

Neutral Citation Number: [2022] EAT 82

Case Nos: EA-2018-SCO-000029-SH  
EA-2018-SCO-000030-SH

**EMPLOYMENT APPEAL TRIBUNAL**

52 Melville Street  
Edinburgh EH3 7HF

Date: 06/06/2022

**Before :**

**THE HONOURABLE LADY HALDANE**

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**Between :**

**INEOS INFRASTRUCTURE GRANGEMOUTH LIMITED**

**Appellant**

**- and -**

**JONES & OTHERS**

**Respondents**

**INEOS CHEMICALS GRANGEMOUTH LIMITED**

**Appellant**

**- and -**

**ARNOTT & OTHERS**

**Respondents**

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**Mr A Burns QC** (instructed by Slaughter and May) for the **Appellants**

**Mr O Segal QC** (instructed by Thompsons Solicitors) for the **Respondents**

Hearing date: 21 April 2022  
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**JUDGMENT**

## SUMMARY

### **20 - TRADE UNION RIGHTS**

This is an appeal by two companies against a Judgment of the Employment Tribunal sitting in Glasgow which held that claims by two employees in terms of section 145B of the **Trade Union and Labour Relations Consolidation Act 1992** were well founded. These cases had been sisted since 2018 pending the decision of the Supreme Court in **Kostal UK Ltd v Dunkley & Ors** [2021] UKSC 47. **Kostal** addressed for the first time the proper approach to claims under s 145B and enunciated the proper legal test, being one based on principles of causation. Parties were agreed that the decision in **Kostal** was directly applicable to these cases, but each argued that the decision supported their respective positions. There was no challenge to any of the findings in fact made by the Tribunal.

The issues in each case were (i) whether an ‘offer’ had been made to employees which engaged s 145B at all, (ii) if so, whether such offer had the ‘prohibited result’ and (iii) what was the employers purpose in making the offers.

The Tribunal held firstly that the communication sent to employees was of the nature of an offer, rather than a ‘unilateral obligation’ as contended for by the employers, secondly that those offers had achieved the prohibited result, and thirdly that the employers sole or main purpose had been to achieve that result.

Held, refusing the appeals, that there was no error of law in the approach of the Tribunal to the question of whether or not the communication sent to the employees was an ‘offer’. Further, that although the decision of the Tribunal predated that in **Kostal** and therefore that it had not directly applied the causation test as now laid down, it had addressed its mind, presciently, to the right question and its decision was therefore entirely consistent with that in **Kostal** and no error of law had been demonstrated. Finally there was ample evidence before the Tribunal to permit is to conclude that the employers’ sole or main purpose had been to achieve the prohibited result and no error of law was demonstrated in that aspect of their reasoning either.

## THE HONOURABLE LADY HALDANE:

### Introduction

1. This is an appeal from a judgment of a full Employment Tribunal sitting in Glasgow and presided over by Employment Judge Meiklejohn. It is a matter of agreement that these two cases are concerned with the same issues of fact and law, and that the appellants are part of the same group of companies. The claimant in each case brought a claim under section 145B of the **Trade Union and Labour Relations (Consolidation) Act 1992** against either the First appellant or the Second appellant.

2. By its Judgement dated 6th March 2018 the Employment Tribunal found in favour of the claimants and awarded each the sum of £3,830 being the amount payable in terms of section 145E(3) of the **Act** as at 5 April 2017. That sum was recently raised with effect from 6 April 2022 to £4554. The appellants wished to appeal that decision, but the cases were then sisted pending the decision of the Supreme Court in **Kostal UK Ltd v Dunkley & ors** [2021] UKSC 47. It was a matter of agreement that the decision in **Kostal** is directly applicable to the present case. The Supreme Court upheld the appeal by the claimants in **Kostal** and concluded that the employers had contravened section 145B of the **Act**.

3. In the present case, the appellants argue that the legal test formulated in **Kostal** leads to the result that their appeal in each case must be allowed. The claimants argue the opposite; that the application of the law as enunciated in **Kostal** means that the appeals should be refused.

### Background

4. This summary is drawn largely from the Judgment of the Tribunal. There was no challenge to any of the findings in fact contained within that Judgment. The claimants were employed by the

appellants at the INEOS Grangemouth site. The claimants were members of the Unite union. Against a background of industrial disputes at the Grangemouth site, INEOS indicated that it wished to implement a survival plan for the site. That plan was not accepted within the timescale set by INEOS and it announced the closure of the site. The survival plan was then accepted and thereafter the appellants entered into Collective Bargaining Agreements (“CBA’s”) with Unite. The terms of the CBA’s reflected the terms of the survival plan.

5. The CBA’s recognised Unite as entitled to conduct collective bargaining in relation to pay, hours and holidays. The agreements were described as ‘simple’ agreements by Senior Counsel for the appellants; they set out arrangements for meetings in schedule 1, dispute resolution in schedule 2 (although this did not apply to collective bargaining) and, with the exception of clause 5 relating to the survival plan and clause 7 relating to previous CBA’s, were not legally binding. In addition they could be terminated by either party at any time, on three months written notice. So far as the number of meetings required during any collective bargaining process was concerned, there was no minimum or maximum number of meetings provided for, other than, inferentially, the reference to ‘meetings’ (plural) in the agreement suggests at least two. The terms and conditions provided by the appellants to their employees, including the claimants, contained a clause that made direct reference to the CBA’s and stated that the employees’ terms and condition as set out in those CBA’s would be negotiated between the appellants and Unite Union on the employees behalf.

6. Pay negotiations were instituted in June 2016. There were initial difficulties putting the arrangements for meetings in place, in particular who should attend those meetings from the union side. The appellants wanted an assurance that a particular Unite representative, a Mr Lyon, would not be involved, directly or indirectly. There was antipathy towards Mr Lyon who was regarded as a key protagonist in earlier industrial disputes. These discussions between the two sides were protracted

and, at times, acrimonious. In the end, five meetings took place between the negotiating teams between 29 November 2016 and 17 March 2017. There were no minutes of these meetings, although handwritten notes were taken by Mr Johnstone of the appellants.

7. The appellants' negotiating stance was influenced by market forces in the industry and in particular a survey conducted by the Chemical Industries Association. This suggested a market increase of 2.5% and this level of offer was initially mandated to the negotiating team. Following the publication of the final results of the survey which indicated a figure of 2.7%, this figure was authorised by Mr McNally of the appellants.

8. The initial proposal put forward by the appellants was 2.3% (there was in addition an offer of a one-off payment to other grades covered by the negotiations). This was not responded to during the second meeting between the parties, but instead the Unite representatives requested further financial information and also requested a mass meeting on site, which request was agreed to. The outcome of that meeting (ultimately held off site) was that negotiations should continue to try and secure a better deal. The Unite counter proposal was ultimately sent on 21 February 2017 and comprised a headline figure of 3.25%, together with enhancements to other terms and conditions. At the next meeting on 22 February 2017, discussions between Mr Beckett, of Unite, and Mr Boyle, of the appellants, became heated and a recess was called. Mr Johnstone of the appellants and Mr Beckett spoke and agreed that Mr Beckett would contact Mr Banham of the appellants' side. The meeting did not reconvene.

9. At the final meeting between the parties the Unite position was that they could not recommend anything below 3% to their membership. Although this was beyond the negotiating team's mandate, Mr Johnstone felt they were close to agreement.

10. Mr Banham authorised the appellants' team to make a best and final offer of 2.8% (together with other lower offers for others in the Bargaining Unit). Mr Johnstone's understanding was that this would be put to a vote. In addition, on the same day (17th March 2017), two other events occurred, firstly a book launch by the aforementioned Mr Lyon – the book was highly critical of INEOS - and secondly an item was published on the Unite website concerning the sale of a pipeline by BP to INEOS. This item too was critical of INEOS' attitude to its employees. These events, the Employment Tribunal found, had a bearing on the ongoing pay negotiations.

11. Two mass meetings were held on 28th March 2017. The negotiations were described to the meeting in negative terms by Mr Beckett. He told those present that if the negotiations could be escalated following a failure to agree, more progress might be possible. Another Unite official, Mr Smart, then presented the detail of the 2.8% offer. He told the meeting that the offer was not recommended but that they had agreed to present it to the members. He did not say that the Unite team had agreed to put it to a vote. As to whether it had unequivocally been stated by Unite to the appellants that the matter would be put to a vote, there was evidence pointing both for and against that conclusion. In any event, Mr Lyon moved a motion that the team be asked to return to talks to try and obtain an improved offer. No one disagreed. The same outcome was achieved at the second meeting held that day.

12. There was evidence before the Employment Tribunal, which it accepted, of "an expectation on the part of both Unite and the Respondents that there would be a 'next stage' if the pay negotiations resulted in an impasse or failure to agree." Further that Mr Banham had told Mr Beckett that INEOS were not putting forward a board member for the negotiations as they wanted the ability to escalate the talks in the event of an impasse and that if Mr Beckett stayed out of the talks it would enable Unite to do something similar.

13. A briefing note was issued by the appellants on 23rd March 2017 which contained the following:- “We hope this offer will be accepted and that we are able to move forward without a failure to agree, or any requirement to invoke the disputes procedure.” The reference to the disputes procedure was accepted by Mr Banham of the appellants to be ‘imprecise’. He further acknowledged it was misleading and “gave rise to an expectation.” He accepted that he had not attempted to clarify any misconception held by the union or the employees that there would be an opportunity for escalation in the form of a disputes procedure.

14. The appellants were disappointed in the outcome of the mass meetings, Mr McNally in particular being recorded as having said in evidence, amongst other things, that “our team had done all that reasonably could have been done.....2.8% was not a provisional negotiating position...it was our final position....the discussions had run their course...it became clear to me that there was no life left in the union negotiations....we had exhausted the CBA procedure”. He went on to describe the negotiations as ‘broken’ and ‘bankrupt’ and of the appellants finding themselves in a ‘perfect storm’, as well as referring to ‘promises broken’. This was understood to refer to firstly the involvement of Mr Lyon in the events of 28th March 2017 as well as Mr McNally’s understanding that the offer of 2.8% would be put to a vote.

15. Mr McNally took the view that the only option was to make the pay award unilaterally. Either that or make no award at all. He wanted the employees to receive a pay increase and bonus in the April payroll, as this was, in the case of the bonuses, what had been promised. Mr McNally met with the INEOS executive team on 31 March 2017. In advance of that meeting, one of the executive team, Mr Currie, wrote in an email to Mr McNally and Mr Ratcliffe, who was also on the executive team, the following:-

**“the only logical conclusion is that we have to engineer a way to get rid**

**of Unite & replace them with a different representative body (which could be a different union of course if that is where the work force want to go)."**

The outcome of the meeting was that Mr McNally was authorised to make the pay award unilaterally.

16. On 5th April 2017 Mr McNally sent the following communication to the appellants employees:-

**"This morning, INEOS has given notice to terminate the collective bargaining agreements with Unite for ICGL and IIGL. As of today, we will implement our pay increase as described in our latest offer backdated to 1st January 2017. We will also pay business and retention bonuses to all employees that qualify in the April pay roll.**

**The negotiations with Unite have been very unsatisfactory. There has been no "fresh start" as was promised. We offered more than 25 meeting dates to Unite over the past 5 months of which only 4 were acceptable to them. Recent mass meetings have been rude and abusive. We are very happy to negotiate with either a works council or an alternative union, but not with Unite.**

**We have committed huge sums of money to renew the Grangemouth site and you, the employees, have worked tirelessly on this for the past three years. Grangemouth deserves a constructive and friendly working environment after all we have gone through together, not the divisive, hostile battleground that Mr Lyon and Unite are seeking. We are very proud of what everyone has achieved at Grangemouth and cannot stand by and see it being denigrated by Unite. I have attached a more detailed factual note and hope to meet with you in the next few days"**

The accompanying note set out the appellants' version of what had gone wrong in the pay negotiations and specifically referred to Mr Lyon's involvement.

17. Mr McNally's explanation for proceeding this way was this:-

**"The reason we made the award was because it was the right thing to do: (for the companies) to help us retain and attract the right people to work for us (and for our people generally) in recognition of the good**

**work of our employees and to thank those who had worked through the Survival Plan and had received no pay rise for three years. The purpose of making the award unilaterally was not to end or undermine collective bargaining, and making the increased pay award didn't have that effect. Anyway, there was no need for us to find a complicated way to get out of collective bargaining as there was a straightforward option: we could achieve the termination of Unite recognition by giving notice to terminate the 2013 CBAs. That is what we did. The relationship with Unite was broken, so we gave them three months' notice of our wish to terminate the 2013 CBAs, as allowed under the terms of the agreement. During the three month notice period, Unite remained the recognised union and the obligations on both sides under the agreements remained in place. The pay award was not an incentive to employees to dislodge Unite or give up any collectively bargained terms."**

### **The applicable law**

18. Section 145B of the **Act** is in the following terms:-

#### **“145B Inducements relating to collective bargaining**

**(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.**

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

**(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.**

**(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.”**

19. Section 145D provides:-

**“145D Consideration of complaint**

**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.**

**(4) 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”**

20. The Supreme Court considered the proper interpretation and application of section 145B in **Kostal**. In that case, the claimants had succeeded before the Employment Tribunal, and the Employment Appeal Tribunal. The employers appealed to the Court of Appeal where they were successful and the claims were dismissed. The claimants then appealed to the Supreme Court. The Supreme Court firstly considered the question of the proper interpretation of section 145B having regard to its purpose, as informed by the European jurisprudence on article 11 of the European Convention on Human Rights which underpinned the bringing into force of section 145B. Secondly,

an application of that interpretation to section 145B led to the conclusion (by the majority, expressed in the speech of Lord Leggatt) that

**“65. I think it is possible to read section 145B in a way which gives meaning and effect to this significant feature of its language and does so in a way which is compatible with article 11 . Once it is recognised that the question whether the acceptance of offers would have the prohibited "result" is a question of causation, it is evident that the state of affairs described in subsection (2) cannot be regarded as the "result" of acceptance of the offers if it would inevitably have occurred anyway, irrespective of whether the offers were made and accepted. In that case there would be no causal connection between the presumed acceptance of the offers and the state of affairs described in subsection (2). More specifically, in order for offers made by the employer to workers to be capable of having the prohibited result, there must be at least a real possibility that, if the offers were not made and accepted, the workers' relevant terms of employment would have been determined by a new collective agreement reached for the period in question. If there is no such possibility, then it cannot be said that making the individual offers has produced the result that the terms of employment have not been determined by collective agreement for that period. In other words, it is implicit in the definition of the prohibited result 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 when they otherwise might well have been determined in that way .”**

Lord Leggatt continued at paragraph 67:-

**“67. Likewise, where there is a recognised union, 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 the employer cannot do with impunity is what the Company did here: that is, make an offer directly to its workers, including those who are union members, before the collective bargaining process has been exhausted.**

**68. It was argued on behalf of the Company that it may be difficult to say with certainty whether the collective bargaining process has been**

exhausted in any particular case and that this interpretation therefore exposes employers to risks which they cannot afford to take and hence would unreasonably restrict their freedom of negotiation. I do not accept this. In my view, employers have two means of protection against that risk. The first is to ensure that the agreement for collective bargaining made with the union clearly defines and delimits the procedure to be followed..... A second level of protection is provided by the requirement of section 145B(1)(b) that the section will not be contravened unless the employer's sole or main purpose in making the offers is to achieve the prohibited result. If the employer genuinely believes that the collective bargaining process has been exhausted, it cannot be said that the purpose of making direct offers was to procure the result that terms will not be determined by collective agreement when that otherwise might well have been the case.

69. This interpretation of section 145B is further supported by section 145D(4)(a) of the 1992 Act . That provision identifies, as a matter which must be taken into account in determining whether an employer's sole or main purpose in making offers was the prohibited purpose, any evidence:

"that when the offers were made the employer ... did not wish to use, arrangements agreed with the union for collective bargaining."

As Professors Alan Bogg and Keith Ewing have pointed out in a commentary on this case, this supports the inference that, where the acceptance of individual offers would by-pass arrangements agreed with the union for collective bargaining, such acceptance would have the prohibited result: see Bogg and Ewing, "Collective Bargaining and Individual Contracts in *Kostal UK Ltd v Dunkley: A Wilson and Palmer for the 21st century?*" (2020) 49 ILJ 430, 451."

Lord Leggatt then considered the application of those principles to the facts of the case and concluded:-

"71. I conclude that, on the proper interpretation of section 145B of the 1992 Act , an offer would have the prohibited result if its acceptance, together with other workers' acceptance of offers which the employer also makes to them, would have the result 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 when, had such offers not been made, there was a real possibility that the terms in question would have been determined by collective agreement. That must ordinarily be assumed to be the case where there

**is an agreed procedure for collective bargaining in place which has not been complied with.”**

### **Submissions**

21. I was favoured with detailed and helpful written skeletons by both Mr Burns Q.C., who appeared for the appellants, and Mr Segal Q.C., who appeared for the claimants. Each supplemented those written skeleton arguments with oral submissions.

### **What is the ‘mischief’ to which section 145B is directed?**

22. For the appellants, Mr Burns began with an overarching submission that the purpose of section 145B was two-fold:- Firstly to stop an employer making an offer to union members which if accepted causes them to surrender collective bargaining rights, with the second purpose being that the employer must not make an offer to union members that would cause collective bargaining to be by-passed, or, put another way, that the employer may not make an offer to workers while collective bargaining is still going on in order to bypass collective bargaining.

23. He developed that submission under reference to two broad grounds of appeal – did the Employment Tribunal err in its approach to ‘prohibited result’, and was there an error in the approach to ‘prohibited purpose’? Mr Burns also had a third ‘Scots Law’ aspect to his submissions, although his primary position was that he could succeed on his other points without requiring to rely on the Scots Law argument. In summary though, his argument under Scots Law was that the Employment Tribunal had erred in concluding that unilateral promise cannot be made in a bilateral contract situation, the Tribunal was plainly wrong as there were numerous examples where Scots Law allows a unilateral promise in a bilateral situation. This argument was developed later by Mr Burns as noted below.

### **The question of ‘offer’ and ‘acceptance’**

24. Mr Burns' primary position under this first main branch of his submissions was that there had been no 'offer' in terms of section 145B acceptance of which would have had the prohibited result. This echoed the appellants' position before the Employment Tribunal. In developing this argument Mr Burns began with a consideration of the terms of the CBA's in this case, against a background of a helpful explanation of the general nature of such agreements.

25. It was Mr Burns' submission that there was a key difference North and South of the border on this question – specifically, that in England it was only possible to do one thing in the context of pay negotiations as between employer and employee, and that is to make an offer for the employees to accept, normally by implication. If the workers are unhappy with the offer, then the contract cannot be imposed upon them. The difference in Scots Law, suggested Mr Burns, is that one party, the employer in this case, can make a unilateral promise to the employees which is binding and enforceable and is collateral to the main contract between the parties and thus, importantly, not within the provisions of section 145B.

26. In the present case, the unilateral promise did not come as a matter of fact during the collective bargaining process, it came after collective bargaining had finished and the employer had decided the 'final offer' was indeed their final position. They wanted their employees to have a pay rise, and so imposed it on them. In England, argued Mr Burns, that set of circumstances would be construed as a breach of contract, or more specifically a repudiatory breach which could be accepted, and the contract brought to an end, or the repudiation could be waived and the employee could continue with their contract. When asked whether this would not give rise to different results North and South of the border in the application of a statute of UK wide extent, Mr Burns accepted that this might be so but that this was not unheard of, and placed reliance upon McNeill v Aberdeen City Council 2014

S.C. 335 in this regard. The key question, argued Mr Burns was whether what was put to the employees in this case should be regarded as an offer, or a unilateral obligation.

**Does acceptance of the ‘offer’ have the prohibited result?**

27. Mr Burns further developed his submission to the effect that the question of the proper characterisation of the communication from the employer was not essential in order for the appeal to be upheld – however this communication was characterised, it came after the collective bargaining process had finished, and, in accordance with **Kostal**, any offer after that point was fair. No criticism could be made of an employer breaching collective bargaining if a reasonable offer was made after their full and final position had been put forward.

28. Further, the right guaranteed by Article 11, and therefore protected by section 145B was the freedom to be represented by a union, and the right for the Trade Union to have its views heard. If however the Union elected to wait until after negotiations had concluded before coming in with a more reasonable offer, the employer does nothing wrong if it says that the offer should have been made during the collective bargaining process. The alternative, suggested Mr Burns would be that the union could continue to make proposals after a ‘final’ offer is made by the employer, with the result that the employer effectively has a ‘Sword of Damocles’ hanging over its head. This, he contended, took the form of the Union always being able to keep the ‘section 145B card up its sleeve’ and hold the employer to an obligation to keep negotiations open even after they had, in fact and viewed objectively, come to an end. That, Mr Burns argued, would amount to subverting the Supreme Court in **Kostal**, where the majority view was clear that there would be no liability under section 145B if the collective bargaining process was followed and completed.

29. The critical question therefore for the assessment of whether or not section 145B is engaged is whether or not, objectively, negotiations are at an end. This was essential for determining the

prohibited result and this exercise required the Tribunal to assess objectively what is the process that the parties have agreed, whether that process had been completed or not, and whether the offer came before or after the end of that process. It was important to remember also that the Supreme Court had also confirmed that the employer has a subjective defence under section 145B in that an offer was only unlawful if it bypassed collective bargaining and it was the employer's purpose to make and offer which bypassed the agreement.

30. Applying that analysis to the present case, Mr Burns accepted that if, as he described it, a 'new' collective bargaining process had been re-started, knowing what the Tribunal learned from the evidence which was that the Union position was softer than had been suggested, a few more meetings might have led to a resolution, but that was not the approach described by the Supreme Court – it mattered not that a deal might have been done. In fact, Mr Burns contended, the findings of the Employment Tribunal in this case were to the opposite effect, that is to say the offer came at a stage after the collective bargaining process had concluded, and that the right protected under the legislation did not include a right to 'additional' rounds of collective bargaining – rather the right was only to one round of bargaining after which the right protected, and the sanction for breach of that right, under section 145D fell away.

31. In the present case Mr Burns suggested that the decision of the Employment Tribunal should be read as concluding that the parties were close to an agreement and that if they had chosen to embark on a second round of negotiations, a resolution might have been achieved.

32. As support for that proposition, Mr Burns identified passages from the judgment of the Employment Tribunal which he said supported his position, for example the finding at paragraph 32 that there was a 'final' meeting at which a 'final and best offer' was made. The recording of these facts, suggested Mr Burns, made it clear that there could be no further meeting, the process was at an

end. The clarity of these findings in fact meant that there was no requirement for the case to be remitted back to the Tribunal to obtain further findings as to whether the process had been exhausted as a matter of fact. The position was so clear, submitted Mr Burns, that the Employment Appeal Tribunal could safely conclude that there was only one answer to the question before it.

33. Any alleged contradiction of that position emanating from the finding that parties expected that there would be a ‘next stage’ (see paragraph 46 of the Judgement) could be reconciled in the following way – properly understood, both sides did think there would be a next stage, if collective bargaining failed, and that was because both had forgotten that schedule 2 of the CBA’s did not apply to the collective bargaining itself and the reality of the situation, namely that the process was exhausted, could find support in the evidence of Mr McNally as set out by the Tribunal at paragraph 49 of its Judgement. Mr Burns reiterated his submission that if an employer believes they have exhausted the procedure, then it is lawful to avoid the application of section 145B and would provide a complete defence to the claim.

34. Mr Burns concluded his submissions on this chapter of the appeal by applying the analysis in **Kostal** to the facts of the present case – in so doing Mr Burns emphasised that there was no question in this case of the employer ignoring or bypassing the procedure, that the employer had not ‘dropped in and out’ of collective bargaining. Further that the legal analysis in the Tribunal Judgement followed that of the EAT in **Kostal** – since that reasoning had been rejected by the Supreme Court, then on that ground alone the appeal was bound to succeed. Finally, Mr Burns revisited the Scots Law question and reaffirmed his contention that in Scots Law, whether something is an offer or not is determined in accordance with an objective construction of its terms. On that basis, properly understood, the communication of the pay rise in this case was indeed a unilateral promise or obligation which was collateral to the main agreement. He relied upon **Walker on Contracts** at

paragraphs 2.10 and 2.33, McBryde on Contract at 2-10, 2-11, 2-20 to 2-24 and 2-28 as well as The Lord Advocate v City of Glasgow Council 1990 S.L.T. 721 as authority for that proposition.

### **Section 145D – what was the employer’s sole or main purpose?**

35. Finally, Mr Burns addressed me on the question of the employers’ sole or main purpose. In relying upon the evidence of there having been a ‘final meeting’, a ‘final offer’ and the evidence of Mr McNally that the negotiations had run their course and that the CBA procedure had been ‘exhausted’, Mr Burns invited me to conclude that the employers sole or main purpose had not been to achieve the prohibited result; rather that the evidence supported the conclusion that there were genuine business reasons for making the pay award to the employees, which was permissible under this section. Looked at as a whole, the application of the law as now understood following the decision of the Supreme Court in **Kostal** to the findings in fact made by the Employment led to the conclusion that the Employment Tribunal had erred in law and the appeal should be allowed.

### **Submissions for the Claimants**

36. Mr Segal opened his submissions by inviting me to conclude that resolution of this appeal could be found in three sentences:- firstly the causation test as set out in the first sentence of paragraph 71 of **Kostal** (see above), secondly the first sentence of paragraph 106 of the Judgment of the Employment Tribunal which is in the following terms “The respective positions of the two sides were sufficiently close that an observer would regard it as more, rather than less, likely that agreement would have been achieved by further collective bargaining”- to suggest, as Mr Burns had, that this should be read as meaning new rounds of collective bargaining was ‘imagining’ – and thirdly the final sentence of paragraph 109 of the Employment Tribunal Judgment “we found that the Respondents real purpose was as stated in Mr Currie’s email of 29 March 2017 – “ to engineer a way to get rid of Unite””.

37. Mr Segal contended that nothing in the appellants' submissions could undermine the two factual findings narrated above in the light of **Kostal**. The offer made by the appellants had the prohibited result, and their main purpose was to achieve that result.

### **The proper approach to construction**

38. Mr Segal developed that principal submission under reference to **Kostal** and submitted that it was central to the exercise undertaken in **Kostal** that such analysis was placed within the modern case law, including the decision in **Uber BV v Aslam** [2021] UKSC 5, [2021] ICR 657, in particular paragraph 70 of that decision in which Lord Leggatt described the exercise thus:-

**“The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose. In *UBS AG v Revenue and Customs Comrs* [2016] UKSC 13; [2016] 1 WLR 1005, paras 61-68 , Lord Reed (with whom the other Justices of the Supreme Court agreed) explained how this approach requires the facts to be analysed in the light of the statutory provision being applied so that if, for example, a fact is of no relevance to the application of the statute construed in the light of its purpose, it can be disregarded. Lord Reed cited the pithy statement of Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454 , para 35:**

**"The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."**

39. Mr Segal suggested that the use of the term ‘realistically’ was most apposite and developed that theme by submitting that although it was common ground that the purpose of section 145B was to protect article 11 rights, those rights were the same on both sides of the border. As Lord Leggatt had emphasised in paragraph 57 of **Kostal**, the right must be one of substance which must not be empty or illusory.

40. Mr Segal developed that argument by submitting that the protection offered must be of substance and not empty. In contrast, accepting the appellants' arguments would lead to the consequence that (a) an employer can avoid liability simply by imposing what it wants without substantive collective bargaining; (b) that the employer can argue that so long as it provides accommodation, notice of meetings and notes of agreed meetings (the essential requirements in the CBA's under scrutiny in this case) that would suffice to exhaust the collective bargaining process and thus defeat a claim under section 145B; (c) the employer could avoid liability if it is offended by the approach of the Union – because the Union does something objectionable the employer can take the view that there is no point in continuing and thus avoid liability regardless of the objective validity of that feeling; and finally (d) that the employer can avoid liability by stating that it is making a final offer – that would be the end of the collective bargaining process unless there was some procedure stipulating particular steps that were required as there was in the agreement under consideration in **Kostal**. Mr Segal submitted that it was important to note that the logic of the appellants position was that collective bargaining can be said to be exhausted where the employer presents what it says at that moment is a final offer. That, argued Mr Segal, was not what Lord Leggatt had said or implied at paragraphs 60 and 68 of **Kostal**. Had he wished to, Lord Leggatt could have said that there would be no difficulty ascertaining when collective bargaining is finished where either party makes a final offer, where in fact he had said the opposite, that there can be no clear conclusion to collective bargaining in the absence of an agreed procedure.

### **The proper context**

41. Mr Segal invited me to bear in mind two matters of context:- firstly a factual matter emerging from **Kostal** which was that the parties in that case had agreed a negotiating procedure consisting of a number of stages including escalation. Therefore the use of the word 'exhausted' by Lord Leggatt had to be seen in the context of a specified procedure that had run its course. The second matter of

context was that the majority in the Supreme Court had rejected the claimants argument that the prohibited result occurred whenever an offer occurred outside of collective bargaining, and that of the appellants that it only occurred when workers were induced, and instead had formulated its own test, holding that the prohibited result occurs when an offer is made outside of collective bargaining but only where, had such offers not been made, they would have been agreed by further collective bargaining – in other words the causation test. Since this was not an argument canvassed by or with parties there was no express consideration of how it would be applied where there was no defined negotiating procedure agreed.

42. Throughout the key paragraphs of Lord Leggatt’s analysis, it is clear he assumes that parties will have agreed a negotiating procedure akin to that in **Kostal**. That being so, reference to procedure being exhausted is in the context of collectively agreed procedure having run its course in that a final stage has been completed. These however are evidential questions that may not apply in many cases where employers, such as the appellants, do not agree to follow a specified procedure.

43. That said, Lord Leggatt makes it clear at paragraph 65 that the question of whether the acceptance of offers would have the prohibited result is ‘a question of causation’ and that “it may be difficult to say with certainty whether the collective bargaining process has been exhausted in any particular case”, but that this risk could be avoided with an agreement that delineates and defines the procedure to be followed.

### **Application of the Kostal test to the present case**

44. Applying that analysis to the present case, Mr Segal submitted that the CBA’s did not include a specific bargaining procedure. There was a form of dispute resolution procedure in schedule 2, but this did not apply to the collective bargaining negotiations. There were no minutes of meetings as provided for in the CBA’s, rather Mr Johnstone had taken handwritten notes. Therefore in the absence

of some sort of collectively agreed procedure the Employment Tribunal needed to determine the causation question. They did not at that time have the guidance of the Supreme Court, however the Tribunal had in fact made precisely the material findings at paragraphs 101 and 106. Therefore, Mr Segal submitted, when the appellant argues that the appeal must succeed because the Tribunal did not know what the Supreme Court would say, in fact the appeal must fail because without even knowing what the Supreme Court would say, the Tribunal had in fact done what the Supreme Court required.

45. It was important that none of these findings had been challenged as perverse, and they were in fact amply supported by other findings – Mr Segal referred by way of example to paragraph 46 and 107 of the Tribunal Judgement. Mr Segal continued by carrying out a critique of the appellants’ skeleton argument – I intend no disrespect to the detail of this part of the submission when I summarise it as inviting the conclusion that the appellants arguments were either misconceived, invited an interpretation of the findings in fact of the Tribunal which was not justified, or lacking in analysis. In particular any implicit suggestion that the analysis of the Employment Tribunal begins and end with that part of the EAT analysis in **Kostal** which the Supreme Court did not uphold is wrong; inasmuch as there might be said to be a deficit it is immaterial given that the Employment Tribunal applied the test exactly as the Supreme Court said it should.

### **Offer and Acceptance**

46. On the question of offer and acceptance, Mr Segal’s position was that the purpose of collective bargaining is to vary the terms of workers’ employment contracts by negotiation. That was a fundamental principle of Industrial Relations law. The relevant term of the claimants contracts in this case were set out at paragraph 6 of the Tribunal Judgment. The purpose of collective bargaining was to add to, subtract from, or change terms, especially pay, hours and holidays. Where an offer is refused and thereafter implemented, the employer is simply implementing its offer – as was in fact

stated in the letter from the employers reproduced at paragraph 53 of the Judgement. Mr Segal also referred to paragraph 111 of the Judgment of the Employment Tribunal in this regard, where the letter is described as ‘a statement of intention to vary’. That was a basic Employment Law concept, and that by continuing to work the workers accepted that variation. The key issue, both from a purposive perspective and by reference to the statutory language, is whether the employer’s implementation of the pay increase is capable of ‘acceptance’ by the relevant workers such that the ‘prohibited result’ arises. It would obviously defeat the purpose of s. 145B if an employer could, during a collective bargaining process, avoid liability simply by implementing its offer unilaterally, as opposed to seeking acceptance from its workers. The ‘fact’ of not requiring express acceptance is “of no relevance to the application of the statute construed in the light of its purpose” and it should therefore “be disregarded” (References to **Kostal**). Testing the matter another way, Mr Segal posed the rhetorical question as to whether it be said that the intention of workers to have the Union represent them should turn on whether the employer says “I offer you 2%” or “ I award you 2%”. Mr Segal suggested that was an untenable proposition.

### **The Scots Law question**

47. Mr Segal submitted it was trite law that interpretation of statutory provisions should be the same in both jurisdictions unless the statute provided otherwise. Reliance by the appellants upon **McNeill** was misconceived as it concerned the situation where an employee terminates his contract and discussed questions applicable to the law of contract, in which there were differences in Scots Law from that in England. In contrast the purpose of section 145B was to protect article 11 rights which were identical on both sides of the border.

48. The relevant law of offer, acceptance and variation was, Mr Segal submitted, identical in both jurisdictions. There was no conflict, rather it was well established that where an employer unilaterally

implements a variation of a contract it makes an offer that requires acceptance. That can be, but not always inferred by the workers continuing to work without protest. Mr Segal illustrated his point under reference to Abrahall v Nottingham City Council [2018] ICR 1425, at paragraphs 71,73,75,76, 87, 102 and 110.

49. In the present case in Scotland as in England the pay rise was an offer of a variation to terms, capable of acceptance, and acceptance readily to be inferred by the employees continuing to work in that relationship based in good faith. Under reference to Miller v Link Group, a decision of the Employment Tribunal promulgated by Employment Judge Sutherland on 9th March 2022, in particular paragraphs 29, 31, 32 and 34, Mr Segal submitted that whilst not binding on me, the analysis therein was entirely apposite and confirmed that Scots Law on offer and acceptance was materially identical to that South of the border.

50. In contrast, the appellants pinned their colours to the mast of there being a collateral obligation sitting alongside the contract between the employer and the employee – this gave rise to the possibility of there being a contract to pay ‘x’, alongside a contract to pay ‘x plus 2%’ under a collateral promise. Against a background of pay being the most fundamental part of the ‘work pay’ bargain the offer to pay could never be said to be collateral to that contract.

### **The prohibited result**

51. Mr Segal analysed the findings in fact that underpinned the conclusions at paragraph 109 and 112 of the Tribunal Judgment that the actions of the appellants did have the prohibited result. These were significant in the context of the Supreme Court analysis in **Kostal**, and consistent with that analysis. Whilst the findings might be most relevant to the employers’ purpose, it gave rise to an inference that their actions would have the prohibited result. Put another way, if your purpose is to get out of a relationship with the Union (paragraph 109) then that gives rise to an inference of

prohibited result. In that context the appellants' reliance on the reference to the 'final' meeting was misleading. Properly understood, the reference to the meeting on 17th March 2017 was a finding that it was final in that it turned out to be the last meeting between the parties. The Tribunal clearly found that agreement was likely if negotiations had continued (paragraph 106).

52. In conclusion, Mr Segal emphasised that the reference in **Kostal** to exhausting the bargaining procedure had to be understood as being in the context of a specified procedure and a situation where an employer genuinely believes that procedure is exhausted. In contrast, in a case like the present one, the employer's subjective view that collective bargaining is exhausted means no more in a context where there is no agreed procedure than appellants' submission that following mass meetings they considered that there was nothing more to be gained by further negotiation. Mr Segal described this as an 'anti-purposive' analysis. If, in a situation where there is no agreed procedure an employer can avoid section 145B by reaching the view that it does not wish to continue any further with collective bargaining, that it is fruitless, that cannot be a relevant let alone decisive factor in determining purpose, otherwise would never be a case where offers were unlawful.

53. In a short reply, Mr Burns emphasised firstly that the Tribunal had not applied the causation test enunciated by Lord Leggatt in **Kostal**, quite apart from the fact that their decision was 'infected' by reliance on the decision of the EAT which had been overruled in **Kostal**, secondly that the appellants had a proper purpose in making the award that they did, and thirdly that the CBA's did contain a process which had in fact been followed in this case.

### **Analysis and decision**

54. The decision of the majority in **Kostal** represents the first authoritative analysis of the purpose, and correct approach to the interpretation of, s 145B. It respectfully seems to me that for present purposes the two key aspects of the Judgement are, firstly, that the proper approach is a

purposive one, quoting as the Court did with approval, the passage from *Uber v Aslam* in the following terms:—"The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically", and secondly that the test to be applied to ascertain whether s 145B has been breached, is based on principles of causation.

### **Is s.145B engaged?**

55. There is in this case a prior question to be determined, which was not one raised in submissions before the Supreme Court in **Kostal**, or addressed in the Judgment. That is because of the particular factual scenario which existed in that case, where there was no dispute that an offer had been made. Here the question arises as to whether or not an 'offer' was made in this case which would have the effect of engaging s.145B at all.

56. Each party relied on the unchallenged findings in fact of the Tribunal for their own purposes. However, so far as the question of whether an 'offer' was made as envisaged by s.145B, the Tribunal concluded that it was. In so doing, it determined that the communication from the employers on 5th April 2017 was a statement of intention to vary employees' contracts as to pay, and that in continuing to work, the employees accepted that variation. Before the Tribunal, the appellants' submission was to the effect that there could be no offer because there had been no expectation of a *'quid pro quo'* in return. By their conclusion, the Tribunal rejected that contention.

57. That argument was not pressed before me, despite being adverted to in the appellants' skeleton. This is unsurprising standing the conclusion of the Supreme Court in **Kostal** on this particular point that there is no requirement for a 'quid pro quo' to be implied into the legislation.

58. Rather, Mr Burns focussed on the proposition that the letter of 5th April 2017, properly understood, was a unilateral promise, not requiring acceptance, which created an obligation collateral

to that contained in the contract between the appellants and the claimants. Mr Segal developed the position advanced before the Tribunal on behalf of the claimants which was to the effect that the contract was a bilateral one which could only be varied by offer, acceptance and consideration (both acceptance and consideration arising or being inferred from the workers continuing to work under the new arrangements). This was the argument ultimately accepted by the Tribunal. Before me, that argument was amplified to be, in summary, that it would offend against basic principles of Employment Law to suggest that something as fundamental as the ‘work pay’ bargain between employer and employee could be varied in a way extraneous to that contract by making a unilateral promise creating an obligation collateral to that bargain.

59. I agree with Mr Segal, both as a matter of principle, and on an analysis of the findings in fact made by the Tribunal. I can discern no error in the conclusion, in paragraph 111, that the word ‘offer’ should be given its ordinary meaning, and that the letter of 5th April 2017 was a statement of intention to vary employees contracts as to pay, which was accepted by the employees continuing to work. Although not expressly stated by the Tribunal, I am of the view that their conclusion is fortified by the express language of the letter of 5th April which states their intention to “implement our pay increase as described in our latest offer backdated to 1st January 2017 (emphasis added).” The plain reading of the letter is consistent with an implementation of an offer already made with the result that the employees’ contractual terms as to pay would be varied. The construction contended for by the appellants would be inconsistent with the language used in their own communication and ultimately artificial. The Tribunal reached a decision that was open to it on the facts it found established. There is nothing in the decision in **Kostal** which bears directly on, or is inconsistent with, this conclusion. For completeness, although not binding on me, I agree with the analysis in **Miller v Link Group** on this question so far as the nature of an offer in Scots Law is to be understood. Read short, the key principles are that “an offer is a proposal from one party which is sufficiently definite in its terms to

form a contract and also manifests an intention to be legally binding on the offeror should it be accepted by the party to whom it is addressed” (SLC review para 3.5) and “an offer may be made and accepted orally or by conduct”....”the use of the word ‘offer’ is neither necessary nor necessarily determinative” (**McBryde on Contract**, 6-05, 6-31). It follows that the appeal so far as predicated on a contention that s.145B is not engaged, on the basis that there was no offer capable of acceptance, fails.

### **‘Prohibited Result’**

60. If the letter of 5th April 2017 contained an offer, did it achieve the prohibited result? The Tribunal concluded that it did. Their conclusions are found at paragraphs 112 of the Judgment and are in the following terms:-

**“We found that the Respondents' offer to their employees did have the prohibited result. The employees' pay with effect from 1 January 2017 was determined by acceptance of the offer to award an increase and not by collective bargaining. There was in effect no other realistic way for the employees to proceed. The Respondents had made a unilateral decision, had given notice to terminate the CBAs and had determined to withhold payment of bonuses until the increase in basic salary had been decided upon. The employees had received no increase in basic salary for three years and bonuses promised for payment in April 2017 were due to be paid”.**

61. The appellants’ position is that this conclusion cannot survive the decision in **Kostal**. Support for that position is said to come from the contention firstly that the Tribunal have not applied the causation test set out in **Kostal**; secondly that reliance was placed upon the decision of the EAT in that case, which was overturned by the Supreme Court; and thirdly, the findings in fact support the conclusion that at the time the offer was made, negotiations had come to an end, and therefore that there was nothing impermissible in making the offer contained in the letter of 5th April 2017.

62. I deal with each of those propositions in turn. Self-evidently, the Tribunal have not directly applied the test as enunciated in **Kostal**, since their decision predates that of the Supreme Court. The negotiations in the present case took place against a background of a much less structured agreement than that under discussion in **Kostal**. The key unchallenged conclusions of the Employment Tribunal are found at paragraphs 101 and 106 and are, in summary, that following the final meeting on 17 March 2017, “Viewed objectively, the parties were close to agreement” and “The respective positions of the two sides were sufficiently close that an observer would regard it as more, rather than less, likely that agreement would have been achieved by further collective bargaining.” These findings are, presciently, so close in language to the test enunciated by the Supreme Court that I conclude that the Tribunal has reached a conclusion that is entirely consistent with the correct legal test as we now know it to be and thus there is no error of law in this aspect of their reasoning.

63. Next, the appellants submit that the reasoning underpinning that conclusion is itself flawed in respect that the Tribunal relied upon the decision of the EAT in **Kostal**. This can be seen most obviously in paragraph 105 of the Judgment where a specific conclusion is reached that the employers’ reaction was neither ‘reasonable’ nor ‘rational’ in the context of pay negotiations. This is the language used by the EAT in its’ determination, and overruled by the Supreme Court at paragraph 47 of **Kostal** where Lord Leggatt states:-

**“Without any clear criteria, however, with which to assess the reasonableness of the employer’s conduct and motives, this is not a workable test and is incapable of providing the legal certainty which Parliament would naturally expect, to provide as to what offers are and are not lawful.”**

The appellants are correct to say that the Tribunal referred to the test as enunciated by the EAT which did not find favour with the Supreme Court. However, look at as a whole, the Tribunal has made clear and unchallenged findings in fact that permitted it to draw the conclusions in paragraphs 101

and 106 which are entirely consonant with the test now articulated by the Supreme Court. Their reasoning and ultimate conclusions do not depend upon the reference to the language of the EAT in paragraph 105 and their conclusions are not vitiated by the use of that language.

64. The appellants also argue that any conclusion that the Prohibited Result was obtained in this case is flawed having regard to the findings in fact that support the inference that negotiations were at an end. In particular the appellants rely upon the findings that there was a ‘fifth and final meeting’ (paragraph 32), a ‘final and best offer’ (paragraph 33), and the recording of the evidence of Mr McNally at paragraph 49. It seems to me that this submission is misconceived as well as ignoring significant other findings and conclusions that suggest otherwise. Read fairly, the reference to the ‘final meeting’ is simply recording a fact – this was the last meeting before events took the course that they ultimately did. The ‘final and best offer’ has to be looked at in the whole context of the unchallenged evidence, including findings that Mr Johnstone of the respondents felt that they were close to agreement (paragraph 32), that ‘the difference was not worth falling out over’ (paragraph 88) and that the appellants (through their witness Mr Banham) accepted that the appellants’ briefing note was misleading and ‘gave rise to an expectation’ of escalation of the negotiations. Mr McNally’s evidence recorded at paragraph 49 reflected a subjective view which the Tribunal concluded was not borne out by an objective analysis of the whole of available evidence which supported the conclusions set out at paragraph 101 and 106. Those were conclusions it was entitled to reach, and once again I can discern no error of law in their approach. In this context I also agree with the submission made by Mr Segal that it would be ‘anti-purposive’ to hold that an employer could avoid its obligations under s 145B simply by stating that any particular offer was a ‘final’ one. Both parties were in agreement that where there is no structured agreement as in **Kostal**, the proper approach is to ascertain, objectively, whether or not negotiations were as a matter of fact at an end. I concur, and

consider that this was the approach taken by the Tribunal in this case when they concluded that parties were close to an agreement.

65. It follows that the Tribunal had evidence before it to permit it to draw the conclusions that (a) looked at objectively, collective bargaining negotiations were not at an end at the time the offer of 5th April 2017 was made and (b) that the offer, implicitly accepted by the workers when there was ‘no other realistic way to proceed’, had the result that the workers’ terms and conditions as to pay were not, or no longer determined by collective bargaining when it was “more, rather than less, likely that agreement would have been reached by further collective bargaining”. I can discern no material difference between the language of that conclusion and the language employed by Lord Leggatt in **Kostal** at paragraph 65. Therefore the conclusion that the offer achieved the prohibited result was one open to the Tribunal and is consistent with the test in **Kostal**.

#### **What was the sole or main purpose in making the offers?**

66. The Tribunal analysed this question at paragraphs 113 to 118 of its Judgment. The appellants’ position, consistent with its submissions to the Tribunal was that the offer was a permissible offer in terms of s 145B, and in any event was made for business purposes and thus did not contravene the relevant provisions of s 145D. It is worth reiterating that this is a case where the CBA’s were not as structured as those in **Kostal** and therefore the argument for the company in the Supreme Court that ‘it may be difficult to say with certainty whether the collective bargaining process has been exhausted’ might have some resonance here. In such a case, the Supreme Court determined that the question of the employers’ purpose in making the offer becomes very relevant.

67. The Tribunal acknowledged that the appellants had engaged in meaningful collective consultation with the union. However it also concluded at paragraph 115 that the Respondents (as they then were) did not wish to use the arrangements agreed with Unite for collective bargaining and

that the email from Mr Currie made this clear. It also found that when the offer was made on 5th April 2017 the appellants did not wish to use the arrangement agreed with the union nor to enter into the arrangements proposed by the union for collective bargaining and that their termination of the CBA's was clear evidence of this. These are findings under s 145D(4)(a) and(b) for which there was ample evidence. Put another way, to quote from **Kostal** at paragraph 69, "this supports the inference that, where the acceptance of individual offers would by-pass arrangements agreed with the union for collective bargaining, such acceptance would have the prohibited result."

### **The Scots Law question**

68. The foregoing conclusions are sufficient to dispose of matters. However, for the sake of completeness and insofar as not already canvassed under the analysis of offer and acceptance above, I should indicate that I prefer the analysis of the claimants to that of the appellants on this question. For the reasons already set out above, I do not consider that the concept of unilateral promise has relevance in the context of a bilateral employment contract where what is sought to be varied is a fundamental term such as pay. Further I agree that the proper approach is a purposive one, informed by the realities of the particular situation. Here, as explained in **Kostal**, the purpose of section 145B is to protect rights enshrined in article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Those rights, as Mr Segal correctly submitted, are the same both North and South of the border. Thus any reliance in this context upon particular aspects of the Scots Law of contract is misconceived.

### **Disposal**

69. The unanimous Judgment of the Employment Tribunal was that the claims brought by the claimants against the appellants under section 145B of the Trade Union and Labour Relations

(Consolidation) Act 1992 were well founded. For the foregoing reasons, I can identify no error of law in the reasoning underlying that Judgment. The appeals in each case are accordingly refused.