



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100538/2020 (V)**

**Held via Cloud Video Platform (CVP) on 27 August 2020**

**Employment Judge M Sangster**

**Ms Caldwell & others**

**Claimants  
Represented by  
Ms Bowman  
Solicitor**

**Scottish Borders Housing Association Limited**

**Respondent  
Represented by  
Mr Maxwell  
Solicitor**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is that the claims were presented within the statutory time limit. The Tribunal accordingly has jurisdiction to consider the claims. The claims will now proceed to a hearing on the merits.

### **REASONS**

#### **Introduction**

1. This was a preliminary hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing. The documents that I was referred to were in a bundle of 4 pages, the contents of which I have recorded.

**E.T. Z4 (WR)**

2. The three claimants submitted a claim to the Tribunal on 28 January 2020, having undertaken early conciliation from 22-27 January 2020. They raised claims of unlawful inducement, contrary to section 145B of the Trade Union & Labour Relations (Consolidation) Act 1992 (**TULRCA**), in relation to letters  
5 from the respondent to them dated 18 September 2019 and 13 December 2019.
3. Following a case management preliminary hearing on 20 May 2020, a preliminary hearing was fixed to determine whether the Tribunal has jurisdiction to hear the claims, or whether they were submitted out of time.
- 10 4. The claimants did not lead any evidence. The respondent led evidence from Karen Gilchrist, HR Advisor. She spoke to the letters dated 18 September 2019 and 13 December 2020, which were the only documents included in the joint bundle.

### Issues to be determined

- 15 5. Were the claims were brought within the time limit set out in section 145C(1)(a) of TULRCA, namely *'before the end of the period of three months beginning with the date when the offer was made or, where the offer is part of a series of similar offers to the complainant, the date when the last of them was made'*?
6. It was accepted by the respondent that the letters dated 18 September 2019  
20 constituted offers for the purposes of s145B of TULRCA, but denied the offers made were in contravention of that section. The respondent disputed however that the letters of 13 December 2019 constituted offers for the purposes of 145B of TULRCA, stating that, as a result, the claims were time barred.
7. Ms Bowman, for the claimants, confirmed that they did not intend to make any  
25 arguments that it was not reasonably practicable for the complaints to be lodged within the relevant time period, or that, if this were the case, the complaints were presented within such further period as was reasonable (s145C(1)(b)). Her position instead was that the letters of 13 December 2019 clearly constituted offers and the claims were accordingly lodged in time.

8. Determination of this matter accordingly turned solely on whether the letters dated 13 December 2019 could constitute offers for the purposes of s145B of TULRCA.

### Findings in fact

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9. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

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10. The respondent engaged in a negotiation process for around 2 years with their recognised trade unions in relation to proposed changes to terms and conditions. The respondent's position was that they could no longer afford to link pay increases to the Retail Price Index, due to changes in the way increases to tenants' rents were calculated. No agreement was reached with the trade unions in relation to the proposed changes to terms and conditions.

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11. From meeting with members of administration staff, the respondent understood that they would accept the terms on offer. The respondent accordingly wrote to those members of staff, on 18 September 2019, giving them the opportunity to agree the amended terms.

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12. The letters confirmed that the recipients were being *'offered the opportunity to accept a variation to your contract of employment'*. The reasons for this were stated and it was confirmed that *'the change is to move to the new pay scheme away from RPI towards annually market based benchmarked salaries.'* How the proposed change impacted each individual personally was then explained, with confirmation of their proposed new grade and salary. Further detail of the proposed revised grades and pay ranges generally was enclosed with the letters.

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13. The letters concluded by stating *'I invite you to consider the proposed change...If you are willing to accept the variation to your contract, please confirm that you accept and understand the variation by signing and returning one copy of the revised terms and conditions of your employment detailed at*

the foot of this letter, by no later than Wednesday 2<sup>nd</sup> October 2019 to SBHA's Human Resources Co-ordinator...This letter forms a variation to your contract of employment and by signing and dating it you are signing your acceptance to the changes and that your contract of employment will be varied by agreement'.

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14. 96 out of 104 employees agreed to the variation. The claimants did not sign to confirm their acceptance to the changes.

10 15. On 13 December 2019, the respondent sent a further letter to the claimants. The letter sent to one of the claimants, Jacqueline Caldwell, stated as follows:

*'Dear Jacqueline*

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***Variation to Contract of Employment  
New Pay and Grading Structure***

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*Further to my letter of 18 September 2019 in which I offered you the opportunity to accept a variation to your fixed term contract of employment, I now write to confirm that the variation will be introduced with effect from 16 January 2020.*

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*From this date position as Factoring Assistant will be Grade A on the new pay structure, see enclosure 1, and your new salary will be £18,004 (per annum) 2019/20 scales.*

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*Please find attached confirmation that your terms and conditions have been amended accordingly and note the following financial arrangement is now being processed:*

1. *New payscale implemented from 16<sup>th</sup> January 2020 and paid on 15 February 2020.*

*Please find enclosed the new grades and pay ranges 2019/20, enclosure 2.*

*Your continuity of employment is unaffected by the change and your other terms and conditions will remain unchanged.*

5           *Yours sincerely'*

16. The letters sent to the other claimants were structured in the same way, albeit tailored with their own personal details.

17. Following receipt of the letters dated 13 December 2019, the claimants indicated that they did not accept the proposed variation to their contracts of  
10 employment.

#### **Claimant's submissions**

18. For the claimants, Ms Bowman spoke to, and thereafter lodged, a written submission.

19. Her position was that the letters of 18 September 2019 and 13 December 2019  
15 formed a series of similar offers and that the letter of 13 December 2019 was the last of these offers. She submitted that the word "offer" for the purposes of the s.145B should be understood as something which would amount to an "offer" in the contract law sense of the word: that is, something which is capable of being accepted by another party, the consequence of which will be either  
20 the formation of a new, or the variation of an existing, legal relationship.

20. In the absence of any contractual authority vary terms, the case must be analysed through offer and acceptance. A contract can only be varied if one party to that contract makes an offer of new terms, and the other party accepts that offer. Acceptance can be expressly or impliedly given. In this case the  
25 claimants did neither.

21. She referred to the case of ***Abrahall and Others v Nottingham City Council and another*** [2018] IRLR 628 indicating that the claimants in that case ultimately won on the basis of their not having given implied agreement. She noted that it was not in dispute in that case that the intimation by the employer

of a unilateral change was sufficient to amount to an “offer” in a contractual sense.

22. As the last in a series of offers occurred on the 13 December 2019, the claims were presented in time and the Employment Tribunal has jurisdiction to hear the claims.

### Respondent’s submissions

23. For the respondent, Mr Maxwell also spoke to and thereafter lodged a written submission.

24. His position was that 145B(1) explicitly requires the employer to make the worker an offer which is capable of acceptance, meaning that for there to be a breach of s145B the respondent must have made offers to the claimants which were capable of acceptance.

25. No definition of 'offer' is provided in the legislation s145B, so it should be interpreted using its ordinary or everyday definition. Under the Cambridge Dictionary the definition is: *"to ask someone if they would like to have something or if they would like you to do something."*

26. He referred to the case of ***Wilson & ors v United Kingdom*** [2002] IRLR 568, which brought about the introduction of s145B, and highlighted that, in that case an explicit offer was made offering the claimant a clear financial benefit in exchange for giving up his collective bargaining rights.

27. He stated that the September letters were offers as they explicitly used the word ‘offer’ and provided the opportunity for the claimants to accept the variation of contract offered, matching the dictionary definition of an offer *"of asking someone if they would like to have something..."*

28. By contrast, the terms of the December letters were vastly different. They did not *"ask someone if they would like to have something..."*. Instead they confirmed the imposition of contractual changes and when those changes will take effect. There was no ability on the part of the claimants to accept or reject the terms outlined in the December letters. They cannot therefore constitute offers. The claims must therefore be rejected, as they were lodged outside the requisite time limit.

### The Law

29. s145B TULRCA states

***'145B Inducements relating to collective bargaining***

5 (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—*

10 (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*

15 (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.*

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

25 (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.*

30 (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.'*

30. Section 145C sets out the time limits for presenting a claim under s145B.

***'145C Time limit for proceedings***

35 (1) *An employment tribunal shall not consider a complaint under section 145A or 145B unless it is presented—*

40 (a) *before the end of the period of three months beginning with the date when the offer was made or, where the offer is part of a series of similar offers to the complainant, the date when the last of them was made, or*

*(b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.'*

## Decision

- 5 31. The Tribunal found that the letters dated 13 December 2019 were offers for the purposes of s 145B TULRCA.
32. Contracts of employment are determined at their foundation. Mutual agreement is required to vary any contract of employment, following its formation. Agreement can be express or implied.
- 10 33. When express agreement to the new terms and conditions proposed by the respondent was not forthcoming from the claimants, following the letters of 18 September 2019, the respondent sought to unilaterally impose the change on 13 December 2019. This was clear from the terms of the respondent's letters to the claimants on that date. To effect a binding change to the claimants' terms and conditions, as a result of these letters, the respondent would require to rely on the claimants' conduct following receipt of those letters to establish implied agreement to the new terms and conditions which the respondent sought to impose. Alternatively, it was open to the claimants to indicate, by their conduct or otherwise, that they did not agree to the change.
- 15 20
34. Given that contracts of employment cannot be varied without mutual agreement, and that implied agreement was required to effect a binding change to terms and conditions following the letter dated 13 December 2019, that letter must constitute an offer to vary the contract.
- 25 35. There is nothing within the wording of s145B TULRCA which indicates that a financial inducement or incentive is required for there to be a valid offer for the purposes of that section.
36. The letter of 13 December 2019 followed on from the letter of 18 September 2019. It related to the same proposed change to terms and conditions. I found, as a result, that both letters formed part of a series of similar offers to
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the claimants, for the purposes of S145C TULRCA. The date of the last offer in that series was 13 December 2019. The claims were lodged, following Acas early conciliation, on 28 January 2020. This was before the end of the period of three months beginning with the date of the last offer.

- 5 37. Accordingly, I am satisfied that the Tribunal has jurisdiction to consider the claims, as they were presented within the statutory time limit. The claims will now proceed to a hearing on the merits.

10 Employment Judge: Mel Sangster  
Date of Judgment: 22 September 2020  
Entered in register: 28 September 2020  
and copied to parties