27 October 2021

PRESS SUMMARY

Kostal UK Ltd (Respondent) v Dunkley and others (Appellants)
[2021] UKSC 47
On appeal from: [2019] EWCA Civ 1009

JUSTICES: Lord Briggs, Lady Arden, Lord Kitchin, Lord Leggatt, Lord Burrows

BACKGROUND TO THE APPEAL

Mr Dunkley and 56 other claimants (and appellants) are all members of the trade union "Unite" and are employed as shop floor or manual workers by the respondent, Kostal UK Ltd. Following a ballot of workers, Kostal and Unite signed a (non-legally binding) Recognition and Procedural Agreement in February 2015. In October 2015, they began formal annual pay negotiations.

Following two preliminary meetings with Unite representatives, Kostal made a pay offer. Union members were balloted and rejected the offer. Kostal then made the same offer to its employees directly, bypassing Unite, on 10 December 2015. On 29 January 2016, Kostal made another similar offer to those employees who had not yet accepted the first offer. Kostal also said that, if no agreement was reached, "this may lead to the company serving notice on your contract of employment". In November 2016, by which time over 97% of employees had accepted one or other of the direct offers, Kostal and Unite reached a collective agreement for 2015 (on similar terms to the direct offers).

In May 2016, the claimants complained to an employment tribunal that the direct offers made to them by Kostal contravened section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 (the **"1992 Act"**). The tribunal upheld the complaints and made the statutory award of £3,800 to each claimant for each offer made to him. Kostal appealed to the Employment Appeal Tribunal (the **"EAT"**) which, by a majority, dismissed the appeal. Kostal then appealed to the Court of Appeal, which allowed the appeal and set aside the decisions of the tribunal and the EAT. The claimants were given permission to appeal to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows the appeal and restores the awards made by the tribunal. It holds that Kostal's direct offers to workers who were Unite members breached section 145B(2) of the 1992 Act. Lord Leggatt, with whom Lord Briggs and Lord Kitchin agree, gives the lead judgment. Lady Arden and Lord Burrows give a joint judgment that concurs in the result but advances a different interpretation of sections 145B and 145D of the 1992 Act.

REASONS FOR THE JUDGMENT

This case is about the correct interpretation of provisions in the 1992 Act regulating collective bargaining between a trade union and an employer. Section 145B and related provisions were inserted by the Employment Relations Act 2004 to bring UK law into line with article 11 of the European Convention on Human Rights after a ruling by the European Court of Human Rights in *Wilson and Palmer v United Kingdom* (2002) 35 EHRR 20 **[16]-[20]**.

The key provisions of the 1992 Act provide: section 145B **(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. Section 145D(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 **[26]-[28]**.

Both parties agree that offers which, if accepted, would require workers who are trade union members to agree to forego or relinquish collective bargaining rights, either indefinitely or for any period, fall within section 145B **[34]-[36]**. Kostal argues that this is the only type of offer which does so **[48]-[52]**. The claimants argue for the wider interpretation accepted by the majority of the EAT whereby it is enough to bring an offer within section 145B that, if the offer is accepted, at least one term of employment would be directly and not collectively agreed, at least for the time being and until the term is subsequently varied or replaced by one negotiated through collective bargaining. On this interpretation any offer made directly to workers who are trade union members to make any change which has not been collectively agreed to a term of their employment falls within section 145B **[37]-[38]**.

Lord Leggatt rejects both these interpretations. He considers that both parties wrongly focused solely on the content of the employer's offer **[63]**. What section 145B prohibits is not an offer with a particular content but an offer which, if accepted by all the workers to whom the offer is made, would have a particular result. What is required is a causal connection between the presumed acceptance of the offers and the prohibited result specified in section 145B(2). That requirement will not be satisfied unless there is at least a real possibility that, had the offer not been made and accepted, the workers' relevant terms of employment for the period would have been determined by a new collective agreement **[65]-[66]**. On this interpretation there is nothing to prevent an employer from making an offer directly to its workers in relation to a matter which falls within the scope of a collective bargaining agreement provided that the employer has first followed, and exhausted, the agreed collective bargaining procedure. If that has been done, it cannot be said that, when the offers were made, there was a real possibility that the matter would have been determined by collective agreement if the offers had not been made and accepted. What an employer cannot do with impunity is what Kostal did here: make a direct offer to its workers, including union members, before the collective bargaining process which the employer has agreed (albeit in honour only) to follow has been exhausted **[67]**.

Lady Arden and Lord Burrows agree that the appeal should be allowed but disagree with the majority's interpretation of sections 145B and 145D of the 1992 Act. Their preferred interpretation is closely aligned with that of the employment tribunal and EAT. They do not think it necessarily follows that an employer can escape liability just because the collective bargaining process has been exhausted (as where, for example, the employer has been determined to thwart the bargaining process). They consider that where an offer is made directly, and not through collective bargaining, to workers who are trade union members which, if accepted, would change one or more terms of their employment, to avoid liability it is for the employer to establish that its sole or main purpose in making the offer was a genuine business purpose **[112]-[116]**.

References in square brackets are to paragraphs in the judgment