



EMPLOYMENT TRIBUNALS

Claimant: Mr D Dunkley & Others
Respondent: Kostal UK Ltd
Heard at: Sheffield **On:** 24 February 2017
Before: Employment Judge Little
Members: Mr G Harker
Mr L Priestley

Representation

Claimant: Mr S Brittenden of Counsel (instructed by Thompsons)
Respondent: Mr D Browne QC (instructed by Hill Dickinson LLP)

JUDGMENT ON REMEDY

The unanimous judgment of the tribunal is that:-

1. Pursuant to the Trade Union and Labour Relations (Consolidation) Act 1992, section 145E(2)(b) the 55 claimants described in the Schedule as being those who received two unlawful inducement offers are awarded £3,800 in respect of each inducement offer – therefore a total award in respect of each of those individuals of £7,600.
2. The claimant Mr Jason Hardman who only received one inducement offer is awarded the sum of £3,800.
3. By way of quantification of the costs award contained in our reserved judgment on liability, by consent the respondent will reimburse to the claimants the issue and hearing fees paid which total £4,800.

REASONS

1. Written reasons are given on the joint request of the parties.
2. The statutory provisions for remedy where a complaint under section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 has been found to be well founded are set out in section 145E (2) of the Act in these terms.

“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 (at the material time) £3,800 (subject to any adjustment of the award that may fall to be made under Part 3 of the Employment Act 2002).
3. We should add that it was common ground that the reference to the 2002 Act and any adjustment under it was now a redundant provision.

The Claimant's Case on Remedy

4. The claimant's solicitors had prepared a 'Schedule of Award Sought'. It referred to all 56 current claimants. In respect of all but one claimant the schedule sought an award of £3,800 in respect of each of two inducements. With regard to the claimant, Mr Jason Hardman the award sought was limited to £3,800 on the basis that there had only been one offer of inducement to him. It followed that the case of the majority of the claimants was that as they had received two inducement offers that should be reflected by two awards in the statutory amount.
5. No evidence has been tendered by either party at this Hearing.

The respondent's case on remedy

6. Mr Browne confirmed that it was agreed that of the claimants all but Mr Hardman had received two inducement offers. However, the respondent's case was that that should not result in the majority receiving 2 awards. The rationale for that proposition is recorded below when we consider the respondent's submissions.

The Claimants' Submissions

7. Mr Brittenden had prepared a skeleton argument and he also addressed us orally. He reminded us that the particulars of claim had referred to a first offer and a second offer. That that was the claimant's case had been acknowledged and recorded at a Preliminary Hearing for case management. We were also reminded that in our reserved judgment on liability we had found that the complaints of all claimants in respect of the first offer were well founded and also that the complaints of those claimants who received the second offer were also well founded.
8. There had therefore been two complaints brought under section 145B. The second offer was not merely repeating or restating the first offer – it was materially different because it made no reference to the Christmas bonus but did contain the threat of dismissal if the offer was not accepted.
9. The scheme of the legislation was that the award was to be a punitive sanction rather than primarily compensatory. There was no scope – in contrast to section 146 complaints – for the tribunal to exercise any just and equitable discretion in assessing the appropriate level of award. The use of the word "shall" meant that the tribunal had no choice other than to make separate awards for those who received each offer letter.
10. Mr Brittenden went on to comment on two first instance employment tribunal judgments on which the respondents relied. The first of these was Bugden v London Borough of Bromley [2360959/2013]. That was a case where four offers had been made and yet the tribunal only made one award to each claimant. Mr Brittenden went on to observe that remedy in that judgment was dealt with in very brief terms in paragraph 55 of the reasons and it appeared that the point had not been raised. There was no

record in those reasons of an argument from those claimants that they should receive more than one award. The fact that the judgment was silent on the issue strongly suggested that the point had never been raised, argued or determined. In any event, a first instance decision would not be binding on us.

11. The other first instance decision relied upon by the respondent was Whitaker v Buckinghamshire County Council [3300720/2013]. Again it appeared that the point had not been raised although that may have been because, on Mr Brittenden's reading of the facts of that case, there had only been one offer to employees – another offer had been made to the union.

The Respondent's Submissions

12. Mr Browne had prepared a short note on remedy and addressed us orally.
13. He suggested that the claims had been pleaded slightly ambiguously as section 9 of the ET1 referred to the remedy sought as "A declaration and £3,715 as per section 145E TULRA 92". The tribunal had found that the first offer included the Christmas bonus, but the second offer did not and so it was to be regarded as a lesser offer and as part of the same sequence – an offer in the same cause. It was not an increased offer but instead was effectively the same offer as the first. Whilst the statutory scheme involved a fixed penalty there was an additional benefit for a claimant who had received an inducement as that did not need to be repaid by virtue of section 145E(4).
14. Mr Browne contended that the punishment should be directed at the purpose of the employer and that purpose had not changed. The claim should not therefore be looked at as two separate complaints. In relation to the cases of Whitaker and Budgen Mr Browne accepted that they were not binding on us and that they did not set out any reasoning on the point which he contended they were persuasive authority for. Mr Browne remained of the view that there had been two offers in the case of Whitaker.
15. The legislation had not been well drafted. Section 145B referred to the making of offers whereas section 145E referred to "the offer".

The Tribunal's Conclusions

16.1 Although Mr Browne has drawn out attention to section 9 of the ET1 Claim Form, we observe that it refers to "as per section 145E" (of the 1992 Act) thereby qualifying the earlier reference to "£3715". In any event, as Mr Brittenden points out, the substantive pleading within the particulars of claim makes it clear that the claim is complaining about two offers.

16.2 We instruct ourselves that today is not an opportunity for the tribunal to seek to bolster the findings which we made in our liability Judgment, nor is it an opportunity for us to revise our earlier judgment and the rationale for it. Despite this observation, we fear that that is what the respondent is now inviting us to do. In circumstances where we have found that there were two offers; that they were different and that both were unlawful, we conclude that it is not now open to the respondent to invite us to make different findings – that the two offers should be viewed as part of a sequence; that the second offer should not be regarded as an unlawful offer because it was "lesser" or that we should take the approach

now that the focus should exclusively be on the respondent's purpose rather than how it went about trying to achieve that purpose.

16.3 In relation to the cases of Bugden and Whittaker the starting point is that at most those could only be persuasive authorities (*but now see the views of HHJ Hand QC in Capita Translation and Interpreting Limited v. Siauciunas UKEAT/0181/16/RN --paragraphs 48-50*). In any event were those two decisions on point? We do not consider that Whittaker was as we accept Mr Brittenden's reading of the facts there to the effect that there was only one offer.

16.4 In relation to Bugden we observe that in paragraph 23 of that tribunal's reasons it is noted that the parties in that case had agreed that three of the four offers were the same. However, in any event, we think that it is very unlikely that the issue which is before us was ever raised in the Bugden litigation. There is no reference when the tribunal records the submissions to it that the issue had been raised by either party and the issue of remedy is dealt with in one very short paragraph (paragraph 55). We therefore conclude that there is nothing in either of those first instance decisions which gives us any assistance in deciding the issue before us.

16.5 In conclusion the approach that we take is that we must make awards so as to penalise the way in which the respondent went about its purpose. That was – for the majority of the claimants – by making two inducement offers to them. Returning to the natural meaning of the words used in section 145E(2)(b), the result is that those claimants who received two offers must also receive two awards.

SCHEDULE

Case Number	Name of Claimant	Award
1800677/2016	Mr D Dunkley	£7,600
1800678/2016	Ms H Atkin	£7,600
1800679/2016	Mrs M Atkinson	£7,600
1800681/2016	Mr J Boughen	£7,600
1800682/2016	Mr K Bruck	£7,600
1800683/2016	Mrs J Bushell	£7,600
1800684/2016	Mrs M Cooper	£7,600
1800685/2016	Mr G Copley	£7,600
1800686/2016	Mr A Danforth	£7,600
1800688/2016	Mr P Darwood	£7,600
1800689/2016	Mrs S Dean	£7,600
1800690/2016	Miss J Dyson	£7,600
1800691/2016	Mr P D Eades	£7,600
1800692/2016	Mrs L Ellis	£7,600
1800693/2016	Miss D Errington	£7,600

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1800694/2016	Miss R Feast	£7,600
1800695/2016	Mr B Ferneyhough	£7,600
1800696/2016	Mrs L Fisher	£7,600
1800697/2016	Mrs J Fletcher	£7,600
1800698/2016	Mrs S Floyd	£7,600
1800699/2016	Mr L Fraser	£7,600
1800700/2016	Ms L Gill	£7,600
1800701/2016	Ms J Goddard	£7,600
1800702/2016	Mr V Green	£7,600
1800704/2016	Mrs L Hall	£7,600
1800705/2016	Mrs L Hall	£7,600
1800706/2016	Mr R Hall	£7,600
1800707/2016	Ms J Hall	£7,600
1800709/2016	Mr G Hanson	£7,600
1800710/2016	Mr J Hardman	£3,800
1800711/2016	Mr A Hollingworth	£7,600
1800712/2016	Miss L Hollinshead	£7,600
1800713/2016	Mr G Jarosz	£7,600
1800714/2016	Mr D Jones	£7,600
1800715/2016	Mrs Y Kitchen	£7,600
1800716/2016	Ms L Lackenby	£7,600
1800716/2016	Mr D Lawton	£7,600
1800718/2016	Miss J Leak	£7,600
1800719/2016	Mrs A Ludlam	£7,600
1800720/2016	Mrs J Mackley	£7,600
1800721/2016	Mrs Y McLoughlin	£7,600
1800722/2016	Ms G Mellor	£7,600
1800723/2016	Mrs S Morley	£7,600
1800724/2016	Miss M Nolan	£7,600
1800725/2016	Mr P Parr	£7,600
1800726/2016	Mrs D Poulter	£7,600
1800727/2016	Ms E Poulter	£7,600
1800728/2016	Mr J Powell	£7,600
1800729/2016	Mr C Rudd	£7,600
1800732/2016	Mr N Smith	£7,600
1800733/2016	Ms M Tarry	£7,600

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1800734/2016	Mrs G Turner	£7,600
1800735/2016	Mrs L Wadsworth	£7,600
1800736/2016	Mr J Wigley	£7,600
1800737/2016	Mr A Wilson	£7,600
1800738/2016	Mrs D Wooley	£7,600

Employment Judge Little

Date 10 March 2017

Sent on: 13 March 2017