EMPLOYMENT TRIBUNALS

Claimant: Mr Jarvis & others

Respondent: British Gas Services Ltd

Heard at: Reading **On:** 27, 28, 29, 30 November, 1, 4, 5, 6 December 2023

Before: Employment Judge Shastri-Hurst, Mr J Appleton, Mrs A Brown

Representation

Claimant: Mr S Brittenden (counsel)

Respondent: Mr A Burns KC & Ms M Tutin (counsel)

RESERVED JUDGMENT

1. **The claimants' claims pursuant to s145B of the Trade Union and Labour Relations (Consolidation) Act 1992 are not well-founded and fail.**

REASONS

Introduction

1. The claimants, over 3000 of them, brought claims pursuant to s145B of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("the 1992 Act").

2. The claimants entered into the ACAS early conciliation process on 8 March 2021: that process ended on 19 April 2021. The claim forms were presented on 18 May 2021.

3. The context of this claim focuses on negotiations that took place between the respondent and the claimants' union, the GMB Union ("the GMB"), from summer 2020 through to Spring 2021. These negotiations revolved around a modernisation of employment terms and conditions for the respondent's workforce. Further details are set out below.

4. The claim has been defended in its entirety.

Case management

5. The Tribunal sets out at this stage its thanks to both legal teams. The manner in which this case was prepared is an example to all legal professionals as to how opposing parties can collaborate in preparing complex cases, and further the overriding objective.

6. The claimants were represented by Mr Brittenden, and the respondent was represented by Mr Burns KC and Ms Tutin. We have benefitted from their prior experience and expertise in this area of law; Mr Brittenden and Mr Burns KC were counsel appearing before the Supreme Court for the respective parties in the

leading case on this topic, Kostal UK Ltd v Dunkley and others 2022 ICR 434 This case ("Kostal") is the subject of some analysis below.

7. The Tribunal was assisted by the Statement of Agreed Facts, Agreed Chronology and Agreed Cast List provided by the parties, as well as both sides' opening skeletons and written closing submissions.

Evidence

8. We had before us a witness statement from Mr Justin Bowden ("JB"), National Secretary with responsibility for the GMB members working for Centrica plc ("Centrica"), and its subsidiaries, at the material time. He has since been promoted to Regional Secretary at the GMB. For the respondent, we were provided with a witness statement from Ms Lisa Micallef ("LM"), Group Senior Vice President of Human Resources and Industrial Relations at Centrica at the material time. She has subsequently moved on to a different employer. References to witness statements are noted as (for example) [JB/WS/X] to refer to paragraph X of JB's witness statement.

9. We heard evidence from JB and LM, who gave evidence and were cross-examined. We then heard submissions from both sides' representatives, to accompany their written closing submissions.

Bundles

10. We had numerous bundles in front of us, which will be given the following nomenclature in this Judgment:

10.1 C/X - page X in the Core Bundle;

10.2 CONS/X - page X of the Consolidated Bundle;

10.3 CRA/X - page X in the Collective Recognition Agreements Bundle;

10.4 HOT/X - page X of the Heads of Terms Bundle;

10.5 JBD/X - page X of Justin Bowden Diaries Bundle

10.6 SC/X - page X in the SteerCo Bundle;

10.7 SP/X - page X in the Slide Pack Bundle.

11. Although there were several thousands of pages enclosed within these bundles, the parties had ordered them in the most accessible way possible. Although we did spend time in some of the subsidiary bundles, most of the work was done in reference to the Core Bundle and the Consolidated Bundle.

12. Some paper copies of the bundle were provided, along with electronic copies. The electronic copy comprised sixteen pdf documents, eight being bundles, eight being indices to those bundles.

13. On Day 3 we were provided with some additional disclosure, that being text messages between JB and LM during the relevant period for this litigation. Those documents were added to the Consolidated Bundle at [CONS/4348] onwards.

Acronyms

14. The following have been used in this case, and so are used in this Judgment:

14.1 CBU – Collective Bargaining Unit

14.2 CTAP – Customer Time Allocation Plan (incentive scheme);

14.3 IA – Industrial Action

14.4 EA – Emergency Assist

14.5 SIPD – Simple, integrated planning and dispatch

14.6 SLT – Senior Leadership Team

Issues

15 The issues in this matter were set out in the Record of Preliminary Hearing of 12 April 2022, and are recorded below.

1. *Was the individual claimant a member of the relevant bargaining unit at the material time?*

2. *Was an offer (in the singular) made to the claimants at some stage between 11 December 2020 and the end of February 2021 by the respondent?*

3. *At the time the offer was made had collective consultation been concluded or did the respondent genuinely believe that it had been?*

4. *Would acceptance of that offer have the prohibited result?*

5. *Was the respondent's sole or main purpose in making the offer to achieve that result?*

6. *Should the Tribunal make an appropriate declaration?*

7. *Should the Tribunal make an order of compensation for each claimant in the sum of £4294?*

16 Since April 2022, the parties have worked collaboratively together and, as a result, Issues 1 & 2 fell away, in that the remaining claimants were all members of the relevant bargaining unit, and it was agreed that the offer of 11 December 2020 amounted to an offer which would be covered by s145B of the 1992 Act.

17 Further, the Tribunal clarified that in fact Issue 3 relates to the factual findings that play into the legal issues at Issues 4 and 5, in that:

17.1 Whether the collective consultation had been concluded is part of the test of whether acceptance of the offer would have had the "prohibited result"; and,

17.2 Whether the respondent genuinely believed that the collective consultation had been concluded plays into the issue as to the respondent's

sole or main purpose in making the offer.

Findings of fact

18 The Tribunal is assisted by the statement of agreed facts, and the judgment from the Employment Tribunal in Scotland, of Fisher and O'Donnell v British Gas Services Ltd (4111350/2021 & 4110441/2021), which involved the same factual matrix as the index case but related to the unfair dismissal legal framework.

19 The Tribunal has only made findings that are relevant and necessary in order to address the issues in this case. We have not sought to deal with each and every aspect of dispute between the parties. In fact, this is a case in which there are limited factual disputes.

Background

20 The respondent is part of Centrica plc ("Centrica"). Centrica is itself the international parent company of several energy services and solutions companies. The Centrica Group's ("the Group") main purpose is the supply of gas and electricity to consumers in the UK and Ireland (whether for residential or commercial premises).

21 The respondent supplies household energy services in the UK. The claimants were, at all material times, employees of the respondent, working as field-based engineers within the Service and Repair part of the respondent. Practically, this means that they are the ones "out and about", attending customers' properties to provide engineering services.

22 The Group voluntarily recognises the following independent trade unions for collective bargaining purposes: GMB Union ("GMB"), UNISON, Unite the Union ("Unite") and Prospect. Prior to 2021, the Centrica Group had ten collective bargaining units, meaning ten separate voluntary recognition agreements with GMB, Unite, Prospect and UNISON. The largest collective

populations were located in Field Operations and Customer Operations – [C/65].

GMB members and structure

23 The GMB was at all material times a recognised trade union in respect of seven distinct CBUs:

23.1 Service & Repair (S & R);
23.2 Smart Metering Services (Smart);
23.3 UK Installations (UKI);
23.4 British Gas Business (BGB);
23.5 Electrical Services (ES).

24 Together these are known as the five "Field" Collectives. The GMB was also recognised in relation to "Staff" and "PJ Jones" bargaining groups. All the Claimants in these proceedings fell within one of the five Field Collective CBUs.

25 The Field Collective CBUs represent the vast majority of the GMB's members within Centrica: over 7,000 members from a total of around 9,495.

26 The structure of the GMB within the Service and Repair CBU is important to set out as it was at the relevant time:

26.1 JB was the National Officer, and LM's main contact throughout the negotiations;
26.2 "The 8" sat immediately below JB, as the lead representatives. They were elected into these positions and then released from their substantive roles within the respondent on a full-time basis to carry out union activities. They were often the core negotiators in any business discussions;
26.3 "The 21" sat below the 8, as the regional representatives. There were actually 27 of them, but for legacy reasons they were called "the 21".

They were not formally released on a full-time basis, but many of them spent the majority of their time working on union activities.

26.4 The local representatives sat below the 21. They worked for the respondent and were released on a part-time basis. They operated on the ground, within each “patch”, to support their members as and when required. JB referred to them during the course of this case as the “patch reps”.

27 JB was very clear to make it understood that what the unions and Centrica hoped to agree upon was a proposal of terms and conditions that could be put to the membership. Whether the membership agreed or disagreed to that was entirely up to them. He wanted to steer clear of using the language of a “deal" being reached between the unions and Centrica before it was put to a ballot, as his view was that the word “deal" implies that an agreement had been reached between the unions and Centrica, and this is strictly not the case. If the word “deal” is used below, it is not intended to indicate that there was agreement on a set of terms and conditions between the unions and Centrica prior to the proposal being placed before the membership; it is simply used as shorthand.

28 JB was clear that, in theory, the membership could vote for a deal that was not recommended by the 8 and the 21, however he conceded that “in reality” if a deal was not recommended, it would not be accepted by the membership. He accepted that, for a deal to be possible within the Field Collective CBUs, it was necessary to get the 8 and the 21 on board; although he told us that it was not necessarily his role to persuade anyone of the merits of the deal.

29 Essentially, both JB and LM were neutral brokers for their respective sides.

Proposals to change terms and conditions

30 These claims arise from a project undertaken by Centrica to modernise and harmonise the terms and conditions of its employees across the Group.

31 On 30 April 2020, the Group discussed potential proposals that the terms and conditions of employment, along with collective arrangements, would be modernised to address the significant operational and financial challenges the business was facing. This would affect all its employees (approximately 20,000). A slide pack was produced by LM in order to brief Chris O'Shea ("CO") (Group Chief Executive Officer) and the SLT on 30 April 2020 – [CONS/4-34]. There were two possible projects available to Centrica's SLT:

31.1 "Project Phoebe" was a plan to negotiate the new terms and conditions with unions, as well as new collective bargaining arrangements, with a view to agreeing new terms and conditions by the end of 2020 in order that they could be implemented in 2021;

31.2 "Project Chorus" provided that, on top of negotiations with the unions, the unions would be informed immediately that, if no agreement could be reached on terms and conditions, Centrica would plan to dismiss and re-engage employees on the new terms and conditions – [CONS/17], [LM/WS/6.8].

32 The proposed timeline for Project Phoebe envisaged that consultation and implementation of new CBUs would take place before negotiation on terms and conditions – [CONS/18]. The negotiation period was marked down as being for an initial period with the possibility (shown with dotted lines) of taking up to 18 months. That would take us through to the end of 2021.

33 Looking at Project Chorus, this proposed that, on Day 1, notice would be given of the intention to fire and rehire employees if negotiations were unsuccessful, as well as six months' notice being given to terminate all existing collective agreements and propose new CBUs and agreements – [CONS/19].

34 It was the view of some stakeholders that the need to modernise was so pressing, that Project Chorus should be adopted – [CONS/20]. However, the SLT with CO decided to proceed with Project Phoebe. LM was instructed to work collaboratively with the unions in order to reach agreement if at all possible.

35 On 8 June 2020, the Board of Centrica met in order to determine whether to approve moving forward with Project Phoebe. It was presented with the slide pack at [C/67]. The Board approved in principle proposals to proceed with Project Phoebe. The Board asked the Project Team to return to the Board in the event that no agreement could be reached with the unions - [LM/WS/6.15]. On 9 June 2020, CO sent an email to the Board, confirming the decision – [C/99]. CO's email states:

> "In summary, please be assured that my desire is for a successful, negotiated outcome...However, we can't rule out the possibility that this is not achievable, and we have plans in place to deal with that too. But we will only go there if we need to."

36 This reference to plans was, we find, reference to the "insurance policy" of the dismissal and re-engagement plan, which would need to take place in line with s188 of the 1992 Act.

Collective negotiations

37 On 11 June 2020, Centrica announced the proposals to its employees to negotiate and agree changes to terms and conditions of employment with effect from the end of the year – [CONS/91]. A call was held with the senior representatives from the unions on the same day, and a meeting was convened with the unions on the following day – [CONS/90, 97].

38 At that meeting on 12 June 2020, the appropriate number of attendees for each union and employee representatives for the negotiation and consultation meetings were agreed, in relation to both the talks on collective agreements and the talks on the new terms and conditions – [CONS/98]. In relation to the negotiations/consultation around new terms and conditions, those would be chaired by David House ("DH") (Deputy Group HR Director) and LM. Emma Harvey ("EH") (Senior Industrial Relations Manager) and a business leader were to chair discussions regarding the collective arrangements.

39 It is not clear to us that any timetable for negotiations on new terms and

conditions was set out and agreed with the unions. We have seen the timetable referred to above, and one at [CONS/99], however these both are Centrica's internal documents. We find that there was no clear collective bargaining process upon which agreement had been reached by the unions and Centrica.

40 The first formal collective consultation meeting took place on 8 July 2020, at which the slide pack at [SP/20] was shared with the unions. The individuals forming the negotiating team for GMB were:

40.1 Aubrey Thompson;
40.2 Paul Hamilton;
40.3 Paul Greenwood;
40.4 Steven Whittle;
40.5 Kevin Haddington;
40.6 Nick Bollam;
40.7 Liz Robinson; and
40.8 Brian Jones.

41 Within that slide pack, at [SP/46], three phases were set out:

41.1 Phase 1 – "Centrica's opportunity to set out why change to existing terms and conditions is needed, and to ensure a common understanding of the proposals. Centrica to consider any initial feedback and any questions from the unions";
41.2 Phase 2 – "explore the proposals in detail and consider counter proposals from the unions";
41.3 Phase 3 – "continued "more detailed negotiations on our proposals, as required, once details and anticipated impacts are understood and views of colleagues have been more clearly articulated"".

42 In cross-examination, LM told us that Phases 1 and 3 were "consultations" in which both union and employee representatives would be present; however, Phase 2 was the negotiation phase, in which only union representatives would

be involved. LM confirmed to us that it was envisaged that it was at the end of Phase 3 that dismissal and re-engagement letters would be sent, if necessary.

43 What is said in [SP/46] regarding Phase 3 does not tally with LM's evidence to us. We find that in fact Phase 3 was treated by the respondent as LM told us – as consultation, effectively on s188 dismissal and re-engagement. However, this differs from what the unions were told would be the purpose of Phase 3.

44 Day 2 took place on 9 July 2020, at which point Centrica set out their proposals for change – [SP/67-73]. In these proposals, Centrica introduced the idea of CTAP at [SP/70]; an incentive scheme in which productivity and performance are measured weekly. High performance would be rewarded, whereas disappointing performance could lead to performance management. The rewards available would be credits, which could either be redeemed as cash or time off in lieu. The level of performance management attached to CTAP was the subject of much discussion throughout the chronology of this case, along with the details of CTAP generally.

45 CTAP was one of the bones of contention throughout negotiations, as the unions were unclear about how it would affect the employees individually. The proposals also included "ways of working", understood by Centrica to be the mechanics of how contractual terms would play out on the ground, in practice. Throughout her evidence, LM made it clear that the contractual terms (the "what") were separate and distinct from the ways of working (the "how"). We return to this point later in our Judgment.

46 On 15 July 2020, Centrica gave notice to commence consultations in respect of potential collective dismissals, pursuant to s188 of the 1992 Act - [CONS/370-381]. The respondent also gave six months' notice to terminate the existing collective agreements, which would therefore terminate on 13 January 2021 [CONS/365-367, 382].

47 This action, one week after the formal opening of negotiations, is much more

in line with Project Chorus than Project Phoebe. There is no reference to either notice being given in the slides setting out Project Phoebe. We find that, although the Board had voted on Project Phoebe, what in fact the management of Centrica implemented was very much closer in nature to (if not the same as) Project Chorus.

48 Formal collective consultation meetings took place with lead representatives of the trade unions from July to November 2020. Meetings took place on 8-9, 15-16, 22-23, 29-30 July; 5-6, 12, 20, 26 August; 2, 3, 7 September; 8, 12-14, 21-22, 29-30 October and 2, 4, 6 and 16 November 2020. That was equivalent to around 300 working hours or 40 working days. Around 44% of the counter-proposals put forward by the trade unions were accepted by Centrica.

49 At around the same time, Centrica negotiated new collective bargaining units and collective agreements with the trade unions.

50 On 21 October 2020, the negotiating teams met and Centrica presented the slide pack at [SP/668]. This set out the original offer as at July 2020, the counter proposals by the unions, and the revised proposal – [SP/670]. Following this meeting, LM sent to JB a draft Memorandum of Understanding ("MoU"), and draft Heads of Terms – [CONS/996]. JB responded stating "this was a first run and there is some way to go collectively to work it up further" - [CONS/1026].

51 Following further emails between the parties, LM sent a revised draft MoU on 27 October 2020 – [CONS/1068]. JB passed this onto his GMB negotiating team colleagues, stating "we are at the last knockings I sense" - [CONS/1067].

52 Another meeting was held on 29 October 2020, in which the slide pack at [SP/708] was shared. This again set out the original proposal, the unions' counter proposals, and the revised position – [SP/710]. To highlight one point of compromise as an example; initially, Centrica had been seeking to increase working hours from 37 to 40 hours a week with no additional payment. The unions had countered this, stating that workers should be paid. The

compromise suggested by Centrica was a one off "transitional payment" of £2,250 - [SP/726]. In terms of incentives, initially Centrica proposed to align all incentive plans, transitioning field engineers to one incentive plan, CTAP. The unions' position was that CTAP should be taken outside of the negotiations. The revised position from the business was to introduce "CTAP Enhanced Payment" as set out on [SP/734]:

> "From 1 January 2022 the individual annual earnings potential under the new performance-related incentive will increase by £3000 compared to 2021 earnings potential. This amount reflects the increase in average weekly working hours and this element of the scheme only (referred to as CTAP Enhanced Payment) will be contractual."

53 After this meeting, JB attended a meeting with CO; JB's notes are at [JBD/68/69]. In advance of this meeting, LM sent CO a briefing note – [CONS/1095/1096]. That briefing note starts with "we are pleased that negotiations are concluding".

54 At the end of October 2020, Centrica set out a slide pack entitled "End of Consultation – Colleague Journey, approach and plan" - [CONS/1156].

55 On 30 October 2020, GMB sent out a negotiations update to its members, opening with "negotiations are coming to a close; we now await the final offer from the business" – [CONS/1134]. On the same day, LM sent an update to the SLT, which stated:

> "[a]s you are aware the negotiating parties on the proposed terms and conditions changes committed to investing the time during October to try to conclude negotiations. I am pleased to confirm that negotiations close [sic] to being finalised and the below note will be issued to colleagues at 4.30pm today" - [CONS/1139].

56 Also on 30 October 2020, DH sent an internal email entitled "Heads up – negotiation with TU's concluded" - [CONS/1205]. DH states in that email:

> "I wanted to give you a heads up that this afternoon we concluded negotiations with the TUs and we will be confirming our final position with them in writing this evening".

57 By the end of October 2020, a collective deal in principle had been reached with UNISON, Unite and Prospect who, once it came to a ballot, recommended to their members to accept the deal (although Unite did not initially recommend doing so). GMB recommended acceptance for its members in the PH Jones/British Gas Social Housing CBUs and took a neutral position in respect of its members in the office CBU.

58 On 1 November 2020, LM sent an email to JB and others, setting out what she understood to be the four areas in which the unions required a clear position from Centrica - [CONS/1182]:

58.1 Base pay for Smart employees;
58.2 Caps on working hours/weekend working;
58.3 Incentive for UKI employees;
58.4 The position on overtime for EA employees.

59 On 4 November 2020, LM shared with JB and others the Heads of Terms setting out its "final offer" as to the new terms and conditions - [HOT/1-35]. The Tribunal has imposed quotation marks on this "final offer", as it transpired that some changes took place to the proposal following 4 November 2020. Within LM's cover letter to this offer, she stated:

> "I acknowledge that there remain issues to discuss on the new ways of working within Field Services and in particular relating to the Customer Time Allocation Plan ("CTAP"). These issues are operational in nature and will be documented, as required, in the CTAP User Guide which is currently being drafted by Rob Harris and his team".

60 LM told the Tribunal in her witness statement that:

> "By this, I meant that negotiations on the contractual terms and conditions had concluded, but I knew we had more to discuss on operationalising the non-contractual elements, such as CTAP and other minor issues relating to operational ways of working. These aspects were non-contractual in nature and didn't form part of the collective bargaining process, but I wanted them to know we were taking those matters seriously too."

61 At that stage, taking working hours as an example of "ways of working", the proposal was that field engineers do a 40-hour week, with core operating hours being between 0700 and 2100 hours Monday to Sunday.

62 Also on 4 November 2020, JB informed LM that he would be sending a member briefing out to GMB members that evening. LM's internal discussion with the Centrica team in response to this briefing was to say - [CONS/1258]:

> "If they don't accept the deal, there is no more available from the Company and people would be signing up to a period of sustained industrial action"

63 On 10 November 2020, JB had a Teams meeting with LM and others, following which he sent an internal email to fellow GMB colleagues, recounting that he had told Centrica that "the Field Reps are likely to tear the proposals to pieces and recommend rejection as there is insufficient information..." - [CONS/1399].

64 On 11 November 2020, JB and LM had a discussion on their own - [CONS/1542]. Following that conversation, LM sent JB the email at [CONS/1462], setting out a summary of the issues that the GMB needed addressing:

64.1 SMART pay – the GMB was seeking a commitment on pay for the SMART CBU only for a set period of 5 years. At that stage, Centrica had offered 3 years;

64.2 CTAP/Fields Ways of Working – the GMB were concerned that there were still unanswered questions as to the operation of CTAP and ways of working;

64.3 HR1/s188 - the GMB at this point formally requested that the s188 notice regarding "fire and re-hire" be taken off the table;

64.4 Trust in leadership – although there was nothing sought by the GMB in relation to this point, it was simply a point of note that its members' trust had diminished, and that this inevitably would impact on the chance of a proposal being accepted.

65 On 13 November 2020, JB and LM met again: LM's notes are at [CONS/1541]. At this stage we make a point about LM's notes. They appear to be colour-coded with the use of four different colours, however, when asked, LM said that there was no meaning to the colours, or at least none that she could remember. The notes are not clear in terms of who said what, or who was in attendance. We consider that the colours must have had a meaning at the time the notes were written, and it is unhelpful that this meaning has not been capable of explanation.

66 LM's notes of this meeting record GMB's position as being that "a negotiated settlement is still possible with movement" - [CONS/1541].

67 On 15 November 2020, LM informed Jill Sheddon ("JS"), Group HR Director, of "Justin's demands", in which she said "I had a couple of lengthy chats with a couple of the TU guys yesterday to understand what is really happening and if there is a way through this" - [CONS/1554].

68 On 16 November 2020, Centrica held a Trade Union Representative Briefing meeting, at which the slide pack at [CONS/1575] was presented. The purpose of the meeting was set out as follows:

> "As Trade Union representatives, you will play a critical role in supporting your members consider [sic] the final offer regarding changes to their Terms and Conditions.
>
> We recognise this impacts you personally.
>
> Today's briefing will give you early sight of the key changes, allowing you time to understand what it means and how you can best support your members in the next few weeks."

69 At this stage, it was LM's evidence in cross-examination that, although GMB wished to continue to negotiate, Centrica had done all they could.

70 Also on 16 November 2020, JS emailed the board to say "negotiations have now concluded...Attached is the detailed final position on T&Cs and a reminder of the starting position". She went on to say - [CONS/1682]:

> "[The engineer] group is the highest risk in terms of rejecting the Terms, based on the practice that by rejecting we will return to the table and offer concessions. We have, however, been very clear that this will not be the case this time".

71 Late on the evening of 16 November 2020, JB sent an email to some of his GMB colleagues, setting out a draft of a bulletin to go to members – [CONS/1692/1693]. The message was that the proposed terms and conditions put "the balance of power too much in the hands of the business" and do not provide sufficient clarity/information still.

72 Around this time, Centrica released a "modeller" that enabled employees (in theory) to input their current pay/job data and it would model what the new terms and conditions would look like for that individual. JB told us that, on the ground, the modeller did not in fact provide a clear enough indication of how the new terms and conditions would affect individuals.

73 JB met again with LM on 20 November 2020, in which JB again told LM to "take the gun off the table", in reference to the s188 notice – [JBD/74]. JB recorded in his note of the meeting that "CO's there is no more money".

74 On 22 November 2020, LM sent "Centrica's full and final offer" to the union representatives. This was however tweaked slightly and was sent out again on 28 November 2020 - [HOT/141].

75 On 23 November 2020, JB sent LM an email, setting out the GMB's position – [CONS/1873-1875]. In short, that position was that there was still not sufficiently clear information to enable employees to make an informed decision on the proposed changes to terms and conditions. A key concern was the fact that the respondent had, in GMB's view, approached negotiations aggressively by issuing the s188 notice. JB summarises the position:

> "[Centrica] refuses to take fire and rehire off the table permanently and instead it expects GMB and our members to join in the "leap of faith", even though it knows that it is still working on its final proposals after it has gone out and communicated them as such."

76 He concluded by saying:

> "In summary, even though it is the business which said that the talking is over, our door remains open to talk further at any time to resolve the issues of disagreement to the workforce in the business' offer.
>
> Centrica should take fire and rehire off the table permanently, and return without delay to the negotiating table."

77 Centrica's view regarding the s188 notice was that, legally, they were unable to remove it, as this would leave it exposed to claims for protective awards under s188.

78 On 24 November 2020, JB and LM had an "OTR" (off the record) discussion, noted by JB at [JBD/76]. In this meeting, LM said that Centrica was:

> "not removing s188, not any more money, can change. Need a win for both".

79 Further, at this meeting, LM told JB that Centrica did not appreciate the fact that the GMB had used the rhetoric that the new terms and conditions were like zero-hour contracts – [JB/WS/88]. JB told us that the analogy was drawn due to the fact that members – [JB/WS/88]:

> "would have reduced control over when they work, and the hours of coverage that there were committed to undertaking".

80 On 24 November 2020, Centrica reassured UNISON that, if it were to "reopen negotiations with GMB", UNISON members would get the same benefit of any changes agreed upon between GMB and Centrica – [CONS/1894].

81 In preparation of the ballot on the new terms and conditions, GMB recommended to its members in the Field Collective CBU rejection of the deal and indicated it would consider taking industrial action - [CONS/1739]. A ballot on the deal opened on 24 November 2020 and closed on 8 December 2020.

82 GMB members in the PH Jones/British Gas Social Housing and customer services/sales CBUs accepted the collective deal but the GMB members in the Field Collective CBUs rejected the deal. Members of UNISON, Unite (in relation to Centrica Storage Limited) and Prospect accepted the deal.

83 Again on 24 November 2020, JB sent to CO and others notice under s226A of the 1992 Act of the GMB's intention to ballot regarding strike action in relation to Centrica's failure to withdraw the threat of dismissal and re-engagement – [CONS/1912]. The ballot on industrial action opened on 1 December 2020 and closed on 17 December 2020.

84 On 27 November 2020, the finalised Heads of Terms were presented to the unions - [HOT/179-212].

Board meeting 2 December 2020

85 On 2 December 2020, the Board met with LM to discuss the options to the business in light of the acceptance of the deal by most trade unions, members and employees. At this meeting, LM presented the slides at [CONS/2046-2058].

86 The Tribunal has also seen the near contemporaneous email that LM sent to CO and JS following the 2 December 2020 Board meeting – [CONS/2210]. In that email of 9 December 2020, she recorded that:

> "We reflected on the fact that we have engaged in detailed consultation and negotiations with our recognised Trade Unions over a period of 4 months during which we met on more than 40 occasions, for a total of more than 300 hours. The negotiations were both

constructive and exhaustive. … After negotiations had formally closed, both GMB and UNISON had another *bite of the cherry* and negotiated some final concessions, designed to help them get the deal over the line with their members."

87 The last sentence indicated to the Tribunal that, had LM thought that there was more that could have been done to "get the deal over the line", she would have talked further with JB before the ballot.

88 LM's email goes on to say:

> "We concluded that further negotiations were unlikely to achieve a mutually acceptable outcome and Centrica cannot afford any more diminution of cost savings as the final offer was already at or below minimum savings identified for the project".

89 It was not alleged by the claimant's side that LM's email was anything other than a fair reflection of the outcome of the 2 December 2020 meeting (this is most certainly not a criticism, but simply an observation).

90 Returning then to the Board meeting of 2 December 2020, the Board was presented with three options - [CONS/2210]:

90.1 Option 1 – abandoning the change to terms and conditions;

90.2 Option 2 – delaying the implementation of the new terms and conditions, with further negotiation; or

90.3 Option 3 – proceeding with the implementation of the new terms and conditions, using "fire and rehire" where necessary.

91 Each option was discussed. Option 1 was rejected outright. Option 2 was discarded on the basis that a delay in implementing the new terms and conditions would impact significantly on Centrica's need to stop further decline to the business, and the feeling that further negotiations would not be fruitful. Option 3 was accepted, the plan being to send out the offer that was put forward for ballot to employees as individuals. For those who rejected the offer, they would undergo individual consultation under s188 of the 1992 Act, with

any dismissals taking place with effect from 1 April 2021.

92 The implementation of Option 3 was conditional on the outcome of the ballot, due to close on 8 December 2020. Evidently, if the proposed new terms and conditions were accepted at the ballot, there would be no need for Option 3.

LM's genuine belief as at 2 December 2020

93 We recognise at this stage that there is a dispute between the parties as to the scope of s145B, as to whether it covers solely contractual terms, or non-contractual conditions as well. We also recognise that there is an issue as to what terms were in fact contractual. These matters are dealt with below.

94 At this stage, we consider whether LM held a genuine belief that negotiations on terms of employment had been exhausted. We consider that this is the date on which we have to determine the nature of LM's belief, as it was on this date that the decision was made by the Board to send out the offer letters that are the subject of this litigation. That decision was made on LM's recommendation to the Board on 2 December 2020.

95 We find that LM did hold a genuine belief that negotiations had been exhausted, for the following reasons:

95.1 For some time, she had been communicating to JB that the business had gone as far as it could. For example, the "barrel [is] empty in terms to give" - 21 October 2020 - [JBD/60];

95.2 By the time of going to ballot, JB understood from LM that "the employer had tabled its final offer" - JB's evidence in cross-examination;

95.3 LM believed that the GMB could not get the 21 to agree to recommend the deal due to internal politics:

95.3.1 11 November 2020, LM said to JB "is this like pension – get so far with the 8 and then 21 bomb it?" - [JBD/72];

95.3.2 20 November 2020, JB noted about the business, "they think it is about [the General Secretary] election and its [sic] "out of

my hands"" - [JBD/73].

95.4 We accept that LM thought that the business' inability to remove the s188 notice was a deal breaker for the GMB. This understanding is one that is recurrent on the contemporaneous evidence. For example, on 12 November 2020 LM and JB had a conversation in which JB set out "4 red lines"; the s188 notice was one of them. LM has recorded in her note of the meeting, at "s188" the answer "No", meaning that the business would not lift the s188 notice – [CONS/1539].

95.5 As we have stated above, we find that LM would have done more, if she thought that there was more to be done prior to the ballot, in order to get the proposed changes agreed by the unions.

96 We accept that, despite labelling the offer of 30 October 2020 the final offer, Centrica did then move again on 4 and 28 November 2020. However, this was before the decision was made to send out the individual letters.

The Board's genuine belief as at 2 December 2020

97 The Board made the decision on 2 December 2020 to send out the individual letters, and follow "Option 3" set out above. We are satisfied that this decision was made on the basis of the information given to the Board by LM at the 2 December 2020 Board meeting, for the following reasons:

97.1 There would be no need to opt for Option 3, the nuclear option, if there was any belief that further negotiations may produce a positive result;

97.2 The Board was told that negotiations had concluded – "We have no more money or concessions to give & negotiations are concluded" - [CONS/2051];

97.3 As we have noted above, there was no suggestion by Mr Brittenden that LM's email summarising the happenings of the 2 December Board meeting as inaccurate. We therefore accept it as an accurate summary of those discussions between LM and the Board. This summary includes the information that "negotiations were both constructive and exhaustive" - [CONS/2211].

98 We must point out that we were not assisted in the exercise of determining the mind of the Board by the lack of Board minutes from this meeting, and the lack of evidence from a Board member. This gave the Tribunal pause for thought in its deliberations as to the genuine belief of the Board. However, ultimately, as we have set out above, there was no suggestion that LM's evidence about the discussion on 2 December was inaccurate (nor could such a suggestion have been reasonably made, given none of the claimants or JB were at that board meeting).

Further discussions

99 On 8 December 2020, the GMB ballot on the new terms and conditions came back, rejecting the proposal. This was communicated by JB to LM at 1730 hrs on that day – [CONS/2169].

100 CO emailed the workforce on the morning of 9 December 2020, in light of the ballot result – [CONS/2228-2229]. In that email, he stated:

> "I am, however, disappointed to hear that our field engineers, who are largely represented by the GMB, have voted to reject out final offer. The GMB have not provided us with the % turnout for the field collective ballots. We have made it clear throughout that this was our best and final offer, and we stand by this. We will meet with trade union representatives over the next few days to listen to their insight on the reasons for rejection, and to consult with them on our proposed next steps in respect of our field collectives".

101 The Tribunal finds that what CO meant was that meetings would be held to gain feedback, and discuss moving forward with the s188 process. That is the natural interpretation of his words. He did not intend to convey that negotiations would continue or be reopened on the terms and conditions; such an intention would be inconsistent with him stating that the offer already made was best and final.

102 On 9 December 2020, LM and JB had a meeting: in LM's notes it is headed

"consultation feedback" - [CONS/2261]. On that page are two post-it notes. One states as follows:

> "You voted overwhelmingly in favour of industrial action – we got the business back to the table – here are the gives – we strongly recommend you say yes!"

103 In [LM/WS/11.3], LM explained that this post-it note was written by her in advance of the meeting, "to make sure I made my most important points". LM contradicted this in cross-examination, telling us that those were not her words on the post-it:

> "that records what JB said, the post-it note was the narrative that he wanted to be able to say to his members if the business was able to reopen negotiations".

> "...JB's narrative was the "we got the business" back. That "we" is the GMB, because JB wanted to demonstrate that the outcome of the ballot meant that the membership had forced the business back to the negotiating table."

104 We find that it is more likely than not that this post-it note was written in advance of the meeting by LM, with her key thoughts, as she stated in her witness statement. Her witness statement was produced nearer to the events than the time at which she was giving her evidence. Further, if the above phrases captured a conversation within the meeting, it makes more sense that they would be incorporated into the notes themselves, as opposed to appearing on a separate post-it note. Therefore, we find that, as at 9 December 2020, it was LM who was bringing Centrica back to the negotiating table.

105 JB also had a meeting with DH on 9 December 2020. A note of this meeting is at [CONS/2247]. DH opened the meeting by asking "What do you think we need to do to unlock this situation?", to which JB set out issues that the business would need to address, asking "it is [sic] a genuine wish to re-open negotiations?". This meeting was set up directly in response to the outcome of the ballot on the new terms and conditions. The reference to "unlocking" we find is a reference to unlocking the impasse between the parties in relation to

the new terms and conditions. This is again the natural interpretation of the word “unlock this situation”: the ballot on industrial action regarding the s188 notice was still open, and so we find that the reference to unlocking does not relate to that matter. It follows that the only situation that could be the subject of unlocking is the situation regarding the terms and conditions.

106 One of the issues that JB set out as being unresolved was Ways of Working in respect of hours of work and days of work; in other words, specifics about working patterns for employees, as opposed to the current proposal of 40 hours within a window of 0700 to 2100 Monday to Sunday. He also raised concerns about the move from 37 to 40 hours more generally. Another point he raised in this meeting was the removal of CTAP and Ways of Working associated with CTAP from the negotiations - [CONS/2247].

107 Importantly, in the Tribunal’s view, DH did not say at this meeting “negotiations on hours are at an end, we cannot negotiate any further, the contractual terms are non-negotiable now", or words to that effect. There was no clear indication to the GMB at this meeting that further negotiations on employment terms and conditions were not possible.

108 It is the respondent’s position that this 9 December meeting cannot constitute further negotiations, as the people in the room were different to prior negotiation meetings. However, in practice, there was the chair of the negotiations (DH) and the National Secretary for the GMB (JB): therefore at least two of the key people to the negotiations were present. Even if the respondent is right that the right people were not in the room on 9 December, we find that this conversation (even if categorised as “off-line”) could have informed other conversations that have been referred to as “on-line” (or formal/official) discussions.

109 We find that, contrary to CO’s intention set out in his email of 9 December 2020, the meetings between JB and LM and DH respectively did amount to further negotiations on matters including hours of and patterns of work and CTAP. There was a discussion in which the business invited the GMB to set out points it wished to be addressed, and did not shut down any further

conversations on those matters. The only reason for asking the question as to how to unlock a situation is if the intent is to do just that. Furthermore, throughout the note of the 9 December meeting, JB made reference to coming to further talks, and invitations to negotiate: at no point does it appear that he was told by DH that there would be no further negotiation on terms of employment - [CONS/2248].

110 On 11 December 2020, CO sent individual letters to GMB and Unite members in the field bargaining unit inviting them to agree the proposed changes to terms and conditions of employment – [CONS/2358]. These are the letters that are said to breach s145B of the 1992 Act. The deadline for acceptance of the new terms and conditions was 23 December 2020.

State of negotiations as at 11 December 2020

111 The Tribunal has found that, as at 9 December 2020, negotiations on some matters relating to terms and conditions were still ongoing (namely hours of work/patterns of work, and CTAP). There is nothing on the evidence before us that shows that this status quo altered between 9 December and 11 December 2020. We therefore find that, at the time the offer letters were sent out, negotiations on those matters were still ongoing.. We make this finding for the following reasons:

111.1 Further discussions took place on 9, 10 and 11 December 2020 - [LM/WS/11.1]. Although LM's evidence to the Tribunal was that "we were clear this was not a renegotiation" that is not consistent with the events of the 9 December 2020 meeting (see our findings above);

111.2 We find that DH went outside the remit of what was anticipated by CO to be the purpose of any meeting with the GMB after the ballot result. It was CO's expectation that there would be some feedback from the ballot, and then consultation on the s188 notice would commence. However, the words used by DH, the Chair of the terms and conditions negotiations, had the effect of continuing those negotiations;

111.3 The existence of the s188 notice did not in fact prohibit negotiations, as

suggested by the respondent. We accept JB's position that, if the rest of the offer had been acceptable, and agreed upon, then the issue surrounding the s188 notice would have fallen away;

111.4 UNISON's position (as an interested third party by this point) was that it hoped that negotiations would continue beyond the ballot – [CONS/1565];

111.5 The trade dispute was not an indication that negotiations were over but was the GMB's way of getting over a hurdle, and to provide some leverage for negotiating further with Centrica – we accept JB's evidence in cross-examination to this effect.

Mid-December 2020

112 On 14 December 2020, another meeting was held between LM and JB. LM's evidence to the Tribunal on this was that:

> "...we were exploring in an offline conversation what would happen if we could find a route through which was part of the role we played in and out of the negotiating room as brokers."

113 The reference here to a "route through", we understand meant a way through the gridlock, by further negotiation. That is the only natural meaning of LM's words. LM attempted to draw a distinction at one point between "online" (official) negotiation meetings, and "offline" (unofficial) meetings. However, she accepted the Tribunal's proposition that offline discussions could well inform online discussions.

114 Another meeting was held on 15 December 2020. LM's note of this meeting is at [CONS/2405]; she entitled the meeting "The Trade Union Red Lines". LM has recorded "actions" at [CONS/2406], including "negotiating team – who needs to be in the next conversation". LM accepted in cross-examination that this meant she was going to schedule a meeting with the negotiating team. We find that this, again, indicates that the negotiations were not in fact exhausted, but that there were further conversations that could be held as at mid-December: there is no other sensible meaning to LM's words, both in her

notes and to the Tribunal.

115 In terms of the subject matter of those ongoing negotiations, LM's notes of this meeting record on [CONS/2406]:

> "Other stuff we need to demonstrate to workforce:
>
> - There have been robust discussions by 37 to 40 hours = no movement;
> - Words re 5 days roster max in any 7 day period;
> - Claiming leiu [sic] time back – how the process works"

116 In terms of CTAP, on [CONS/2405] there is reference to "performance management" and a "cap on # of people in performance mgm't [management]". LM's note states "We need to give assurance to colleagues re how we are going to apply the process". Performance management was part of the CTAP scheme.

117 We therefore find that negotiations on both CTAP and ways of working in relation to hours of work and patterns of work were ongoing after 11 December 2020.

118 A second meeting occurred on 15 December 2020: this one was entitled Trade Union Follow-Up by LM – [CONS/2407]. In this meeting, JB raised four matters that the GMB needed to be resolved in order to move forward:

118.1 Performance management;
118.2 The negative multiplier;
118.3 The end of day; and
118.4 Commitment to tying up loose ends.

119 LM's notes of the meeting record that there was some room for manoeuvre on these four matters from Centrica's point of view. In terms of performance management, LM noted "we can see a way through". In terms of "loose ends", it was discussed that a Memorandum of Understanding ("MoU") would be beneficial.

120 Further meetings were then held on 16 December 2020 - [CONS/2409& 2410]. Discussions were held around the four matters set out immediately above. The meeting ended by JB stating “we will take away in good faith and consider” - [2410].

120.1 On 17 December 2020, LM sent to JB and others a draft MoU - [CONS/2450]. The draft wording of that MoU is at [CONS/2453] and includes wording relating to core hours and working patterns.

121 JB sent his email at [CONS/2460] in response, stating that he really valued “the time you and your colleagues put into exploring options before anymore [sic] “trains leave stations””. In that email he raised other matters of importance, that had been discussed between the parties, including the move from 37 to 40 hours, and CTAP.

Industrial action

122 A ballot on industrial action opened on 1 December 2020 and closed on 17 December 2020. GMB members voted for industrial action. Discontinuous strike action took place between 31 December 2020 and 16 June 2021.

ACAS involvement 2021

123 At the invitation of ACAS, Centrica and the GMB engaged with ACAS to see if the industrial dispute could be resolved through conciliation. ACAS reached out specifically regarding the industrial action, not in relation to terms and conditions.

124 ACAS meetings were held on 20-22 and 25-28 January, and 1-5, 8-12, 16-19 and 22 February 2021.

125 Throughout this period, the new contract of employment remained open for

employees to accept.

126 ACAS issued a statement at the end of the conciliation process, which can be found at [CONS/3725]. The statement includes the following:

> "The company has recognised the impact that "Fire and Rehire" has had on the workforce and confirmed that as part of this agreement that they will never use "Fire and Re-hire" in any shape or form in the future".

127 Following the conclusion of the parties' talks through ACAS, Centrica put together an Addendum to Heads of Terms – Field Services document, dated 18 February 2021 - [HOT/247]. The GMB balloted its members on this offer, and it was again rejected.

Dismissal and re-engagement consultation process – January 2021 onwards

128 Collective consultation meetings occurred in January 2021, the main purpose of which was to discuss how dismissals could be avoided. Taking one example of the meeting on 14 January 2021, the GMB set out ways in which the dispute between the parties could be mitigated – [SP/798]. These included matters that had been part of the discussions around the new terms and conditions.

129 On 19 January 2021, the "T&C Team" (Terms and Conditions Team) sent an email to its workforce regarding the terms and conditions consultation process – [CONS/3410]. This email included the following:

> "We restated our position that negotiation is now over, but we are of course happy to continue discussions on those ideas which help support and reassure colleagues without requiring material changes to the T&Cs that have been extensively negotiated with all of our unions, and agreed to by 83% of our colleagues."

130 The key words here are "without requiring material changes to the T&Cs". LM was cross-examined as to the meaning of these words. It was suggested to her that they meant that Centrica was open to further negotiations to terms

and conditions as long as the changes were not material. LM's answer was that Centrica had been very clear that the negotiating period was over. However, she could not explain why, if that were the case, the email did not say "without requiring *any* material changes to the T&Cs". She went on to say that:

> "...at this phase, all discussions were about how we mitigate, and how do we get colleagues to consider the individual offers made, and we extended the deadline for individuals to be able to sign up".

131 The Tribunal considers that, whether labelled as mitigation consultations or not, the practicality of seeking to mitigate dismissals and to get employees to sign up to the new terms and conditions required discussion of those terms and conditions. Therefore, we find that this communication sent by the T&C Team demonstrates a willingness from Centrica to negotiate further on terms and conditions of employment at this point (January 2021).

132 There were individual consultation meetings with affected employees.

133 A further letter to the GMB and Unite members in the field bargaining unit was sent on 8 March 2021 re-offering protected terms and transition payments and a one-off cash payment or pension contribution. The revised offer remained open to accept until 25 March 2021.

134 On 26 March 2021, JS sent an email to the Board entitled "Project Phoebe, Modernising our Terms and Conditions of Employment" - [CONS/3903]. In that email, the Board was invited to approve the step to issue notices of termination to those employees who had not signed up to the new terms and conditions. At [CONS/3906], JS stated:

> "We are satisfied that we have fully exhausted the possibility of achieving a collectively agreed outcome for the Field Services Collective, a conclusion which is not disputed by the GMB National Officials. Any further talks are likely to result in the same outcome and would only serve to delay implementation of the new terms and the realisation of the benefits, cause continued uncertainty and unrest for our employees, extend the period of

disruption to the business and customers. We have concluded there is no point continuing to talk to the GMB National Officials as they cannot bring their members with them".

135 The Board approved the decision to terminate employment and offer re-engagement to those that had not accepted the new contract of employment. Notices of dismissal were issued, along with offers of re-engagement, on or around 31 March 2021. The affected employees were given a right to appeal between 31 March and 9 April 2021.

136 The final day of employment for employees who did not accept the new terms and conditions was 14 April 2021, with the new contract of employment taking effect from 15 April 2021. By that date 19,205 out of the 19,672 affected employees (about 98%) had accepted the new terms and conditions of employment.

137 Mr Brittenden argued for the claimants that the s188 consultations must have concluded before it can be said, for the purposes of s145B, that negotiations on terms of employment have been concluded. We find that s188 and s145B are separate procedures that are not interlinked by the 1992 Act. Furthermore, if it was necessary to complete the s188 consultations before sending individual offer letter, it would mean that any change to terms and conditions in order to avoid dismissal under s188 could not be discussed for fear of the employer being in breach of s145B.

138 We therefore find that the s188 consultation did not need to be concluded before it could be said that negotiations were exhausted.

Collective agreement negotiations

139 The negotiations regarding new collective arrangements commenced on 14 July 2020 - [SP/83]. The plan was to reduce the number of CBUs from 10 to 5. The impact of this change was set out on 17 July 2020, at [SP/149], which shows that 555 more field service employees were to be brought within collective bargaining, under the new Field Services CBU – [SP/149].

140 Another change was to be that Centrica policies no longer sat within individual collective bargaining agreements. Policies would be determined by a policy forum, at which the recognised unions would have a seat at the table - [SP/84], and LM's evidence in cross-examination.

Dispute resolution

141 There was no dispute resolution process between the GMB and Centrica in relation to the new terms and conditions of employment. It is argued for the claimants that the collective bargaining process cannot have been exhausted by 11 December 2020, as no dispute resolution had taken place.

142 On this point, we find that there was no requirement, be it contractual or otherwise, for the parties to enter into dispute resolution. In cross-examination, LM was taken to various collective agreements that do include a reference to dispute resolution, however those were not collective agreements relating to the claimants. There is no requirement to undertake dispute resolution in the claimants' collective agreements. Mr Brittenden referred LM and the Tribunal to [CONS/846], in which it appears that Centrica planned for time for "ongoing dispute resolution"; however, this is in relation to industrial action, not negotiations on the terms and conditions. We also note that neither party requested or suggested dispute resolution of any kind during the negotiations on terms and conditions.

143 Therefore, the fact that there was a lack of dispute resolution does not lead us to find that negotiations were not exhausted.

Law

144 S145B of the 1992 Act provides as follows:

> **"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."

145 S145D provides as follows:

"145D Consideration of complaint

(1) On a complaint under s145A 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."

146 A worker has the right to present a claim to the Tribunal on the basis that their employer has acted in contravention of s145B. If the worker's claim is successful, the Tribunal may award a figure set out in s145E(3). This amount is subject to annual increases, taking effect from the date of the relevant offer. The relevant offer in the index case was made on 11 December 2020, therefore the fixed award is £4294 (see the **Employment Rights (Increase in Limits) Order 2020**).

The prohibited result

147 The Supreme Court in Kostal UK Ltd v Dunkley and ors 2022 ICR 434, for the first time, considered s145B of the 1992 Act. The Tribunal in that matter found that there had been a breach of s145B. The Employment Appeal Tribunal upheld this decision, however the Court of Appeal allowed Kostal's appeal. In the Supreme Court, the appeal was allowed, and the Tribunal's decision restored.

148 The majority decision in the Supreme Court was that the key issue for determination was not (as the parties suggested) the content of the relevant offer, but the causal link between acceptance of that offer and the result that the employees' terms of employment would not (or would no longer) be determined by collective agreement. If so, the offer would have the

"prohibited result".

149 The mischief that s145B is designed to prevent is employers circumnavigating collective bargaining whilst such bargaining is still ongoing – Kostal para 61. It is a complete defence to a claim under s145B if the parties cannot reach agreement via collective bargaining.

150 In light of that mischief, the majority held that the causal link for a successful s145B claim will only be satisfied where there was a real possibility that (if the offer had not been made and accepted) the relevant terms would have been determined by a new collective agreement – Kostal para 65:

> "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*".

151 The prohibited result will therefore usually be assumed to be the case where there has been a failure to comply with the collective bargaining process agreed between the negotiating parties.

152 In other words, any offer made before the agreed collective bargaining procedure has been followed and exhausted will be found to have the prohibited result – Kostal paragraph 67. There is a neutral burden on this point: we consider that there must be an evidential burden on each side to raise the argument that (respectively) the procedure had or had not been exhausted.

153 The position on the prohibited result was set out by Lord Leggat in his conclusion at para 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."

154 In Kostal, the Tribunal had found as a fact that the collective bargaining process had been continuing at the point at which the direct offers were made. It had therefore been entitled to find that this offer contravened s145B. In Kostal, this was a fairly clear-cut finding of fact to make, given that there was an agreed collective bargaining process of four stages, and the offer had been sent out when the parties were at Stage 3.

155 What about cases involving collective bargaining processes that are not agreed, and/or clearly set out? The case of INEOS Infrastructure Grangemouth Ltd v Jones and others [2022] IRLR 768 helps us here, at paragraph 64:

"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..."

156 Thus, a key question of fact for the Tribunal to determine is whether the negotiations regarding collective bargaining had in fact been exhausted at the point the relevant offer was made. If so, the claims will fail, as the offer (if accepted) would not have the prohibited result.

The prohibited purpose

157 Under s145D, the burden of proof in demonstrating the respondent's sole or main purpose is on the respondent. The Tribunal, in determining the purpose, must consider the factors set out at s145D(4).

158 Lord Leggat in Kostal held at para 68:

> "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"

159 Mr Burns KC and Ms Tutin's position is therefore that, if the respondent had a genuine belief that the collective bargaining process had been exhausted, this provides a second complete defence to a claim under s145B, as the prohibited purpose would not be present.

160 Mr Brittenden (unsurprisingly) disagreed with this position. He argued on behalf of the claimants that, if the prohibited *result* is found to exist, this must have a bearing on whether the prohibited *purpose* is present. He based this submission on para 31 of Kostal:

> "It is...important to note that what constitutes the prohibited purpose is defined by reference to what constitutes the prohibited result. For that reason too, although the relevant provisions must be construed as a whole, the primary question must be to identify the nature and scope of the prohibited result."

161 He therefore submitted that, contrary to the respondent's position, there is no complete defence open to the respondent if it can show that it genuinely believed collective bargaining was at an end.

162 On reading Kostal as a whole, and considering the legislation as a whole, coupled with its purpose, we accept the respondent's position on this point, that, if the respondent can demonstrate it genuinely believed collective bargaining was exhausted, it will have a complete defence. If this were not so, and the key issue was solely the question of prohibited result, it is difficult to see why the legislature would have needed to include s145B(1)(b) as a requirement to liability being established. If the mischief that s145B seeks to prevent is to stop employers circumnavigating collective bargaining, it must be a complete defence for the employer to show that this was not its intent.

163 This interpretation is consistent with Lord Leggat's remarks at para 68 of Kostal:

> "In my view, employers have two means of protection against 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 s145B(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."

164 The second factual question for the Tribunal in a s145B case is therefore whether the respondent can demonstrate it had a genuine belief that the collective bargaining process was exhausted. If so, a s145B claim will fail.

The scope of s145B of the 1992 Act

165 There was a dispute between the parties as to the scope of s145B: whether it covers solely contractual terms, or whether it is wider, covering non-contractual conditions also. We consider that it is most appropriate to deal with this matter at this stage, given it is a matter of legal interpretation, and not a question of findings of fact.

166 The question for us to consider here is what the legislature meant by "terms of employment" in s145B.

Claimant's submissions

167 Mr Brittenden argued that the phrase needs to be read in the context of the rest of the 1992 Act, and in a purposive manner, as endorsed by Kostal: he submitted that the correct interpretation is that terms and conditions, both contractual and non-contractual, are covered by s145B. Mr Brittenden invited the Tribunal to read across the 1992 Act, particularly looking at ss244, 178, and Schedule A1.

168 S178 reads as follows:

(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 of 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) ...

169 S244 provides as follows:

(1) In this Part a "trade dispute" means a dispute between workers and their employer which relates wholly or mainly to one or more of the following –

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.

(2) …

(3) …

(4) …

(5) In this section –

"employment" includes any relationship whereby one person personally does work or performs services for another; and

"worker", in relation to a dispute with an employer, means –

a. a worker employer by that employer; or

b. a person who has ceased to be so employed if his employment was terminated in connection with the dispute or if the termination of his employment was one of the circumstances giving rise to the dispute.

170 Schedule A1, paragraph 3 sets out the following:

(1) This paragraph applies for the purposes of this Part of this Schedule.

(2) The meaning of collective bargaining given by section 178(1) shall not apply.

(3) References to collective bargaining are to negotiations relating to pay, hours and holidays; but this has effect subject to sub-paragraph (4).

(4) If the parties agree matters as the subject of collective bargaining, references to collective bargaining are to negotiations relating to the agreed matters; and this is the case whether the agreement is made before or after the time when the CAC issues a declaration, or the parties agree, that the union is (or unions are) entitled to conduct collective bargaining on behalf of a bargaining unit;

(5) …

(6) ...

171 Mr Brittenden also pointed the Tribunal to the case of Hadmor Productions v

Hamilton [1982] ICR 114 HL, which considered s29 of the 1992 Act's predecessor, the **Trade Union and Labour Relations Act 1974**. This is the equivalent of s244 in the 1992 Act. Lord Diplock, at 124E-G, held:

> ""Employment" is deliberately widely defined in [subsection 5 of s244 of the 1992 Act] so as to cover *any* relationship whereby one person personally does work for another. It is not confined to a contractual relationship, and "terms and conditions of employment" in [s244(1)(a)] are similarly not confined to contractual terms and conditions. I cannot do better than adopt the words of Lord Denning M.R. in British Broadcasting Corporation v Hearn [1977] ICR 685, 692, where he said:
>
> > "Terms and conditions of employment may include not only the contractual terms and conditions but those terms which are understood and applied by the parties in practice, or habitually, or by common consent, without ever being incorporated into the contract"".

172 Given that s178 contains the same phraseology of "terms and conditions", Mr Brittenden submitted that we can read across Hadmor and apply it to s178. He went further to say that the legislature intended for "terms of employment" in s145B to mean the same as "terms and conditions" in s178 and, therefore, Hadmor can also be read into s145B.

173 Mr Brittenden also prays in aid the case of P v NASUWT [2003] ICR 306 HL, in which s244 was the legislation under the microscope. Lord Bingham held as follows:

> "3 The first issue turns on the definition of a trade dispute in s244(1) of the 1992 Act as meaning (so far as relevant) "a dispute between workers and their employer which relates wholly or mainly to … (a) terms and conditions of employment." It is plain that most disputes between employers and employees which lead to strike action or industrial action short of a strike fall squarely within this definition, however it is construed. One might instance disputes about rates of pay; ancillary benefits such as paid holiday, sick pay or pensions; working hours; overtime; rostering and shift patterns; and so on. In such situations, the employers or the employees (or their representatives) are seeking a change in some aspect of the employment relationship between them, whether strictly contractual or not, which the other party is resisting, and the action is taken to put pressure on the other

party to accede.

> 4 But Mr Giffin, for the appellant P, contended that the statutory definition of trade dispute covers nothing other than a dispute about terms and conditions of employment...I am persuaded that such a construction would be too narrow and would deny protection to genuine, employment-related disputes between employers and employees which have in the past been thought to be protected and ought in fairness to be so...I would accordingly read the statutory definition as covering a genuine dispute between employees and their employer relating wholly or mainly to the job the employees are employed to do or the terms and conditions on which they are employed to do it.

174 In relation to Schedule A1, Mr Brittenden pointed us to Underhill LJ's decision in BALPA v Jet2.com Ltd [2017] IRLR 233 CA, in which he rejected the employer's submission that recognition was limited to negotiating over *contractual* terms of employment – [28]:

> "...I can see nothing in the phrase "negotiations relating to pay, hours and holidays", to suggest that it covers only proposals which if agreed would give rise to individual contractual rights. No doubt the paradigm of a proposal relating to pay, hours and holidays is one which involves an enhancement of the contractual rights of workers, but that is not axiomatically the case. There is no reason why a trade union might not want to obtain agreement from an employer about aspects of pay, hours and holidays which would not give rise to individual contractual rights:…"

175 Finally, Mr Brittenden pulled these threads together by referring us back to Kostal, and [28], in which Lord Leggat held:

> "In [s145D] the word "recognised", in relation to a trade union, means being recognised by an employer for the purpose of collective bargaining: see section 178(3) of the 1992 Act. The phrase "collective bargaining" means negotiations relating to or connected with one or more of the matters specified in section 178(2). Those matters include (among others) terms and conditions of employment. The phrase "collective agreement" means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers relating to one or more of the specified matters: see section 178(1)."

176 Mr Brittenden invited us to consider the ramifications if we were to find that

only contractual terms were covered by s145B. This would lead to a situation in which an employer could simply rip up collective agreements regarding incentive schemes and ways of working on the basis that they were non-contractual.

Respondent's submissions

177 On the other hand, Mr Burns KC countered firstly that, if the drafters of the 1992 Act had intended s145B to cover "terms and conditions", that is what s145B would say. The phrase "terms of employment" is distinct from "terms and conditions", and that phrase must be interpreted as having been deliberately chosen so as to be distinct.

178 Secondly, he argued that Mr Brittenden's analysis of the legislation does not bear close scrutiny when you consider the wider framework of the 1992 Act. Specifically, Mr Burns KC drew our attention to s296, which provides as follows:

> (1) In this Act worker means an individual who works, or normally works or seeks to work –
>
> a. Under a contract of employment, or
>
> b. Under any other contract whereby he undertakes to do or perform personally any work or services for another party to a contract who is not a professional client of his, or
>
> c. In employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as such employment does not fall within paragraph (a) o (b) above.
>
> (2) In this Act employer, in relation to a worker, means a person for whom one or more workers work, or have worked or normally work or seek to work.
>
> (3) ...

179 Mr Burns KC submitted therefore that the general framework for the 1992 Act is a contractual one, given this contractual definition of worker. S145B falls

within this general framework.

180 S244 specifically has its own, non-contractual definition of employment and worker at subsection (5), taking it outside the general contractual framework of the 1992 Act. This must be deliberate drafting, so as to allow trade disputes and industrial action to lawfully be called about a dispute involving non-contractual conditions of work. This makes sense given the purpose of s244, to allow for trade disputes.

181 However, this means that the facts and findings in Hadmor fell outside the general contractual framework, given that s244(5) replicates s29(6) of the 1974 Act. Therefore, Mr Burns KC's case was that it would be wrong to read Hadmor across into s145B, given that s145B is within the contractual framework, and s244 is (deliberately) without.

182 Mr Burns followed through this logic, submitting that we could not read across the same meaning of "terms and conditions" from Hadmor and s244 into s178 for the same reason. S244 contains its own specific, non-contractual definition of worker and employment, whereas s178 falls back on the general, contractual, definition within s296.

183 Turning to Schedule A1 and BALPA, Mr Burns KC considered the purpose of that Schedule, to provide a process for mandatory recognition where a union can show it has met the various thresholds of support within the relevant CBU, and so can go to the Central Arbitration Committee ("CAC") to make an application to force the employer to collectively bargain. Schedule A1 is restricted to three matters; pay, hours and holiday. It does not cover all the factors set out in s178(2)(a)-(g). Moreover, paragraph 3 of Schedule A1 specifically excludes s178, including the reference to "terms and conditions of employment" and also the implied contractual definition of worker and employment under s296. Once again, therefore, Mr Burns KC argued that Mr Brittenden is effectively seeking to compare apples and oranges, by seeking to compare sections within the contractual framework to sections that are expressly taken outside of that framework by the legislature.

184 In terms of Kostal, Mr Burns KC's submission was that the language used in Kostal is all contractual, as is the language of s145B. S145B uses the words "acceptance", "offer", "terms...determined", all of which are the language of contract law. This language simply does not make sense when applied to non-contractual conditions of working. Kostal mirrors this language; for example, at [65] Lord Leggat held:

> "Once it is recognised that the question whether the acceptance of offers would have the prohibited "result" is a question of causation, it is evidence 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..."

185 Lord Leggat goes on to discuss "terms of employment" being "determined by collective agreement". This demonstrates, submitted Mr Burns KC, that the Supreme Court's understanding of s145B was that it is limited to contractual terms only.

Tribunal's conclusions

186 On balance (and a fine balance it is), we agreed with the interpretation of the legislation Mr Burns KC presented, and find that s145B's scope is restricted to contractual terms only.

187 In coming to this conclusion, we considered Lord Leggat's guidance as to interpreting legislation, at [30]:

> "First, as with any question of statutory interpretation, the task of the court is to determine the meaning and legal effect of the words used by Parliament. The modern case law – including, in the field of employment law, the recent decision of this court in Uber BV v Aslam [2021] ICR 657, para 70 – has emphasised the central importance of identifying the purpose of the legislation and interpreting the relevant language in the light of that purpose. Sometimes the context and background, or the statute viewed as a whole, provides clear pointers to the objectives which the relevant provisions were seeking to achieve. In other cases, however, the purpose needs to be identified at a level of particularity which requires

it to be elicited mainly from the wording of the relevant provisions themselves."

188 We have considered the language of the statute as a whole, and first conclude that Parliament's wording of "terms of employment" as opposed to "terms and conditions" must be deliberate. If s145B was intended to relate to terms and conditions, that is the phrase that would have been used. On that basis, we find that we cannot read across the non-contractual meaning of "terms and conditions" in s244, into s145B.

189 In any event, taking the statute as a whole, it is clear to us that the deliberate extraction of s244 and Schedule A1 from the general contractual framework (and therefore the definitions in s178 and s296) was intended by the legislature to make a difference as to how the Tribunals approach those different sections. S244 and Schedule A1 were, for very good reasons, drafted, and have been interpreted, so as to cover non-contractual arrangements between workers and their employers. The same cannot be said of s178 and s145B; both of which rely on the contractual definition of worker within s296.

190 Looking then at the wording of the relevant provision, the language of s145B is the language of contract law. Offer and acceptance are the fundamental bases of any contractual arrangement. Looking at this language and taking into account the contractual definition of worker in s196 to which s145B applies, we conclude that the legislature intended for s145B to be confined to contractual terms only. The cases relied upon by the claimants do not assist, as they relate to provisions of the 1992 Act that have been taken outside of the contractual framework.

191 Having looked at the statute as a whole, and the specific wording of the provision in question, we consider the issue purposively. If s145B were to cover non-contractual arrangements, the negotiations that need to be exhausted before a direct offer can be lawfully made to employees would be unwieldy. It would be nigh on impossible to in fact exhaust negotiations if those negotiations needed to include all non-contractual arrangements between the parties. This could have the effect of tying up employers with legitimate

business reasons for wanting the change terms and conditions for an unreasonable and unworkable length of time in lengthy negotiations, covering the ins and outs of employees' working lives. It is only right that all parties understand what needs to be negotiated upon, and what discussions need to be exhausted, prior to a lawful offer being made. The only way we can see that this is possible is if those negotiations are limited to covering contractual terms of employment.

Conclusions

Were CTAP and "Ways of Working" contractual or non-contractual matters?

192 We have found that negotiations on certain matters regarding the new terms and conditions were still ongoing as at 11 December 2020, namely CTAP and hours/patterns of work. A key question for us to consider is whether those matters are contractual terms, or non-contractual conditions.

193 The parties differ over their categorisation of CTAP and Ways of Working. Unsurprisingly, the claimants argued that both must be contractual, whereas the respondent submitted that both are non-contractual.

CTAP

194 JB's evidence in his witness statement is that CTAP is non-contractual – [JB/WS/60]. This ties in with LM's evidence on the point – [LM/WS/7.64]. In evidence, LM set out that there were two aspects to CTAP: her evidence was as follows:

> "There were two elements to CTAP. The main part of CTAP was an incentive scheme, non-contractual in nature. Then the second element was "enhanced CTAP" where we committed to make payment to colleagues going from 37 hours to 40 hours (a one-off payment)".

195 This explanation is consistent with the evidence within LM's witness

statement, cited above. We therefore accept this evidence, as LM has been consistent, and the contemporaneous documentation at [SP/734] supports this evidence. Furthermore, JB's own evidence set out the position that the CTAP incentive scheme was non-contractual.

196 We therefore conclude that the CTAP incentive scheme was a non-contractual scheme, much in the same way as a discretionary bonus. The CTAP enhanced payment was however contractual in nature.

Ways of working

197 One of the biggest contentions between the parties was the inability of Centrica to give any more specifics about the hours that employees would work. The draft Heads of Terms sent on 28 November 2020 stated that working hours for field engineers would be 40 hours, and that those would be worked between 0700 and 2100 Monday to Sunday – [HOT/10-11].

198 As to whether working hours equate to contractual terms, we refer to s1 of the Employment Rights Act 1996 for assistance, in which the particulars of employment that are required to be given to an employee at the commencement of their employment are set out. We understand that this is the bare minimum of detail that a new employee is entitled to and, as such, must be contractual in nature.

199 In terms of hours of work, s1(c) sets out that the statement of particulars shall include:

> "any terms and conditions relating to hours of work including any terms and conditions relating to:
>
> (i) Normal working hours,
>
> (ii) The days of the week the worker is required to work, and
>
> (iii) Whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined".

200 Clearly, the factual matrix here would require there to be variation in an individual engineer's timetable each week, depending on customer demand. This means that the workers were entitled to understand how their working weeks and any variations would be determined under the new contract.

201 We conclude that working hours/patterns, and how any variation in those hours is to be determined, are contractual matter, not simply non-contractual detail.

Prohibited result – 145B(1)(a)

Were negotiations in fact exhausted at the time the offer was made (11 December 2020)?

202 We have found that certain matters were still the subject of negotiation as at 11 December 2020. Those matters included CTAP and Ways of Working, relating to working hours/patterns.

203 We have found above that the CTAP enhanced payment was contractual, whereas the CTAP scheme itself was non-contractual. Ways of Working regarding working hours and patterns was contractual in nature.

204 Although the name of the CTAP enhanced payment changed to Quarterly Incentive Plan, we find that, on the evidence before us, there was no material difference that could be said to equate to a change of a contractual term in relation to CTAP enhanced payment pre- and post-11 December 2020. We accept the evidence of LM on this topic, at [LM/WS/14.17], which was not challenged.

205 Therefore, negotiations in relation to CTAP enhanced payment were not ongoing at the time of the sending of the offer letters on 11 December 2020.

206 In terms of CTAP itself, the mechanics of this scheme were the subject of ongoing discussions and dispute between the GMB and Centrica post-11 December 2020, but were non-contractual in nature.

207 Regarding Ways of Working (hours/pattern of work), these were contractual in nature, and negotiations were ongoing around these matters as at 11 December 2020.

208 Therefore, in conclusion, negotiations in relation to certain contractual terms were not exhausted at the time the offer letters were sent out. As such, we conclude that the prohibited result is established in this case, given the framework provided in Kostal.

Prohibited purpose – s145B(1)(b)

Does reasonableness play a part?

209 The Tribunal considered whether there was any objective "reasonableness" test to be included within our determination as to the respondent's genuine belief. For example, in cases of harassment under s26 of the Equality Act 2010, there is a requirement that (1) the claimant subjectively believes a harassing environment to have been created by the respondent's actions and (2) that that belief is reasonable in all the circumstances. Likewise, for unfair dismissal (conduct) cases under s98 of the Employment Rights Act 1996 ("ERA"), it is necessary for a respondent to first prove that it held a genuine belief that the claimant was guilty of the alleged misconduct, but that genuine belief must be based on reasonable grounds, following a reasonable investigation. Finally, by way of example, the belief required on the part of a claimant in making a protected disclosure under s43B ERA is "reasonable belief", which again imposes both a subjective and objective element to the test.

210 By contrast, in s145B, and in Kostal, there is nothing that expressly sets out that reasonableness of the respondent's genuine belief needs to be

considered. This gave the Tribunal some concerns as we could envisage a scenario in which a genuine belief would be objectively unreasonable, and yet would still lead the respondent to a successful defence.

211 The Tribunal however understands that the lack of a “reasonableness" requirement must stem from the purpose of the legislation: to prevent an employer from deliberately circumnavigating collective bargaining. Therefore, it may be thought that, however unreasonable the genuine belief is, such a genuine belief would still mean that the sole or main purpose required by s145B would not be present.

Whose belief?

212 First, the question for us is “whose belief is it that needs to be genuine, within the respondent?”. Mr Brittenden said that it must be a collective belief, as opposed to any one individual. Mr Burns KC stated that it must be the directing mind of the respondent: in this case that would be the Board, following the recommendation of LM.

213 We determined that this meant that our first consideration must be to consider LM’s belief as to whether negotiations were exhausted. Our next consideration was then to find what the Board genuinely believed. We have made our findings of fact on those two matters above: we have found that both LM and the Board had a genuine belief that negotiations on terms of employment had been exhausted at the relevant time.

214 We conclude that, in this case, the relevant time must be 2 December 2020, as that was the day on which the decision was taken (subject to the ballot outcome) for the individual offer letters to be sent. In the event, the letters were not sent until 11 December 2020, however the sending of them was set in motion on 2 December 2020 at the Board meeting.

215 There was some concern from the Tribunal that the “directing mind” was in fact the senior management team of the respondent, as opposed to the Board.

This line of discussion stemmed from the manner in which negotiations had progressed from June 2020. Specifically that, despite the Board opting for Project Phoebe, notices under s188 and notices to terminate collective agreements were both given on 15 July 2020. Neither termination notice was envisaged within Project Phoebe - [CONS/17-19]. Furthermore, no conversation was had with the unions at the beginning of the process to explain that the reason for the s188 notice was that the respondent considered that this was a legal obligation on them, as opposed to the respondent choosing to give notice. The Tribunal held concerns that this in fact showed an undermining of the Board's decision making, and that it was the senior management that was in fact the controlling entity in this process.

216 This was however an assertion that had not been advanced by the claimants (and that is in no way intended as a criticism of the claimants, simply an observation). We therefore do nothing more than note this point for completeness.

217 Thus, we conclude that it is indeed LM and the Board's belief that is relevant under s145B. We have found that both LM and the Board did hold a genuine belief that negotiations had been exhausted as at 2 December 2020.

S145D – factors to take into account

218 In considering the respondent's sole or main purpose and, in so doing, its genuine belief that negotiations have been exhausted, the Tribunal must consider any evidence that the employer had recently changed or sought to change, or did not wish to use, arrangements agreed with collective bargaining.

219 The Tribunal held some concerns that the notice to terminate all collective agreements at the very beginning of negotiations on new terms and conditions stood against Centrica under s145D. On the face of it, such action goes to undermine the relationship between employer and recognised unions, particularly given the following:

219.1 There is on the face of it a recognition that doing so would undermine the unions - the Industrial Relations SteerCo slide deck from 19 June 2020 - [SC/88];

219.2 The apparent leap from Project Phoebe to Project Chorus;

219.3 The overlapping of negotiations regarding terms and conditions and collective agreements, given that the initial plan in Project Phoebe was that consultation and implementation of new CBUs would take place before negotiations on terms and conditions – [CONS/18].

220 We therefore had some reservations that the respondent's termination and renegotiation of collective bargaining agreements was done in order to weaken the influence of the unions. This was particularly given the introduction of a Policy Forum which removes some influence from the unions.

221 However, on balance, we are satisfied that the manner in which Centrica dealt with the unions and collective bargaining was not done so as to circumnavigate collective bargaining, for the following reasons:

221.1 LM's evidence in cross-examination that, "the end of the changes of modernising collective arrangements meant that the unions (including GMB) had more membership post-change than pre-change, and collective bargaining rights had been expanded not reduced";

221.2 This is supported by the documentary evidence – [SP/149-151];

221.3 The first negotiation meeting regarding collective agreements in fact occurred the day before notice to terminate was served - [SP/83];

221.4 The purpose of the changes to collective agreements was to bring them up to date with the structural and organisation changes that had occurred within Centrica in recent years. The existing structure of collective agreements did not mirror the organisational structure of the respondent – [CONS/365]. JB's evidence appeared to agree with this point; at [JB/WS/5], he states "...the agreements don't easily delineate the seven bargaining groups for whom the GMB was recognised in relation to on a day-to-basis [sic]. This is because practice changed over

time and our arrangements were not always documented in as regimented a fashion as we would have ideally liked". The Tribunal accept that this is a legitimate reason for wishing to change collective agreements.

222 Taking into account s145D, we maintain the finding that the respondent held a genuine belief that the negotiations were exhausted, and therefore the sole or main purpose was not the prohibited purpose. The respondent therefore has a complete defence to the claim under s145B of the 1992 Act.

Conclusion

223 It seems to the Tribunal that the respondent had convinced itself, genuinely, that it had followed a clear structure, in which there were to be consultations, then negotiations, then further consultations. The respondent's key people understood that consultations and negotiations were different, and consultations could not lead to any change to terms of employment. Once the final offer was put to a ballot, we accept that the respondent genuinely believed it had concluded Phase 2, the negotiation stage of the process, and could happily move on to consultations regarding s188.

224 The respondent was also under the misapprehension that certain matters that it had labelled as ways of working were non-contractual, such as working patterns/shift patterns. Again, we accept that this was a genuine misapprehension, which meant that the respondent considered it could continue to negotiate on certain matters without being deemed to be negotiating on terms of employment.

225 However, the effect of LM and DH's words in conversations following the outcome of the ballot, and 11 December 2020 was to keep negotiations going. It is the scrutinising of those various conversations in December 2020 that has led us to the conclusion that negotiations were in fact not exhausted.

226 However, given that holding a genuine belief that negotiations have been

exhausted provides a complete defence to a respondent, the respondent has successfully defended the claims.

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Employment Judge Shastri-Hurst

Date: 08 January 2024

RESERVED JUDGMENT & REASONS

SENT TO THE PARTIES ON

.....07 March 2024.....

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FOR EMPLOYMENT TRIBUNALS