EMPLOYMENT TRIBUNALS

Claimants: Mr R C Wilson & Others

Respondent: Synthite Ltd

Heard at: Cardiff

On: 6, 7, 8 and 9 November 2023
4 December 2023 - panel only deliberation

Before: Employment Judge Cawthray
Ms. Y Neves
Mr. K Gotbi-Ravandi

Representation
Claimant: Mr. Rushton, Counsel
Respondent: Mr. Grundy, Counsel

CORRECTED JUDGMENT

The unanimous decision of the Tribunal is:

The Respondent did make an inducement relating to collective bargaining in breach of section **145B** Trade Union & Labour Relations (Consolidation) Act 1992.

The Respondent is ordered to pay each claimant in the table at paragraph 3 below £4,554.00.

CORRECTED REASONS

Introduction

1. This claim is brought by 49 claimants against Synthite Ltd, the Respondent. The claimants are listed in the table at paragraph 3 below, and are referenced collectively as the Claimants throughout.

2. All the Claimants, at the material time, namely June 2022, were members of the trade union, Unite the Union, hereinafter referenced as the Union.

3. Mr. Robert Clive Wilson, known as Clive, is the Lead Claimant.

1601383/2022	Robert Clive Wilson
1601385/2022	Dean Andrews
1601386/2022	Wayne Barter
1601387/2022	Nerius Berlingis
1601388/2022	Michael Coleclough
1601389/2022	Kevin Davies
1601390/2022	Simon Davies
1601391/2022	Christopher Dobson
1601392/2022	Gordon Dodd
1601393/2022	Kieran Douglas
1601394/2022	Alan Ducker
1601395/2022	Phil Evans
1601396/2022	John Galeandro
1601397/2022	Neil Galeandro
1601398/2022	Mark Gee
1601399/2022	Gregory Homan-Russell
1601401/2022	Kieran Homersley
1601402/2022	Nathan Homersley
1601403/2022	David Johnson
1601404/2022	Kevin Johnson
1601405/2022	Russel Johnston
1601406/2022	Kevin Jones
1601407/2022	Llifon Jones
1601408/2022	Neil Jones
1601410/2022	Simon Jones
1601411/2022	Kieron Keenan
1601412/2022	Christopher Kregar-Ruck
1601413/2022	Paul Meese
1601414/2022	Kenneth Moffatt
1601415/2022	Stephen Moore
1601416/2022	Neil Mcmanus
1601417/2022	Teresa Peate
1601418/2022	Daneil Preece
1601419/2022	Julie Richardson
1601420/2022	Christopher Robinson
1601421/2022	Peter Rowley
1601422/2022	Anne Seville
1601423/2022	Shaun Sewill
1601424/2022	Jamie Sharp
1601425/2022	Joanna Thomas
1601426/2022	David Threlfal
1601427/2022	Michael Trickett
1601428/2022	Callum Wellings
1601429/2022	Kyle Wellings
1601430/2022	Craig Williams
1601431/2022	Dylan Williams
1601432/2022	Gareth Williams
1601433/2022	Ian Williams
1601434/2022	Leonard Yates

Evidence & Procedure

4. At the start of the hearing Mr. Rushton and Mr. Grundy made some comments regarding the draft List of Issues. Whilst the Tribunal were reading, Mr. Rushton and Mr. Grundy agreed and produced a List of Issues. The issues to be considered are set out below.

5. The following witnesses gave evidence on behalf of the Claimants:

   Mr. Robert Clive Wilson - Lead Claimant, Mr. David Griffiths – Regional Officer, Ms. Jo Goodchild – Regional Officer and Ms. Elizabeth Lewis – Regional Officer.

6. The following witnesses gave evidence on behalf of the Respondent:

   Mr. Kevin Bardsley - Managing Director, Mr. David Kelso – Finance Director and Ms. Susan Wild – HR Manager.

7. All witnesses had provided a written witness statement and were cross examined. The Tribunal asked some witnesses questions as it considered necessary.

8. The parties had agreed a bundle. The main bundle contained 160 pages. A further, additional bundle produced by the Respondent containing 70 pages was provided.

9. During the course of the hearing witnesses on both sides referenced various documents that had not been disclosed and were not included in the Bundle or the Additional Bundle.

10. Mr. Rushton and Mr. Grundy both provided a skeleton closing argument, together with case authorities, and gave oral submissions.

11. The Tribunal was not able to complete deliberations on the final day of the hearing, and reconvened without the parties on 4 December 2023 to conclude deliberations.

12. No adjustments were required for any of the witnesses.

Issues

Claim Issues

13. The list of issues agreed by the parties is set out below.

14. Was Unite the Union recognised by the Respondent at the material time?

15. Did the Respondent have a collective agreement with Unite the Union for the purpose of collective bargaining connected to pay as per section 178 of the

Trade Union and Labour Relations (Consolidation) Act 1992 (the Act) at the material time?

16. Did the Respondent make an offer or offers to the claimants within section 145B of the Act and, if so, when?

17. If so, did or would acceptance of such offer or offers have the prohibited result under section 145B(2) of the Act, that the claimants' terms of employment, or any of those terms, would not (or would no longer be) determined by collective agreement?

18. In respect of issues 3 and 4 above, had such offers not been made was there a real possibility that the increase in pay would have been determined by collective agreement. [Kostal UK Ltd v Dunkley and others [2022] IRLR 66]

19. Was the Respondent's sole or main purpose in making the relevant offer or offers to achieve that prohibited result?

Jurisdiction – claim out of time

20. Was the claim filed within the 3-month time limit set out in section 145C of the Trade Union and Labour Relations (Consolidation) Act 1992?

21. If not, was it reasonably practicable for the claim to have been filed in time?

Findings of Fact

History of relationship with Unite the Union

22. The Respondent is a chemical manufacturer. It employs in the region of 100 - 120 employees and approximately 50% are trade union members.

23. Mr. Kevin Jones was Managing Director from 1 July 1999. Prior to that, Mr. Edward Thurgur was the Managing Director. It is not known when Mr. Thurgur started in post.

24. Prior to 2007 the trade union that engaged with the Respondent was the Transport and General Workers Union **(TGWU).** TGWU and Unite merged in 2007. Reference to the Union prior to 2007 means reference to TGWU.

25. From 1999, the majority of the Union's dealings with the Respondent were via Mr. Jones. The Union and the Respondent's management had a good working relationship.

26. Ms. Elizabeth Lewis was a full time Regional Officer for TGWU from 1997. Ms. Lewis was assigned the Respondent in 1998. Her evidence is that in 1998, when she first became involved with the Respondent, the Union had been recognized for some years previously. She had not seen a written recognition agreement. Ms. Lewis remained in post until her retirement in 2019, but was not assigned to the Respondent from 2008 onwards. Ms. Lewis had not reviewed the contracts of employment for the Union members employed by the Respondent.

27. Ms. Lewis, in her witness statement, references a signed agreement dated 1992. This agreement is headed "Relief Crew Continuous Shift Operation". It states that it is applicable to shift personnel in the Formaldehyde Department and deals with shift working patterns. We do not find this document to be a recognition agreement, but consider it to be an agreement reached between the TGWU and the Respondent regarding shift working.

28. Ms. Lewis attended the Respondent on various occasions between 1999 and 2007 in the months of April, May and June. She considered there to be a strong union presence in the years she was involved and that her main involvement was in relation to annual pay discussions.

29. Discussion regarding pay rises generally took place around April, May and June each year. Ms. Lewis discussed pay with Mr. Jones. The discussions, in some years, involved negotiation on the amount offered and sometimes the offers were put to ballot. The negotiations between Ms. Lewis and Kevin Jones were generally amicable. Ms. Lewis' unchallenged evidence is that Mr. Jones' starting point in pay discussions was that there was no money available for pay rises. Discussions would take place until a figure was agreed. She describes Mr. Jones as working in a way as to wanting to get things done.

30. In the bundle there is a Wages Settlement document for the year 2000 signed on behalf of T&GWU Branch Secretary and by Kevin Jones on behalf of the Respondent.

31. There is no similar document for 2004 in the Bundle, but there is an email from Kevin Jones dated 29 April 2004 stating*: "T & G union members have accepted company pay offer of 3.5%, as usual can you type up the agreement for signature."*

32. On 13 July 2006 Ms. Lewis sent Kevin Jones a letter stating "I am pleased to tell you that following a ballot the membership has accepted the company offer". The letter has a handwritten note on it which states *"Sue, 2.7% increase. Kevin".*

33. In the bundle there is a 2006 Wages Settlement document which was signed on behalf of the TGWU Branch Secretary and by Mr. Jones on behalf of the Respondent.

34. On 4 July 2007 Ms. Lewis sent Mr. Jones a letter, in the letter it says *"The Company's increased offer of 3.4% has been accepted by our members in a recent postal ballot."*

35. In the bundle there is a 2007 Wages Settlement document which was signed on behalf of the TGWU Branch Secretary and by Mr. Jones on behalf of the Respondent.

36. Mr. Jones, engaged with and discussed pay with Ms. Lewis. Based on Ms. Lewis' evidence and the documentation, it appears that in some years negotiation on the amount of pay rise offered did take place.

37. In some years, prior to 2008, a ballot on the pay increase did not take place. Ms. Lewis only became involved in pay negotiations that were not managed and completed by local trade union representatives. Ms. Lewis stated, and it is accepted, that there were some years when Mr. Jones had direct discussions with local trade union representatives where the pay increase was directly agreed and no ballot was undertaken.

38. Robert Clive Wilson, the Lead Claimant, has been employed by the Respondent since April 2013. In 2016 he became the Branch Chairman for the Union. Mr. Wilson would meet Mr. Jones to discuss pay between April and June each year. Mr. Jones would make contact to arrange a meeting. Between 2016 and 2021 the pay discussions took place between local trade union representatives and Mr. Jones, no full time trade union officials were involved. In one year, Mr. Wilson negotiated with Mr. Jones a pay increase from an offer of 2.5% to 2.75%.

39. Mr. Wilson met with Ms. Sue Wild, HR Manager, on a couple of occasions to talk about more minor matters.

40. Mr. Wilson's oral evidence, in response to cross examination, was that there had been three similar pay rise agreements to those for 2000, 2006 and 2007 signed off by local officials. He says he provided these to his solicitor but they are not in the Bundle.
41. Ms. Jo Goodchild is a full time Regional Officer for the Union. She started in post in October 2015 and was allocated the Respondent in around 2017. Her view was, following her first meeting with local trade union representatives and Mr. Jones, that there was a good relationship between the Union and the Respondent.

42. In 2017 the Union moved to a digitalized system and relocated offices. A temporary member of staff was engaged to scan documents on the Unions U drive. The U drive does not contain a copy of any written recognition agreement.

43. In 2017 Ms. Goodchild discussed updating the recognition agreement between the Union and the Respondent with the local representatives. Ms. Goodchild's evidence is that the Union was recognized and there had been a recognition agreement in place, but that a copy of the document couldn't be found by the Respondent or the Union, as it had been lost.

44. In May 2017 there was email correspondence between Mr. Craig Galeandro, Branch Secretary and Ms. Wild for the Respondent. This email chain was about a Facility Agreement, and Ms. Wild stated *"I've asked Kevin about the facility agreement and he said we have never had the formal agreement – that we have never had the need for one".* A facility agreement is an

agreement that sets out the procedures for time off for trade union duties and use of facilities.

45. Mr. Galeandro was provided with a draft written recognition agreement by the Respondent in or around August 2017. Mr. Galeandro emailed Ms. Goodchild a copy of the draft on 9 August 2017. Ms. Goodchild reviewed the draft, which was about 2 pages long, and provided Mr. Galeandro with a copy of the Unions model template, which was longer and more detailed.

46. Ms. Goodchild met with Mr. Jones in or around September 2017 to discuss the draft recognition agreement. Mr. Jones said he would need to discuss the matter with Mr. David Kelso, current Finance Director, and that he was on holiday. Ms. Goodchild did not discuss the agreement with the Respondent again but was engaged in discussions and correspondence with the Respondent, including Ms. Wild, HR Manager, regarding holiday pay from November 2017 through to 2018. Ms. Wild said she replied in writing to Ms. Goodchild following the Respondent obtaining legal advice.

47. The correspondence dealt with addressing holiday pay following a change in the law. The correspondence references options sought by the Unions members. Mr. Jones contacted Ms. Goodchild's office directly on 6 December 2017 seeking to arrange a meeting to discuss the holiday pay matter.

48. Ms. Goodchild met with Mr. Kelso in early 2018 and following discussion and emails in which Mr. Kelso provided proposed calculations, the matter was resolved.

49. Mr. Wilson has been permitted to attend trade union training. It is not clear how often he attended such training. He was paid for time spent on union activities/training on at least one occasion. On the information available we are unable to make specific findings on the volume and dates of such activity/payment. Ms. Goodchild 's view is that although possible, she has never known an employer that does not recognize a trade union to pay for training for staff.

50. Ms. Goodchild also discussed other matters with Mr. Jones on occasion such as notice boards, office space for Union paperwork and health and safety issues. At some points, the trade union representatives were provided with a facility room.

51. Between 2017 and 2020, when Ms. Goodchild was assigned to the Respondent, Ms. Goodchild was not directly involved in annual pay discussions as they were dealt with by management and Mr. Wilson and Mr. Galeandro, as the local representatives.

52. The Respondent operates a check off system for payment of trade union membership fees via payroll. Not all the Union's members pay via payroll, some pay via direct debit. If a new employee joins the Union, the Union sends Ms. Wild a letter and she makes arrangements for check off.

53. We find that discussions regarding pay, when they took place between Union representatives and management, usually occurred in April, May and June. There is no evidence of any ballot taking place between 2017 and 2021.

During 2020 and 2021 discussions with members took as place as possible noting the pandemic.

54. Mr. Jones passed away suddenly in December 2020.

55. Mr. Wilson says that after Mr. Jones passed away Mr. Wilson asked Mr. Kelso if there would be any changes to collective bargaining following the separation of two companies, and Mr. Kelso told him there would not be any changes. Mr. Kelso recalls a brief passing conversation in which Mr. Wilson asked him if there would be any changes to terms and conditions, and does not recall Mr. Wilson using the phrase collective bargaining. The use of the phrase collective bargaining used by Mr. Wilson in his witness statement was not challenged in cross examination. We accept the conversation as described by Mr. Wilson took place.

56. In March 2021, Mr. Kevin Bardsley became the Managing Director of the Respondent. Prior to starting this position Mr. Bardsley had not worked at the Respondent and had no knowledge of the Respondent's practices.

57. Mr. Bardsley was previously the General Manager of Dynea UK which employed approximately 20 people. He has no experience in a workplace that recognized a trade union.

58. At the commencement of his employment, Mr. Bardsley had informal discussions with Mr. Kelso, Ms. Wild and Mr. Niazi (Board Member) regarding the approach to pay rises. He formed the view that the Board decided the sum and informed staff.

59. Mr. Kelso and Ms. Wild had no involvement in pay rise discussions, and were not aware of meetings or discussions between Mr. Jones and the Union. Ms. Wild, in her capacity as HR, would send employees individual letters notifying them about the pay rise and change to their salary as directed by management.

60. In April 2021 Mr. Wilson met with Mr. Bardsley. There is a factual dispute as to how this meeting came about. Mr. Wilson says a letter was left for him a pigeon hole inviting him to a meeting and Mr. Bardsley says Mr. Wilson sent him an email titled "catch up". Neither document is in the Bundle. In any event, we do not find this to be a chance chat, and was a meeting. Mr. Bardsley knew that Mr. Wilson was a trade union representative before meeting with him.

61. At the meeting in April 2021 Mr. Bardsley and Mr. Wilson discussed various matters. At the meeting Mr. Bardsley told Mr. Wilson that he thought the Respondent was willing to give a pay rise of 2.75%. Mr. Wilson spoke to members in various departments about the pay rise.

62. The workforce were happy to accept a pay rise of 2.75%, noting this was still during the covid pandemic. No ballot took place. The pay rise was put in place.

63. During the meeting it was also discussed that Mr. Bardsley and Mr. Wilson would meet every 3 or 4 months. Mr. Wilson raised the idea of getting an updated recognition agreement in place. Mr. Bardsley said he would look into

the matter and asked Mr. Wilson to ascertain if there was already a document in existence.

2022 Pay Award

64. Prior to 10 April 2022 Mr. Bardsley and Mr. Wilson arranged to meet. A meeting took place on 10 April 2022 and Mr. Simon Davies, Unite Chairman, also attended. Mr. Wilson says that Mr. Bardsley told them the Respondent had budgeted for a 4% pay rise. Mr. Bardsley says he cannot recall the figure put forward but does not deny he said 4%. We find he did give the Union representatives a figure of 4%.

65. Mr. Wilson asked for financial figures in order to be able to consider and put the offer to members.

66. Mr. Davies also presented a draft recognition agreement at the meeting.

67. Mr. Wilson's evidence is that some months prior to this meeting he gave Ms. Wild a hard copy of the draft recognition agreement and that she lost it. Ms. Wild's evidence is that she was not given a draft recognition agreement and has not lost such a document. In the absence of any other evidence, we are unable to make a definitive finding of fact on this point.

68. There were no minutes of this meeting, or the meeting in April 2022, but we find them to be meetings in which pay and other Union and work related matters were discussed, and were not informal chats.

69. Mr. Wilson and Mr. Davies had been informed of a complaint about night shift pay in the Chemical department, which is a different department to that they worked in. Staff working the nightshift were annoyed they were only being paid £4.00 more that the day shift. They considered this to be a collective grievance and raised the matter with Mr. Bardsley. Mr. Bardsley told them he would look into the matter. Mr. Bardsley does not consider the matter to be a collective grievance, and says staff contacted Ms. Wild directly and was not a Union matter but accepts the matter is still not resolved.

70. On 12 April 2022 Mr. Davies emailed Ms. Wild stating:

> *"As you probably know we're starting pay negotiations on 26th April. To give us the best chance of putting an acceptable proposal forward, with the current increases in national insurance and the cost of living. Please can you send me a breakdown of all site wide basic hourly rates and all shift differentials. I'd need these for all departments, to discuss with the area representative."*

71. This was the first time a trade union representative had asked Ms. Wild for pay information of this nature, but prior to his passing Mr. Jones managed pay discussions entirely.

72. Mr. Wilson and Mr. Davies understood that a further meeting would take place on Friday that same week, but this did not take place and Mr. Bardsley said there was nothing to discuss. Mr. Wilson and Mr. Davies then contacted the Union's Regional Officer, Dave Griffiths.

73. A board meeting took place 5 May 2022, although the minutes appear to be dated 1 December 2022. In relation to the pay offer, the minutes state:

> *"KB advised that there has been a newly appointed Regional Union Representative and appears to have a remit to increase union membership. KB confirmed that current membership is only 32% of the workforce and there is no Union Recognition Agreement in place. Initial discussions with local representatives have been undertaken and KB advised he would like to settle at 5%."*

74. A meeting took place with Mr. Wilson, Mr. Davies and Mr. Bardsley on 10 May 2022. Mr. Bardsley does not recall whether or not he said that he would not sign the newly drafted recognition agreement and would not deal with the collective grievance, we find that he did say these things in the meeting. Mr. Bardsley told them the pay award offer would be 5%. Mr. Bardsley used the word offer in response to cross examination.

75. Following this meeting, on 17 May 2022 Mr. Davies sent Mr. Bardsley a copy of a "Pay Negotiations Update" bulletin. In the same email Mr. Davies advised Mr. Bardsley that *"I've been around talking to members and non-members and the general Consensus is that 5% would probably be accepted if the pay discrepancy issue was dealt with and all operators were placed on an even standing with hourly base rates".*

76. Mr. Bardsley replied on the same day, saying he would review and come back shortly. A couple of hours later Mr. Bardsley emailed with comments, the key points being:

- He notes there may have been more meetings between the trade union and members but that there had only been two meetings between the Union and the Respondent
- Pay was being treated separately to the other issue, often referred to as the collective grievance, relating to the shift pay in the chemical team, and that issue would be responded to in due course.
- Asked whether information about unprecedented levels of capital expenditure had been provided to members.
- Stated: *"As a reminder, we mentioned during discussion, there is no collective bargaining agreement in place with non-union members."*
- Asked for the total number of union members.

77. Mr. Wilson and Mr. Bardsley exchanged emails on 18 May 2022. Mr. Wilson explained that he considered there had been no information given to relay to members and had not seen the figures and that Dave Griffiths, Regional Officer, would be getting involved. In an email from Mr. Bardsley to Mr. Wilson he stated**:** *"It is not that anyone was unhappy with the announcement, more as mentioned, that it was to be clear, on what had been discussed previously to avoid any misunderstandings".* It also commented about facilities and room and closed by stating: *"At this point there is nothing new to discuss, suggest you go ahead with your planned ballot and we can pick things up from there – please keep us informed on the outcome".*

78. At some point in or around mid-May 2022 the Union placed the notice that had been provided to Mr. Bardsley on the notice board.

79. In his witness statement, Mr. Bardsley states: "*After that meeting there was a notice put up on the staff board that stated there were extensive conversations and meetings between me and the union. This was not true and changed the dynamic of everything. I emailed Simon about this. This changed the tone of everything and made me treat this much more formally. The notice was rubbish. There had been no "offer" as the notice implied that there was, and it claimed that we had been negotiating heavily."*

80. The tone of his email response on 18 May 2022 does not accord with comments in his witness statement.

81. Mr. Bardsley now seeks to categorise pay discussions with Union representations as conversations/informal chats, and states he does not consider the discussions to have been negotiations. It is noted the discussions may have took place in an informal manner, but we do not agree that they were simply general chats and given the topics of discussion and persons involved.

82. On 19 May 2022 Mr. Griffiths emailed Mr. Bardsley and asked for details of the offer. Mr. Bardsley replied within which he stated *"the company plan to award all staff a pay increase of 5% effective 01st June 2022. I am not aware of any previous annual pay offers going to ballot but any decision to do so on this occasion is entirely the decision of the union and its' members."* Mr. Griffiths replied stating that he was a "*bit confused as to how Pay ballots have been done in the past?"* but that it would be organised and arranged as quickly as possible.

83. Members were notified, in a notice, stating that a 5% offer had been made and that a ballot would take place on 6 June 2022.

84. Mr. Davies informed Mr. Bardsley and others, on 26 May 2022 that the notice had been put up.

85. The majority of the members rejected the offer of 5%. On 6 June 2022 Mr. Davies emailed Mr. Bardsley informing him of the ballot results and asked to arrange further negotiations to discuss the way forward.

86. Mr. Bardsley replied later that day, and within his response stated:

> *"Without union recognition or collective bargaining agreements the company has to consider the position of all employees.*
>
> *The members of the union constitute the smaller proportion of the total workforce and therefore the larger majority must not be unfairly disadvantaged.*
>
> *To that end the company will be putting through the 5% rise for all employees effective from the 01st June 2022*

As mentioned during our two conversations on the company pay award. 5 % is what is being awarded and there is no more money available to increase that.

At this present moment there is nothing further to discuss on the matter."

87. At no point prior to 6 June 2022 did Mr. Bardsley say anything or act in any way that indicated or implied that he did not consider the Union to be recognised.

88. On 7 June 2022 Mr. Griffiths emailed Mr. Bardsley and told him that if pay was imposed in this manner he would ballot for Industrial Action. Mr. Bardsley replied the following day, 8 June 2022. He stated that the Union was not recognised and that it was custom and practice for the company to set pay awards mid-year.

89. The Respondent increased salaries at some time after 6 June 2022 but the exact date is not clear. At some point in June 2022, but after 6 June 2022 Ms. Wild sent staff individual letters confirming their increase in salary. The letters are headed *"Employment Protection (Consolidation) Act 1978".* They state: *"I am pleased to inform you that the Board of Directors has authorised an increase in your salary from [redacted] to [redacted] per annum, effective from 1 June 2022."*

Contracts of Employment

90. The Respondent provided Mr. Wilson with a Summary of Employment Terms and a Contract of Employment. The Contract of Employment was signed by the Claimant on 12 October 2020. This is a standard form of contract given to employees.

91. Paragraph 20 of the Summary states: *"Collective Agreements: There are no collective agreements with trade unions that affect the terms and conditions of your employment".*

92. Clause 3 of the Contract of Employment states*: "The Company shall pay you at the rate and intervals stated at paragraph 8 of the Summary. The Company reserves the right to alter the time, method and frequency of payment by issuing you with reasonable notice of any such change. The Company shall review your pay annually at its discretion. Receipt of a pay increase one year creates neither the right to nor expectation of a pay increase in any subsequent year".*

93. There is no incorporation of any collective agreements in the Summary or Contract of Employment.

General

94. Generally, there appears to be missing documents and poor document administration on both sides.

Law

95. Set out below are the relevant legislative provisions and a summary of the key legal principles and/or reference to the case authorities considered.

96. Trade Union & Labour Relations (Consolidation) Act 1992 (TULRCA):

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.

145C Time limit for proceedings

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

(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.

(2)Section 292A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (1)(a).

145D Consideration of complaint

(1) On a complaint under section 145A it shall be for the employer to show what was his sole or main purpose in making the offer.

(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.

(3) On a complaint under section 145A or 145B, in determining any question whether the employer made the offer (or offers) or the purpose for which he did so, no account shall be taken of any pressure which was exercised on him by calling, organising, procuring or financing a strike or other industrial action, or by threatening to do so; and that question shall be determined as if no such pressure had been exercised.

(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.

145E Remedies

(1) Subsections (2) and (3) apply where the employment tribunal finds that a complaint under section 145A or 145B is well-founded.

(2) 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 **£4,554** (subject to any adjustment of the award that may fall to be made under Part 3 of the Employment Act 2002).

(4) Where an offer made in contravention of section 145A or 145B is accepted—

(a) if the acceptance results in the worker's agreeing to vary his terms of employment, the employer cannot enforce the agreement to vary, or recover any sum paid or other asset transferred by him under the agreement to vary;

(b) if as a result of the acceptance the worker's terms of employment are varied, nothing in section 145A or 145B makes the variation unenforceable by either party.

(5) Nothing in this section or sections 145A and 145B prejudices any right conferred by section 146 or 149.

(6) In ascertaining any amount of compensation under section 149, no reduction shall be made on the ground—

(a) that the complainant caused or contributed to his loss, or to the act or failure complained of, by accepting or not accepting an offer made in contravention of section 145A or 145B, or

(b) that the complainant has received or is entitled to an award under this section.

178 Collective agreements and collective bargaining.

(1) In this Act "collective agreement" means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of the matters specified below; and "collective bargaining" means negotiations relating to or connected with one or more of those matters.

(2) The matters referred to above are—

(a) terms and conditions of employment, or the physical conditions in which any workers are required to work;

(b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;

(c) allocation of work or the duties of employment between workers or groups of workers;

(d) matters of discipline;

(e) a worker's membership or non-membership of a trade union;

(f) facilities for officials of trade unions; and

(g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.

(3) In this Act "recognition", in relation to a trade union, means the recognition of the union by an employer, or two or more associated employers, to any extent, for the purpose of collective bargaining; and "recognised" and other related expressions shall be construed accordingly.

Recognition

97. The definition under section 178 TULRCA requires an employer to negotiate with a view to reaching an agreement, it is not enough to simply discuss or consult. There is an important difference between consultation and negotiation.

98. A Tribunal must decide whether or not there is negotiation objectively on the facts.

99. An employer's willingness to negotiate may be established in a formal written agreement, or it may be inferred through a course of dealings between the parties. Written evidence, or the lack of it, is not necessarily conclusive. Further, negotiation rights do not have to be wide ranging and may relate to any of the matters in section 178(2) TULRCA.

100. The Court of Appeal in *National Union of Gold, Silver and Allied Trades v Albury Brothers Ltd 1979 ICR 84, CA* set out the general principles that must be considered when a Tribunal is determining whether a union has been recognised:

101. There must be mutuality (namely the employer acknowledges the role of the union for the relevant purposes and the union assents to this) such mutuality can be express or implied. If mutuality is implied, the acts relied upon must be clear and unequivocal and (usually) the result of a course of conduct over a period of time.

102. There may be partial recognition (namely collective bargaining may be limited to only one of the matters in section 178).

Collective agreements

103. A collective agreement is an agreement which is negotiated between employers and trade unions. Collective agreements may not legally binding in themselves, but their terms are often incorporated into individual contracts of employment, either expressly or by implication. Such agreements often aim to give detail on collective matters such as the provision of negotiating machinery for management and trade unions. Section 178(1) TULRCA sets out the definition of a collective agreement. There is a difference between an agreement and a contract.

104. The definition in section 178 applies not only to formal written 'agreements' but also to 'arrangements'. Therefore, any unwritten/undocumented understandings between an employer and a union can fall under the provision. Such arrangements may be implied from a

course of conduct or custom and practice, but there must be some agreement between the parties.

105. The Tribunal may imply incorporation of a collective agreement where there is an implied agreement between the parties that they will be bound by the terms of the collective agreement. In reality, this requires examination of the conduct of the parties and evidence of custom and practice.

Inducements relating to collective bargaining

106. Section 145B(1) TULRCA sets out that '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'.

107. Section 145B(2) states that *'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'.*

108. The concept of a prohibited result was considered by the Supreme Court in *Kostal UK Ltd v Dunkley and ors 2022 ICR 434, SC*. In that case the recognised trade union rejected a package of pay increases, a Christmas bonus and some detrimental changes to terms and conditions. Following the rejection Kostal wrote directly to all employees offering them the same package and also posted a notice stating that if employees did not agree to the new terms, they would forfeit the Christmas bonus. Kostal then wrote again to employees setting out that their contracts might be terminated if agreement could not be reached.

109. The case progressed from the Employment Tribunal to the Supreme Court, at which point the Supreme Court restored the decision of the Employment Tribunal that there had been a breach of section 145B. The majority of the Supreme Court held that section 145B was not concerned with the content of an offer made but rather whether the offer, if accepted by employees/workers, had a particular result. It is necessary to focus on the potential practical consequences of the employers conduct and there must be a causal connection between the acceptance and the prohibited result. The majority stated that requirement will not be satisfied unless there is a real possibility that, had the offer not been made and accepted, that the employees/workers terms would have been determined by collective agreement. It followed, that if there was no possibility it could not be said that making the offer had the result that the terms would not have been determined by collective agreement.

110. Kostal set outs that an employer can make a direct offer to employees after the collective bargaining process has been exhausted, but not before. The legislation seeks to prevent employers going above the union with direct offers to workers, in order to achieve the result that one or more terms will not be determined by collective agreement with the union if offers are accepted.

111. *Kostal* was applied by the Employment Appeal Tribunal in *Ineos Infrastructure Grangemouth Ltd v Jones and ors and another case 2022 EAT 82*. In *Ineos* the EAT held that the employer imposing a pay award at a time when pay negotiations with the recognised trade union were at an impasse was a breach of S.145B.

112. In *Ineos* pay negotiations took place at five meetings and the employer eventually made a 'final and best' offer, which Unite presented to its members but did not put to a vote. The employer determined that it had done all that it reasonably could do in the negotiations and sent a communication to all employees informing them that 'we will implement our pay increase as described in our latest offer'. It also stated that it was terminating the collective bargaining agreement with Unite in light of the 'unsatisfactory' way in which it had conducted the negotiations. The claims were successful in the Employment Tribunal, which decided that the communication was an offer and not a unilateral promise or obligation, and that acceptance of the offer had the prohibited result. The Employment Tribunal considered the employers sole or main purpose was that it did not wish to use the collective bargaining arrangements in place with Unite. On appeal, the EAT upheld that the communication could be construed as an offer within section 145B. The EAT also noted that two key aspects of the Supreme Court's decision in *Kostal* were that the proper approach to section 145B is a purposive one, and that the test to be applied is based on principles of causation.

113. Section 145B is triggered when an offer is made to "workers".

114. Although section 145B is labelled as 'Inducements related to collective bargaining', the word 'inducement' is not within the section. It is not necessary for a claimant to show that the offer/s contained an inducement. Instead, as explained above, the focus is on whether the offers would bring about the prohibited result, and whether that is the employer's sole or main purpose.

115. In relation to the burden of proof, it is for the claimant to show that an offer was made under section 145B. However, in relation to showing what the sole or main purpose is, that burden rests with the employer. In short, the claimants must raise a prima facie case, and if that is made out, the employer must prove on balance of probabilities that it had an alternative, proper purpose which was either its only purpose, or at least an equally important purpose in making the offers.

116. The Tribunal is entitled to draw reasonable inferences from the evidence.

Conclusions

Issue 1 - Was Unite the Union recognised by the Respondent at the material time?

117. In order to bring a claim under section 145B the Claimants must be a member of an independent trade union at the time the offer was made but also the Union must have been recognized or be in the process of being recognized.

118. Trade union 'recognition' refers to the process by which an employer accepts a trade union (or unions) as entitled to act on behalf of its workers for some purpose.

119. Section 178(3) of TULRCA 1992 defines recognition as:

"(3) In this Act "recognition", in relation to a trade union, means the recognition of the union by an employer, or two or more associated employers, to any extent, for the purpose of collective bargaining; and "recognised" and other related expressions shall be construed accordingly."

120. The vast majority of recognition agreements are 'voluntary', meaning that they were entered into freely by the parties. However, a statutory recognition scheme was introduced in 2000 by the Employment Relations Act 1999 (ERelA) via amendments to the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A). The scheme gives unions the opportunity of gaining recognition for workers — if the majority of the workers concerned want it — in the face of opposition from the employer. This is not a case where a request for recognition has been made under the statutory recognition agreement process.

121. The Respondent's case is that the Union has never been recognized, and that engagement with the Union was done out of goodwill to foster good work place relations.

122. The Claimants case is that the Union has been recognized for many years. The Claimants accept that there is no written recognition agreement that can be relied upon. The absence of a written agreement is not fatal and we note that recognition can be inferred from the Respondent's conduct.

123. In order to meet the section 178 definition of recognition, it is not adequate for an employer to be simply willing to consult or discuss with a union on one of the matters listed section 178. There is an important difference between consultation and negotiation. Negotiation involves striking a bargain. It must be demonstrated that the employer will negotiate with a view to actually reaching an agreement. It must be determined by an objective assessment of the facts.

124. Considering the facts as set out above we assessed whether the Respondent has negotiated with the Union, as opposed to just consulted.

125. We considered the principles in the case law to which we were directed, namely *TGWU v Dyer* [1977] IRLR 93, *NUGSAT v Albury Brothers Limited* [1978] IRLR 504, *National Union of Gold, Silver and Allied Trades v. Albury Brothers Limited [1978] IRLR, Unite, the Union and Rettig (UK) Limited (D1/07/2018), 5 February 2019, Unite, the Union v. Sainsburys Supermarkets Limited and another ET case no. 2403815/11* and *Working Links (Employment) Limited v. Public and Commercial Services Union EAT 0305/12.*

126. In our view, the findings of fact demonstrate a history of negotiation with the Union. The particular elements we relied upon were as follows. As long ago as 1992 an agreement relating to shift patterns was concluded with the Union. Mr. Jones would start pay discussions stating that no money was available but discussions resulted in pay rises. The pay offer had gone to ballot on several years, and the letter dated 4 July 2007 indicates the Respondent had increased its offer during negotiations. Mr. Wilson had negotiated a pay rise of 2.75% directly with Mr. Jones sometime between 2016 and 2020. In 2022 the Respondent opened with an offer of 4% relayed to the Union representatives and increased the offer to 5%.

127. We noted that there were some gaps in the historical account, but concluded that this does not demonstrate that the Respondent did not negotiate with the Unions. There is no evidence that Mr. Jones went back to the Board to seek an increase in the sum to be offered, but considering this against the fact we found his starting position to be that no money was available, we do not consider this demonstrates that negotiation was not taking place. Mr. Jones liaised with the Union and local representatives directly, it is evident that other staff at the Respondent, and the Board, had no awareness of or detail about the nature of discussions that were taking place.

128. We note that as set out in *TGWU v Dyer [1977] IRLR 93* the fact there had been negotiations on several occasions in the past does not prove that an employer accepts there is a duty to negotiate in the future. However, in this case, considering the evidence in the round and the way in which negotiations were conducted we conclude that the Respondent, via Mr. Jones did accept there was a duty to negotiate in relation to pay.

129. *NUGSAT v Albury Brothers Limited* [1978] IRLR 504 sets out that recognition can be inferred from conduct and *National Union of Gold, Silver and Allied Trades v. Albury Brothers Limited [1978] IRLR 504* reminds us that when considering if there is implied recognition the acts relied on must be clear and unequivocal through a course of conduct over a period of time.

130. We also considered it was relevant that the Respondent made facilities available for Union activity and paid Mr. Wilson's training fees. In addition to negotiating annual pay rises, the Respondent also engaged with the Union regarding a holiday back pay issue.

131. We consider all of the above, together with the language used in the correspondence and the emails from Mr. Bardsley before 6 June 2022, demonstrated a mindset that the Respondent was willing and did negotiate with the Union.

132. We considered *Unite, the Union and Rettig (UK) Limited (D1/07/2018), 5 February 2019*, and whether it could be said that any earlier recognition had withered away. We concluded that on the evidence available, there had not been any withering of recognition meaning that the Union was no longer recognised. Although there was no evidence of any ballot taking place in recent years before 2022, there was still annual pay discussions and negotiation that resulted in an increased offer/award. We consider the absence of ballots indicated the pay awards were agreed amicably, without the need for ballot or regional intervention/engagement.

133. We also took into account the fact that the although the Respondent operated a check-off system for deduction of Union fees from payroll this alone does not demonstrate recognition.

134. On balance, considering the facts and the law, we concluded that in relation to pay awards, there was a well-established and smooth running negotiation process and that the Union was recognised, and had been continuously since at least 1998.

Issue 2 - Did the Respondent have a collective agreement with Unite Union for the purpose of collective bargaining connected to pay as per section 178 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the Act) at the material time?

135. There is no written collective bargaining agreement.

136. It is acknowledged, as set out in the findings of fact that the contracts of employment make no reference to any collective bargaining arrangements being in place.

137. The Claimants say this is not surprising in the absence of a written agreement and that a collective agreement connected to pay can be inferred from the conduct of the Union and the Respondent, and that agreement was in place in 2022.

138. The Respondent says there is no proper evidence to prove on the balance of probabilities that a collective agreement was made or in existence in 2022 and that the express terms of the contracts of employment contradict incorporation of a collective agreement.

139. We have considered whether a collective agreement can be inferred by the conduct of parties.

140. We have noted that best practice is for contracts of employment to reference collective agreements and for employers and trade unions to have clear documentation. There was a lack of organised record keeping by both the Union and the Respondent in this case, and it is very relevant that engagement with the Union was primarily with Mr. Jones, and other staff had little understanding or awareness of the relationship with the Union. Mr. Jones, in relation to pay awards, led on the matter and simply sent instructions to the Respondent's HR team upon the conclusion of negotiation. The documentation also references old law. As per our conclusions in relation to Issue 1 above, there was an unwritten understanding and practice that pay would be negotiated with the Union.

141. On the balance of probabilities, weighing up the conduct of the parties (again as set out above) against the lack of reference to collective agreements in the standard form of contract of employment, we concluded that that in this case a collective agreement relating to pay can be inferred by the conduct of the parties.

142. For completeness, we did not agree with the Respondent's submission that the fact no complaints had been brought under section 11 of the Employment Rights Act 1996 indicated there was no collective bargaining agreement in place. In this case, there was an established negotiation process in place that the Union and the Respondent, prior to 6 June 2022, had no concern about and the Claimants and Union representatives had not considered the particulars of the standard contract of employment.

Issue 3 - Did the Respondent make an offer or offers to the claimants within section 145B of the Act and, if so, when?

143. In relation to this issue, we considered it to be helpful to summarise in very short form the submission of Mr. Rushton and Mr. Grundy.

144. Mr. Rushton submitted that there was a series of offers, but last one was on or around 6 June 2022 (it was accepted by both parties that the exact date of imposition was not known) when 5% was imposed and submits the imposition is in itself an offer. He submitted further that the Claimant's continuing to work amounts to acceptance. He relies on *Ineos* as authority.

145. Mr. Grundy submits that offers made to the Union in April and May 2022 and therefore do not qualify as offers. He further submitted that the imposition of pay, in the form of letters notifying employees of increase in pay, does not constitute an offer and that it was not open to acceptance.

146. There are similarities between the present case and *Ineos.* In *Ineos* an offer was made via the trade union and it was rejected. The employer the told employees that it would be implementing the last offer.

147. In the present case we have had to consider whether the imposition of the pay rise of 5%, which was communicated to the employees in the letters sent by Ms. Wild, can amount to an offer.

148. The wording in the letter, the date on which it was sent being unknown, is different to the letter references in paragraph 59 of the *Ineos* judgment. In *Ineos*, the letter tells staff of the intention to implement. In this case the letter appears to be sent after the implementation,.

149. We do not consider that that to be fundamental.

150. The Respondent wanted their employees to have a pay rise of 5% and imposed it on them.

151. We agree with Mr Rushton regarding the interpretation of clause 3 of the standard contract of employment. It is worded in such a way that would give the employer freedom to make any changes to pay it wished, and that cannot be correct.

152. We note that it would defeat the purpose of section 145B if an employer could avoid the liability by making unilateral impositions as a way to avoid it being concluded that an offer was being made.

153. The Claimants continued in employment, their continuing employment constitutes acceptance of the offer, but it is noted that in reality there was little real choice about how to move forward.

154. We conclude that an offer was made. The Respondent imposed pay, that amounted to an implementation of the offer made. The decision to impose was communicated on 6 June 2022, but it's not clear exactly when the payment was made. We conclude the offer was on 6 June 2022.

Issue 4 - If so, did or would acceptance of such offer or offers have the prohibited result under section 145B(2) of the Act, that the claimants' terms of employment, or any of those terms, would not (or would no longer be) determined by collective agreement?

155. It is noted that issues 4, 5 and 6 have been set out for consideration separately, however, there is overlap between the conclusions.

156. It is always worth a close examination of the legislation. We needed to consider what is meant by prohibited result and what the consequence of acceptance of the offer was.

157. What the Respondent did in the present case was to impose the offer, without undertaking any further negotiation following the rejection of the ballot.

This effectively ended collective bargaining. We consider the Claimant's continued employment constitutes acceptance.

158. We conclude that the acceptance of the offer did have the prohibited result as it meant that the pay award, pay being a term of employment, was not determined by collective agreement (negotiation with the Union).

Issue 5 - In respect of issues 3 and 4 above, had such offers not been made was there a real possibility that the increase in pay would have been determined by collective agreement. [Kostal UK Ltd v Dunkley and others [2022] IRLR 66]

159. It is necessary to consider the causal connection between the acceptance of the offer and the prohibited result.

160. There has to be a real possibility that if the offer had not been made and accepted, in this case the pay imposed and the Claimants continuing in employment, that the increase in pay would have been determined by collective agreement.

161. Considering all of the findings of fact above, we conclude that there was a real possibility that had the Respondent not imposed the pay award that the pay increase would have been negotiated by collective agreement with the Union.

162. Historically, there is evidence of negotiation and although in many years the pay award process ran smoothly and was agreed, there was no evidence that there was ever an imposition, and agreement was always reached, albeit it amicably.

163. On close examination of the factual findings of the negotiations in 2022, it does very much appear that the Respondent was initially negotiating with a view to agreement being reached. In particular, there were initial discussions with the Union representatives in April 2022 as was custom and practice, there was an offer of 4% relayed by Mr. Bardsley to the Union representatives, there was an initial, informal exploration of what may be agreeable by the workforce, there was feeding back of information from the Union representatives to Mr. Bardsley. In our view the written language used in contemporaneous documentation is also telling, up until the notification on 6 June 2022 stating that the 5% would be implemented, and evidences that there was a real possibility that the pay increase would have been determined by collective agreement, just has it had been agreed via the Unions previously.

164. In particular, the Board Minutes on 5 May 2022 state: *"Initial discussions with local representatives have been undertaken and KB advised he would like to settle".* The words "initial" and "like" are important.

165. In an email dated 18 May 2022 Mr. Bardsley stated: *"At this point there is nothing new to discuss, suggest you go ahead with your planned ballot and we can pick things up from there – please keep us informed on the outcome".* The reference to "we can pick things up from there" are important.

166. In an email dated 19 May 2022 Mr. Bardsley stated *"the company plan to award all staff a pay increase of 5% effective 01st June 2022."* The word "plan" is important, and we consider this to indicate a proposal, an intention. It is a common understanding that plans can change.

167. Following the ballot results on 6 June 2022 Mr. Davies emailed Mr. Bardsley informing him of the ballot results and asked to arrange further negotiations to discuss the way forward. This clearly indicates an understanding on the Unions part that the negotiations were continuing.

168. Upon learning of the ballot result, a further meeting could have been held. In our view there were many potential and realistic outcomes. For example, the offer of 5% may have been collectively agreed with the night shift matter being managed separately or a revised higher offer may have been made.

Issue 6 - Was the Respondent's sole or main purpose in making the relevant offer or offers to achieve that prohibited result?

169. When reaching our conclusions we noted section 145D(4)(a) requires the Tribunal to take into account evidence 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 and that the employer did not wish to enter into arrangements proposed by the union for collective bargaining

170. We concluded that following the sudden death of Mr. Jones, there had been a change in management, and a lack of awareness and understanding in how pay had been agreed but also more generally regarding the relationship with the Union.

171. We consider that the change in approach came following the Union notice, we consider the following extract of Mr. Bardsley's witness statement evidences the change in his attitude towards the Union, in particular: *"This changed the tone of everything".*

172. "*After that meeting there was a notice put up on the staff board that stated there were extensive conversations and meetings between me and the union. This was not true and changed the dynamic of everything. I emailed Simon about this. This changed the tone of everything and made me treat this much more formally. The notice was rubbish. There had been no "offer" as the notice implied that there was, and it claimed that we had been negotiating heavily."*

173. Further, we consider Mr. Bardsley's email dated 6 June 2022 to be important evidence. This was the first time that the Respondent set out its intention clearly, and that it was choosing to implement an entire workforce pay award and made reference to the Union members being the smaller proportion and that it was considering the position of all employees in view of Mr. Bardsley's sudden determination that there was no union recognition or collective bargaining arrangements in place.

174. We concluded that, based on the evidence and our findings of fact, the Respondent, no longer wished to recognise the Union or be bound by collective agreement with the Union.

175. We have concluded that the purpose of implementing the 5% pay increase was to avoid any further negotiation with the Union, and in turn avoid the need to try and reach an agreement via the Union. In our conclusion, the sole or main purpose was to achieve the prohibited result.

176. There was no clear written bargaining agreement in place, and therefore it is necessary as part of reaching our conclusions to consider on an objective basis whether the negotiation (collective bargaining) process had been exhausted or not.

177. It is notable that collective bargaining had taken place over many years, being undertaken by Mr. Jones, and a pattern of engagement with local representatives was in place.

178. We do not consider it to be the case that the Respondent had a genuine belief that that the negotiation process had been exhausted, indeed the conclusions set out in relation to Issue 5 are relevant here, although we have not repeated them save to note again that had the Respondent met with the Union representatives after the ballot results and discussed the situation again, we consider that there was a very real possibility that the pay would have been determined by negotiation.

179. We conclude that the sole or main purpose of making the offer was to achieve the prohibited result, the Respondent has not demonstrated, on the evidence any other alternative proper purpose.

Jurisdiction – claim out of time

Issue 7 - Was the claim filed within the 3-month time limit set out in section 145C of the Trade Union and Labour Relations (Consolidation) Act 1992?

Issue 8 - If not, was it reasonably practicable for the claim to have been filed in time?

180. In submissions, Mr. Grundy accepted that if the Tribunal found an offer was made on or after 1 June 2022 that the claim would be in time.

181. As set out in the findings of fact above, we found that the offer was made on or after 6 June 2022, and therefore the claim is in time.

Employment Judge G Cawthray

Date 5 February 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON 7 February 2024

FOR THE TRIBUNAL OFFICE Mr N Roche

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/