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EMPLOYMENT LAW BULLETIN

SEPTEMBER 2022

Welcome to Wrigleys' Employment Law Bulletin, September 2022.

With rising costs, calls for improved pay and benefits, strike action, and recruitment and retention concerns, these continue to be very uncertain times for employers. Two of our case reports this month focus on the legal risks for employers who are seeking to make changes to terms and conditions in the context of a unionised workforce. They highlight the importance of transparent communication and good relations between employers, unions and staff, particularly when times are tough.

In our first article, we report on the EAT's decision in ***Ineos Infrastructure v Jones*** which confirmed that the employer had made an unlawful offer of a pay rise directly to staff when it unilaterally imposed the pay rise, which had been rejected by the union, rather than continue to negotiate under the collective bargaining procedure.

We also report on the Court of Appeal case of ***USDAW and others v Tesco Stores Ltd*** which overturned the High Court's injunction prohibiting Tesco from carrying through a "fire and rehire" exercise.

Our final article this month highlights the importance of supporting the wellbeing of staff who are suspended pending disciplinary investigation and recent Acas guidance for employers on this issue.

We hope you can join us for our next **free Employment Brunch Briefing** which takes place on **Tuesday 4 October 2022**. This will cover some of the trickiest aspects of termination discussions and settlement agreements. It promises to be a really useful session which will help employers to avoid some common pitfalls. Please click on the link below to book your place.

We are always interested in feedback or suggestions for topics that may be of interest to you, so please do get in touch.

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

Forthcoming webinars:

4 October 2022
Wrigleys' Employment Brunch Briefing
Ten top tips when using settlement agreements
Speaker: Sue King, partner at Wrigleys Solicitors
Click here for more information or to book

13 October 2022 - SAVE THE DATE
Wrigleys' 31st Annual Charity Governance Seminar
Speakers: Keynote speakers to be announced including various speakers from our Wrigleys charities team
Click here for more information or to book

If you would like to catch up on previous recorded webinars, please follow this link.

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The risks of seeking to avoid collective bargaining

Article published on 23 September 2022

EAT: Unilateral imposition of a pay rise outside collective bargaining was an unlawful offer.

It seems we are heading into a further period of uncertainty for employers and employees characterised by tough negotiations and consultations on pay, benefits and job security. In these difficult times, it is vital that good relationships are nurtured and transparent communication between employers, unions and staff is prioritised.

Employers with recognised trade unions, or where unions are seeking recognition, should also be aware of the significant legal risks of bypassing union negotiations on terms which are to be determined by collective bargaining.

We reported in November 2021 on the Supreme Court's decision in the case of ***Kostal UK Ltd v Dunkley and others***. For more detail, please see our article: Employers should exhaust collective bargaining procedures before making direct offers to workers (available on our website).

When will a direct offer to employees be unlawful?

Under section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), a direct offer of terms by an employer to a member of a trade union which is recognised or seeking to be recognised will be unlawful where:

a) the effect of the offer, if accepted, would be that the workers' terms, or some of those terms, will not be determined by collective agreement (this is known as the "prohibited result"); *and*

b) the employer's sole or main purpose in making the offer is to achieve the prohibited result.

In *Kostal* the Supreme Court made clear that offers can be unlawful if there is a real possibility that the term would otherwise have been determined by collective agreement, such as when the steps set out in a procedural agreement are not yet complete.

It also stated that offers can be unlawful where the effect of acceptance would only be a temporary removal of the term from collective bargaining and where the term will be determined by collective bargaining in future.

What are the penalties for making an unlawful offer?

The fixed penalty awards for unlawful offers are increased each year. Since April this year, claimants can be awarded £4,554 for each separate unlawful offer. An employer which makes a number of unlawful offers to a large group of workers could therefore face very significant financial liability.

Collective bargaining procedure must be exhausted

Kostal was found not to have exhausted the agreed collective bargaining procedure, and so there was a real possibility that the terms in question would otherwise have been determined by collective agreement. The procedural agreement in Kostal included a final step of referring the dispute to Acas for conciliation. This had not been done.

The Employment Appeal Tribunal (EAT) has now upheld the decision of a tribunal that an employer made unlawful offers to members of a recognised trade union in order to avoid collective bargaining where the collective bargaining agreement did not include a clear final step of this kind.

Case details: ***Ineos Infrastructure and others v Jones and others***

Unite was a recognised trade union of the Ineos group. Pay, hours and holiday terms were subject to collective bargaining but, unlike in *Kostal*, the collective bargaining agreement did not include clear procedural steps and did not have a dispute resolution procedure applicable to collective bargaining.

A series of pay negotiation meetings took place in 2016 and 2017. These resulted in the employer making a "best and final offer" of 2.8%. Unite's members authorised the union to return to talks to seek an improved offer. Its position was that it could not recommend a pay increase to its members of less than 3%. The tribunal found that there was an expectation by both parties that there would be a 'next stage' if the pay negotiations resulted in an impasse or failure to agree.

Ineos considered that the relationship with Unite had broken down and was unwilling to continue negotiations. Ineos wrote directly to workers stating that a pay increase of 2.8% in line with its latest offer would be implemented. It stated that it had given notice to terminate the collective bargaining agreement with Unite but that it was happy to negotiate with a works council or alternative union.

An employment tribunal found that Ineos had made unlawful offers under section 145B TULRCA.

The EAT agreed with the tribunal that the offers were unlawful and dismissed the employer's appeal.

Can the unilateral imposition of a pay increase be an unlawful offer?

Ineos argued that it had not made an offer to its workers (and so could not have made an unlawful offer) when it wrote to them to inform them of the pay increase, and that this was rather a unilateral promise not requiring acceptance. The EAT did not agree.

The EAT agreed with the tribunal that the letter included a statement of intention to vary contractual terms as to pay. The unilateral imposition of the pay increase was the implementation of an offer which had already been made and this offer was accepted by the employees by continuing to work.

Did the offer have the prohibited result?

The EAT agreed that the offer had the prohibited result as its acceptance meant pay terms were not determined by collective bargaining. Importantly, it noted that the tribunal had found that collective bargaining negotiations were not at an end when the offer was made and it was likely that agreement would have been reached had negotiations continued. Evidence showed that the two sides were not far apart and that the difference between them was "not worth falling out over".

Was the employer's sole or main purpose to achieve the prohibited result?

The EAT agreed with the tribunal's findings that Ineos' main purpose in making the offer was to achieve the prohibited result. These findings were based on inferences drawn from evidence that the employer sought to "get rid of Unite" and that it in fact gave notice to terminate the collective bargaining agreement.

Comment

Ideally, collective bargaining agreements will include a clearly staged procedure. However, this is not always the case. As with Ineos, the agreement may imply that a series of negotiation meetings should be undertaken, but have no indication of what happens when an impasse is reached or what marks the end point of negotiations.

The Supreme Court in *Kostal* commented that employers who genuinely believe negotiations are at an end will not be found to have made a direct offer with the sole or main purpose of avoiding collective bargaining. Italso made clear that any agreed procedure for attempting to resolve an impasse in negotiations should be followed before direct offers are made to workers.

Employers seeking to show they genuinely believed negotiations were at an end would need good evidence that the collective bargaining process was exhausted before the offers to workers were made. Where no clear procedure is agreed, how can the employer evidence that the collective bargaining process is at an end? Such evidence might include minutes of meetings evidencing the employer's genuine commitment to the bargaining process, written evidence of any impasse in negotiations, setting out in writing a formal failure to agree, and evidence of any relevant dispute resolution step being followed.

Employers who are considering making offers to workers outside of a collective agreement are strongly advised to take legal advice at an early stage.

Court of Appeal overturns injunction against termination and re-instatement

Article published on 30 September 2022

Decision means Tesco may proceed with a 'fire and rehire' process to withdraw benefits.

There have been a slew of recent cases highlighting the risks for employers when seeking to change terms and conditions of employment.

The decision nearly a year ago in *Kostal UK Ltd v Dunkley and others*, which considered when offers made to members of a trade union would amount to unlawful inducements, and therefore a breach under s.145B of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), has been considered in our articles 'The risks of seeking to avoid collective bargaining' and 'Employers should exhaust collective bargaining procedures before making direct offers to workers'.

TULRCA is not the only means by which unions and employees who are party to collective agreements can seek to defeat an employer's plans for changing terms and conditions.

A recent case has highlighted other legal routes that employees have pursued to prevent their employer from dismissing and re-engaging them.

Case: ***USDAW and others v Tesco Stores Ltd [2022]***

In 2007 Tesco planned an expansion and restructure of its distribution centre network which involved opening new sites and closing others. To retain experienced staff, Tesco incentivised those workers at a site it was closing to move to two other sites by offering 'Retained Pay' which took the form of additional payments on top of usual wages. If staff refused this offer, the alternative was to be dismissed on the grounds of redundancy. This offer was more generous than redundancy pay and was taken up by a number of the affected employees.

In 2010 Tesco recognised USDAW via a collective agreement which acknowledged USDAW as the sole representative and negotiating trade union for its staff below the level of Team Manager at 'new contract sites', which included those sites where staff had agreed to move and work in exchange for Retained Pay.

The collective agreement referred to Retained Pay, noting that it would remain a feature of the relevant contracts subject to the following rules:

- it could only be changed by mutual consent
- it would cease on promotion to a new role
- it would remain as long as the employee was employed in their current role

Some time later, Tesco wanted to end Retained Pay and it gave notice to affected staff that it wanted to agree to remove the Retained Pay clause from their contracts in exchange for a payment equal to 18 months' of Retained Pay. If the employee did not agree, Tesco intended to terminate the contract and re-engage on different terms.

The employees brought a claim to the High Court seeking to stop Tesco from firing and rehiring them to drop the Retained Pay clause. The employees argued, amongst other things, that there were implied terms in the employment contract that prevented Tesco doing this.

The employees pointed to documents and statements made before the collective agreement was signed as evidence that there were implied terms in the collective agreement that Tesco would not fire and rehire staff for the purposes of removing Retained Pay provisions. One of the documents referred to was a Q&A to staff about Retained Pay, which stated *'…your new employment contract will be protected by* […] *'Retained Pay' which remains for as long as you are employed by Tesco in your current role. Your Retained Pay cannot be negotiated away* [by Tesco][…]'.

The employees also pointed to a supposed joint statement which claimed that Retained Pay would be *'guaranteed for life'*.

The High Court found that the Retained Pay clause, together with the documents referred to above, allowed the Court to read into the contract that Tesco's right to terminate the contract on notice could not be exercised for the purpose of removing or diminishing the right of the employee to Retained Pay.

The High Court also granted an injunction stopping Tesco from doing just that, on the basis that the other remedies available to the employees (claims for wrongful dismissal) were unsuitable because financial compensation for breach of this implied term would be insufficient.

Tesco appealed the decision, arguing the High Court had erred in the construction of the terms implied into the employment contract, specifically that it was wrong to imply that Tesco's rights to terminate the contract could be restricted in this way. Amongst other points, Tesco argued that the interpretation of the clauses the Court used were not precise or clear enough to allow them to stand.

The Court of Appeal overturned the decision of the High Court, noting that the evidence the High Court had used to deduce the implied terms did not show mutuality. It is long-established in case law that to imply the kinds of terms the High Court had into the contract (which restricted one party's ability to act) there had to be clear evidence that both parties agreed to this. The Court of Appeal highlighted that the joint statement by the parties in the pre-agreement announcement was made three years before the collective agreement was entered into and the statement was not cross-referenced in the agreement.

The Court of Appeal agreed with arguments that the terms implied lacked clarity, particularly over what was meant by the 'permanency' of the Retained Pay clause. For example, it was accepted by the employees that the Retained Pay being 'guaranteed for life' would not stop Tesco from dismissing an employee on notice, for example, for theft or permanent incapacity. The Court of Appeal also considered whether it was right to imply permanency of the term in the contract if, for example, the employee wished to keep working into their 90s based on this implied term and whether it was right that Tesco would be in breach of contract if they refused to allow it. The Court of Appeal noted that had the clause been implied to say 'provided the site remains open, Retained Pay will continue until you reach the age of 65' then it would have sufficient clarity to operate.

In addition, the Court of Appeal noted that the effect of the clause, as implied by the High Court, did not make sense because the implied terms would mean Tesco would be liable for breach of contract if it gave notice and offered to re-engage in the same role, but not if it offered the employee a different role or gave notice and made no offer at all.

Finally, the Court of Appeal concluded that an injunction was not the appropriate relief, as the proper relief for breach of contract was damages.

Comment

When the High Court issued the injunction it was seen a potential counter to the practice of fire and rehire, which as a practice gained some notoriety after the P&O ferries affair. Though legal commentators recognised the decision was highly fact-specific, it did suggest that employers needed to take care when negotiating collective agreements to not agree terms that restricted their ability to negotiate room to change benefits granted to employees. This, it was thought, would mean employers avoided similar claims to those faced by Tesco.

In March 2022 the government announced its intention to issue a new Statutory Code of Practice which the government stated would prevent unscrupulous employers using fire and rehire tactics. However, the Code has not yet appeared, and even when or if it does, the Code is not expected to ban the practice of fire and rehire, rather it will seek to reinforce and clarify existing requirements on employers to hold fair, transparent and meaningful consultations on proposed changes to employment terms. As with other statutory codes, the courts and tribunals will have the power to apply an uplift of up to 25% of an employee's compensation if an employer unreasonably fails to comply with the Code where it applies.

The decision of the Court of Appeal has decided the issue in favour of the employer for the time being. Whilst this decision may be subject to appeal, it suggests that we may not see an increase in trade unions seeking an injunction to halt a dismissal and re-engagement process. However, employers should be aware of this possible approach which could increase the legal risks and costs entailed in a dismissal and re-engagement process.

Supporting employees' mental health during suspension

Article published on 27 September 2022

Acas publishes new guidance on managing disciplinary suspension.

Suspending an employee pending a disciplinary investigation is a process which requires careful thought at the outset and proactive management to minimise risks to the employer and employee.

For detail on the important considerations for employers before taking a decision to suspend, see our Wrigleys Essential Employment Guide on this topic from November 2021 (available on our website).

Acas has recently published updated guidance for employers on suspension. This is available at https://www.acas.org.uk/suspension-during-an-investigation. The guidance highlights the risks arising from suspension when it is not necessitated by the circumstances. It also emphasises the importance of considering alternatives to suspension which will help to lower risks while protecting the integrity of the investigation and the wellbeing of colleagues. Alternatives to suspension might include changing the times and place of work, adjusting the type of work which is carried out, or controlling those with whom the employee comes into contact.

The updated Acas guidance reminds employers that suspension can trigger or worsen existing mental health issues for the employee under investigation. The guidance also makes the point that

suspended employees are likely to be less visible to managers than usual and that mental health issues during this time away from work can be missed or underestimated. It is therefore important to be proactive and to signpost sources of support in letters, emails and calls to the employee.

It provides useful suggestions for supporting employees' mental health while they are suspended. These include:

- clear communication with the employee at the outset so they are aware of why they are suspended and what this means for their pay and benefits;
- regular updates on what is happening in the disciplinary process and the likely timescales involved;
- making sure the suspension only lasts for as long as it needs to;
- providing a point of contact for the employee if they have any concerns;
- signposting the employee to support within the organisation, such as an employee assistance programme, mental health champion or trade union, and encouraging them to access it; and
- signposting the employee to external support such as a mental health helpline, Citizens Advice, or the Acas helpline.

Employers continue to have a duty of care to employees who are suspended and they may face personal injury or negligence claims where it is alleged that poor treatment in relation to suspension has led to psychiatric damage. Tribunals considering unfair dismissal claims may be asked to consider whether the employer acted reasonably in relation to the suspension decision and the employer's treatment of the employee during suspension. Having a clear paper-trail showing careful thought around the decision to suspend, clear communication of reasons for suspension, and meaningful support during suspension will assist an employer to defend such claims.

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