant factor to take into account under section 145D(4)(a).

Further it was contended that it was exceptionally improbable that the employer had not intended the consequence of circumventing the collective bargaining process when writing directly to individuals. If all the staff had accepted the alleged inducement there would be nothing left for the union to bargain about.

Returning to the question of the reason for the offer, our attention was drawn to the second paragraph of the 8 December 2015 letter (pages 76 to 77) which stated that the company wished to reward its employees for their efforts in 2015 hence the pay offer. It was not until the fifth paragraph of that letter that reference was made to the Christmas bonus. We were asked to conclude that Mr Johnson during the course of cross-examination had exhibited marked reluctance to answer the question as to whether it was incompatible with collective bargaining to make a parallel approach to the workers.

It was obvious that the union would be undermined by that approach. We were invited to find that it was no coincidence that the Respondent had subsequently publicised how many staff had accepted the offer and made explicit reference to trade union representatives and members apparently being among those who did accept (the General Notice at page 81). We were reminded that Mr Coop's evidence was that his mandate had been "blown away". That was the mischief which the legislation was intended to prevent.

We were invited to take the Respondent's letter of 29 January 2016 as the revelation of the Respondent's malign intent. That letter had threatened dismissal if new terms were not accepted and in Mr Brittenden's view conspicuously it had not informed staff of a crucial piece of information, namely that if such notice was served they would be immediately re-engaged on the revised terms with preserved continuity.

Recourse to Hansard?

During the course of Mr Brittenden's oral submissions and as we were aware that there had been no decided cases on the scope of section 145B – at least none that we were referred to – we enquired of counsel whether they thought we might be assisted by considering anything relevant in Hansard. Mr Brittenden's initial view was that this was probably not appropriate. We asked both counsel to provide us with further written submissions on the point.

As of the date of our meeting in chambers (5 December 2016) we only had submissions from the Claimant. Mr Brittenden reminded us of the principles set out in **Pepper v Hart** [1993] AC 593. In relation to the relevant provision his research showed that there was no clear and unequivocal Ministerial statement and in any event the conditions set out in **Pepper** for resorting to Hansard as an interpretative tool were not met. We were reminded of the passage in **Pepper** where Lord Griffiths explained that the exception could only apply where the expression of the legislative intention was genuinely ambiguous or obscure or where a literal or prima facie construction led to a manifest absurdity. Mr Brittenden's view was that the relevant provisions that we were dealing with were not sufficiently ambiguous.

In the alternative, if the Tribunal were minded to take other factors into account we were referred to the review of the Employment Relations Act

1999 – a Government response to public consultation and Mr Brittenden set out paragraph 3.12 from that document.

6.2The Respondent's submissions

Mr Bourne had prepared written submissions and he made further submissions orally. As addressed in cross-examination of the Claimant's witnesses, the verification process (which should have taken place prior to the commencement of pay negotiations) had not in fact taken place. Mr Bourne contended that the Respondent had shown good will by being prepared to begin negotiations prior to verification and he had suggested to the Claimant's witnesses that a certain degree of bad faith had been exhibited by the union in obstructing the verification process. We should add that Mr Brittenden's submission on this point was that it was irrelevant.

The Respondent had included the three relevant revised terms in a collective agreement (completed on 3 November 2016) even after a large majority of the employees had accepted the new terms prior to Christmas 2015. Mr Bourne contended that if the Claimant's case were to be accepted the result would be that an employer could never agree individual terms with employees where the trade union refused to agree.

Mr Bourne contended that the statutory wording connoted a degree of permanence was required. In other words a term had to be excluded completely from collective bargaining. The legislation did not in terms outlaw an offer that had the result of exclusion for the time being. There was no suggestion that the statutory provision was intended to prevent an employer seeking what Mr Bourne described as a temporary solution to an impasse. There had never been any suggestion that those workers who accepted the Respondent's offer would thereafter no longer be covered by collective bargaining and meetings had continued between the union and the Respondent after the offer had been made.

Even if the offers had the prohibited result the Tribunal needed to determine whether that had been the Respondent's sole or main purpose in making the offer. Here the Tribunal should take into account that the Respondent had been content to enter into the collective bargaining arrangements. The only purpose behind the offer had been to avoid employees losing their Christmas bonus. Account should also be taken of the fact that although the Respondent had obtained the agreement of the great majority of the workforce to the new terms the Respondent nevertheless continued in it's efforts to conclude an agreement on all the remaining terms and eventually succeeded in that.

In his oral submissions Mr Bourne suggested that questions put during the course of cross-examination and by members of the Tribunal tended to suggest (wrongly he implied) that the employer was not entitled to obtain an advantage in negotiations.

There had been no credible evidence from the Claimant's witnesses as to any hostility towards unions by the Respondent. Mr Parr's evidence had been exaggerated when he referred to an occasion when the union had been "smashed".

Mr Bourne referred us to the case of **St John of God (Care Services) Ltd v Brookes** [1992] IRLR 546 as an example of a case where an employer could terminate employment on one contract and re-engage on revised

terms (although of course factually that is not relevant to the case before us).

On the question of the scope of the legislation Mr Bourne said that the explanatory notes to the 2004 Act indicated that the provisions could apply to cases which were comparable to those of **Wilson and Palmer** whereas in Mr Bourne's submission these Claimant's cases were not comparable. That was because collective bargaining was to continue.

Whilst the Respondent may have been seeking to avoid the union's tactics, it was not seeking to avoid collective agreement. The Respondent had made no secret of what it was doing. The union was aware that the Respondent was to write directly to the employees. The Respondent had continued to engage with collective bargaining up to reaching agreement on that in November 2016. If by that stage there was nothing to negotiate about, "so what," as Mr Bourne put it.

Returning in his oral submissions to the question of the Respondent's purpose, it was suggested that Mr Johnson had been unshakeable when giving evidence that his purpose had been to ensure payment of the Christmas bonus. It had not been put to him that the purpose was to avoid collective bargaining. Whilst the Claimant had sought to portray Mr Johnson as a 'union basher' there had been collective bargaining before. The Respondent never abandoned collective bargaining.

Hansard

Mr Bourne's further submissions did not arrive until 14 December as his instructing solicitors had initially sent them to ACAS in error. The Tribunal considered those submissions and noted that Mr Bourne agreed with Mr Brittenden that the Pepper test was not met and so we should not consider Hansard. Despite that, he sought to refer us to a Standing Committee debate and a Research Paper. However we have taken the view that we should not stray into that territory.

7.The relevant law

Section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 provides, so far as is relevant, as follows:

"(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 offer 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".

Section 145D(2) provides:

"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".

Section 145D(4) provides:

"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".

8.The Tribunal's conclusions

8.1 Did the Respondent make offers to the Claimants?

It is common ground that the Respondent, on or about 10 December 2015, sent the letter dated 8 December 2015 (pages 76 to 77) to all the Claimants and to the non union members of it's workforce. All the Claimants were members of Unite the Union which is an independent trade union. Unite were recognised by the Respondent by virtue of the Recognition and Procedural Agreement made in early 2015. Obviously the letter contained an offer from the Respondent – in short a pay increase and a Christmas bonus. The letter went on to require the recipient to agree to three changes to the terms and conditions of employment. The offer of a Christmas bonus was conditional upon the recipient agreeing to those changes in his or her terms of employment.

It is also common ground that at least some of the Claimants subsequently received a further offer – that contained in the Respondent's letter of 29 January 2016 (pages 106 to 107). That offer was similar although the Christmas bonus no longer featured. However consideration was offered in the form of a backdating of the offered pay rise conditional upon acceptance of the offer no later than 4 February 2016. We are not aware at present of exactly how many of the Claimants received that letter. It was clearly however sent to more than one Claimant.

8.2Did acceptance of that offer have the prohibited result?

Here we need to interpret the scope of the legislation. We have taken into account the history of the legislation as carefully set out in Mr Brittenden's skeleton argument. The explanatory notes to the 2004 Act indicate that the purpose of the legislation was to give protection not only to workers who found themselves in the position of Mr Wilson and Mr Palmer – whose employers were striving to have their trade unions de-recognised – but also to workers in circumstances considered by the Government to be comparable. The explanatory notes do not give any indication of what those comparable circumstances might be.

However the starting point clearly must be the plain words of the statute itself. Section 145B(2) provides that one of the prohibited results is that the workers' terms of employment will not (or will no longer) be determined by collective agreement. That is the **Wilson** and **Palmer** type of case. 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 Claimants contend that it is this type of prohibited result which is in play here.

Mr Bourne for the Respondent contends that if the Claimants are right the result would be that an employer could never agree individual terms with its employees where the trade union refuses to agree – "even though there is no threat to the process of collective bargaining" – although that that rather begs the question. Mr Bourne goes on to contend that that would be a far reaching change which would require clear and express terms in the Act because he says it would fundamentally change an employer's ability to vary the contract provided there was a business need that justified that course of action. (see paragraph 8 of the written submissions). However that does not align with the industrial experience of this Tribunal. That experience indicates that in the event of such an impasse the way forward for the employer would be to terminate employment on the current terms and immediately engage on the new terms – as in **St John of God (Care Services) Ltd**. Indeed that was a course of action which the Respondent intended to take by the time it was making the second offer on 29 January 2016 – although unfortunately as has been pointed out referring to the dismissal only and not the re-engagement.

We do not understand Mr Bourne's written submission at paragraph 10 which reads:

"On the Claimant's case, the employer could dismiss but it could not then re-engage since (to) do so would trigger the type of claim now being pursued".

That seems to be a non sequiter. In order to take the action of dismissal and re-engagement all that would be necessary would be the rejection of an offer communicated via the union and so there would be no need to approach individual employees with the offer.

Mr Bourne also refers to the statutory wording connoting a degree of permanence – that the term in question would be excluded completely from collective bargaining. He says that there is nothing to stop an employer seeking a temporary solution because the statutory language does not describe a prohibited result as including that the workers' terms of employment (for the time being) will no longer be determined by collective agreement.

We agree that the prohibited result is about terms being changed "permanently" to the extent that it uses the word "determined" – that is finally decided. However, we find that that is exactly what the offers were intended to achieve. As Mr Johnson accepted in cross-examination, when Mr Nigel Jones - the recipient of the sample 8 December offer we have – signed his letter, he was agreeing that he accepted the pay offer set out within that letter. A bargain, as Mr Johnson accepted, had been struck. From the date of acceptance Mr Jones' terms with regard to Sunday overtime, daily breaks and pay would be governed by that bargain. Accordingly the Respondent had achieved a 'permanent solution' rather than a temporary one.

Whilst there would ultimately be a collective pay agreement concluded in November 2016, in law that did not alter the fact that the individuals who

had accepted one or other of the individual offers had already had their terms determined on the basis of the individual agreement rather than the considerably later collective agreement. That document was purporting to record a collective agreement in circumstances where the terms and conditions had for some time been governed by variations agreed individually.

Although we still need to deal with question of what the employer's purpose was in making the offer, we take the view that it is not permissible for an employer to abandon collective negotiation when it does not like the result of a ballot, approach the employee's individually with whom it strikes deals and then seeks to show it's 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 it's 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.

8.3Was that result the Respondent's sole or main purpose in making the offers?

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 the 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 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 it's 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.

Result

Accordingly we find that the complaints of all the Claimants succeed in relation to the first offer and that those Claimants who received the second offer are also successful.

Employment Judge Little

Date 30th December 2016

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON
10 JANUARY 2017

Mr D Dunkley & Others -v- Kostal UK Limited

Case Number	*Claimant Name*
1800677/2016	Mr D Dunkley
1800678/2016	Ms H Atkin
1800679/2016	Mrs M Atkinson
1800681/2016	Mr J Boughen
1800682/2016	Mr K Bruck
1800683/2016	Mrs J Bushell
1800684/2016	Mrs M Cooper
1800685/2016	Mr G Copley
1800686/2016	Mr A Danforth
1800688/2016	Mr P Darwood
1800689/2016	Mrs S Dean
1800690/2016	Miss J Dyson
1800691/2016	Mr P Eades
1800692/2016	Mrs L Ellis
1800693/2016	Miss D Errington
1800694/2016	Miss R Feast
1800695/2016	Mr B Ferneyhough
1800696/2016	Mrs L Fisher
1800697/2016	Mrs J Fletcher
1800698/2016	Mrs S Floyd
1800699/2016	Mr L Fraser
1800700/2016	Ms L Gill
1800701/2016	Ms J Goddard
1800702/2016	Mr V Green
1800703/2016	Mr K Guest
1800704/2016	Mrs L Hall
1800705/2016	Mrs L Hall
1800706/2016	Mr R Hall
1800707/2016	Ms J Hall
1800709/2016	Mr G Hanson
1800710/2016	Mr J Hardman
1800711/2016	Mr A Hollingworth
1800712/2016	Miss L Hollinshead
1800713/2016	Mr G Jarosz
1800714/2016	Mr D Jones
1800715/2016	Mrs Y Kitchen
1800716/2016	Ms L Lackenby
1800717/2016	Mr D Lawton
1800718/2016	Miss J Leak
1800719/2016	Mrs A Ludlam
1800720/2016	Mrs J MacKley
1800721/2016	Mrs Y McLoughlin
1800722/2016	Ms G Mellor
1800723/2016	Mrs S Morley
1800724/2016	Miss M Nolan
1800725/2016	Mr P Parr
1800726/2016	Mrs D Poulter
1800727/2016	Ms E Poulter
1800728/2016	Mr J Powell
1800729/2016	Mr C Rudd
1800732/2016	Mr N Smith
1800733/2016	Ms M Tarry
1800734/2016	Mrs G Turner
1800735/2016	Mrs L Wadsworth
1800736/2016	Mr J Wigley
1800737/2016	Mr A Wilson
1800738/2016	Mrs D Woolley

Number of Cases **57**