



EMPLOYMENT TRIBUNALS

Claimants: The individuals listed at Schedule 1 ('GMB Claimants')
The individuals listed at Schedule 2 ('Unite Claimants')

Respondent: Walsall Housing Group Limited ('Respondent')

Heard at: Birmingham

On: 11 & 12 March & (in chambers) 13 March and 2 May 2024

Before: Employment Judge Flood
Mrs Forrest
Mrs Howard

Representation

GMB Claimants: Mr Mensah (Counsel)
Unite Claimants: Ms Veale (Counsel)
Respondent: Mr Leiper KC (Counsel)

RESERVED JUDGMENT

The complaints that an unlawful inducement relating to collective bargaining was made contrary to section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 are not well founded and are dismissed.

REASONS

The Complaints and preliminary matters

1. Claim number 1305512/2022 ('GMB Claim') was presented on 2 September 2022 (following a period of early conciliation between 25 June and 5 August 2022) by 169 named claimants including the GMB Claimants. Claim number 1308455/2022 ('Unite Claim') was presented on 20 October 2022 (following early conciliation between 10 August and 21 September 2022) by 28 named claimants who are the Unite

Claimants. Both claims brought complaints of unlawful inducement relating to collective bargaining in breach of section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA').

2. The Respondent defended both claims.
3. There was a preliminary hearing for case management before Regional Employment Judge Findlay on 14 April 2023 in respect of the GMB Claim. At that hearing the issue of whether all 169 individuals named as claimants in the GMB Claim in fact had validly pursued a claim was discussed. Claims pursuant to Section 145B(5) TULRCA must be brought by individual employees or workers and it became apparent that some of the named claimants were not in the Respondent's employment at the material time. Orders were made with regard to providing the necessary authority to pursue claims by the named claimants. In addition, the GMB Claim and the Unite Claim were consolidated to be heard together.
4. A further preliminary hearing was listed which came before Employment Judge Gaskell on 4 July 2023. By the time of this hearing a number of the named claimants in the GMB Claim had withdrawn their claims. However there remained 39 named claimants in the GMB Claim who were not represented by Simpsons Solicitors who represented the GMB Claimants but who had not indicated whether they wanted to pursue the claims or not. Orders were made for the provision of the contact details for those claimants to enable the Tribunal to contact them to ascertain whether they still pursued the claims. At this stage no such irregularity had been identified in relation to the Unite Claim and all 28 claimants still pursued their claims. Subject to resolving the issue related to the 39 named claimants in the GMB Claim, the matter was listed for hearing. A list of the issues in dispute were identified as being:

"(i) Was each Claimant a worker who was a member of a recognised Trade Union?

(ii) It is accepted an offer was made to the Claimants. Would acceptance of that offer have the effect that a pay term would no longer be determined by collective agreement?

(iii) Was the Respondent's sole or main purpose in making the offers to achieve that result?"

5. Following that hearing, there was various correspondence between the parties and their respective representatives and the Tribunal in relation to identifying the correct claimants to both claims. At the time the claim came before this Tribunal hearing, the position was as follows:

- 5.1 The Unite Claim consisted of claims made by the 21 named claimants identified at page 108 of the Agreed Bundle of Documents prepared for this hearing ('Bundle');
- 5.2 The GMB Claim consisted of claims made by the 95 named claimants identified at page 106-7 of the Bundle;
- 5.3 The named claimants that had been categorised as unidentified list at page 109-110. As at the date of the hearing, the number of such claimants had reduced to 10. By the time this judgment was made, all but two of the unidentified claims (in relation to a Mr A Kumar and a Mr P York) had been dismissed either upon withdrawal or having been issued with a strike out warning, to which no (or no adequate) response had been provided. These two claims will be addressed separately by the Tribunal.
6. As a result of the above, the issue identified at paragraph (i) of the draft list of issues above was no longer in dispute in that all parties agreed that the GMB Claimants and the Unite Claimants (together 'the Claimants') were at the relevant time a worker who was a member of the recognised trade union. The issue identified at paragraph (ii) of the draft list of issues had also now been agreed as it had been accepted by the Respondent that (a) an offer was made to the Claimants; and (b) that acceptance of that offer had the effect that a pay term would no longer be determined by collective agreement. Therefore the sole issue before the Tribunal at this hearing was whether it was the sole or main purpose of the Respondent when making the offer to achieve the result in question (i.e. that a pay term would no longer be determined by collective agreement).

Documents before the Tribunal

7. We had the Bundle and where page numbers are referred to below, these are references to page numbers in the Bundle. The witnesses listed below had provided written witness statements and Mr Mensah and Ms Veale provided written submissions at the conclusion of the evidence. We also had a Chronology and Cast List and a Bundle of Authorities.

The Issues

8. The sole issue to be determined by the Tribunal was as follows:

"(iii) Was the Respondent's sole or main purpose in making the offers to the Claimants to achieve the result that a pay term would no longer be determined by collective agreement?"

Findings of Fact

9. In the judgment, the Tribunal has used initials to identify the people listed below rather than their full names in the interests of brevity. Other terms used may also be defined in a similar manner through the judgment.

Witnesses and other individuals

10. The following people attended to give evidence on behalf of the claimant:
 - 10.1.1 Justine Jones ('JJ'), Regional Organiser, GMB Midlands;
 - 10.1.2 Nathan Allen ('NA') Regional Officer, Unite (from early 2022).
11. The following people attended to give evidence on behalf of the respondent:
 - 11.1.1 Theresa Huburn ('TH'), Corporate Director of People and Learning at the Respondent from May 2016 to 2 July 2022;
 - 11.1.2 Lisa Wallis ('LW'), Corporate Director of People and Learning at the Respondent from 11 July 2022 onwards.
12. The following individuals were referred to during the evidence:
 - 12.1.1 Gary Fulford ('GF'), Chief Executive at the Respondent .
 - 12.1.2 Victoria Roden ('VR'), Head of People Services at the Respondent
 - 12.1.3 Ray Salmon ('RS'), Regional Organiser, Unison
 - 12.1.4 Sittu Ahmed ('SA'), Unison representative
 - 12.1.5 Phil Griffin ('PG'), Unison representative
 - 12.1.6 Salim Perager ('SP') Unison representative
 - 12.1.7 Mark Astley ('MA'), Unite representative
 - 12.1.8 Mark Thompson ('MT'), Unite representative
 - 12.1.9 David Lilley ('DL'), Unite representative
 - 12.1.10 Dave Walters ('DW'), GMB representative
 - 12.1.11 Luke O' Toole ('LT'), GMB representative
 - 12.1.12 Nathan Vickery ('NT'), GMC representative
13. The Tribunal made the following findings:
 - 13.1 The Claimants were all employees of the Respondent at the relevant time.
 - 13.2 The Respondent is a charitable Registered Provider of Social Housing, regulated by the Regulator of Social Housing and in receipt of public funds. The Respondent is one of the largest housing groups in the

Midlands; it operates in a number of local authority areas, including Walsall, Telford, Wolverhampton, Worcestershire and Staffordshire and provides affordable homes for rent, shared ownership and sale.

- 13.3 The Respondent recognises 3 trade unions: GMB, Unison and Unite and each year it enters into collective bargaining and negotiates the annual pay increase for all of its workers. In October 2022, the Respondent had approximately 780 employees and (whilst it did not have accurate membership numbers) it estimated that approximately one third of these employees were union members and two thirds were not. We also accepted TH's evidence that in terms of representation, GMB and Unite tended to represent the Respondent's trades employees with Unison tending to represent the non-trades employees.

Standard contract of employment

- 13.4 At page 190-198 we saw a copy of the standard contract of employment issued to employees of the Respondent at the relevant time which reflected this collective bargaining arrangement. It contained the following provision at paragraph 3.17 (page 197):

"COLLECTIVE BARGAINING

Your terms and conditions of employment are determined by negotiation between the company and the recognised trade unions. This means that as an employee you are bound by the outcome of any collective bargaining arrangements (whether you are a member of the recognised trade union or not). Your terms of employment will reflect the terms so determined therein and they may therefore be amended from time to time.

Further details of the company's Policies and Procedures can be obtained from your Manager. These Policies and Procedures may be changed from time to time, after appropriate consultation, where this is considered necessary by the company. Other local Policies and Procedures may form part of your terms and conditions of employment and are hereby incorporated therein. These may be developed and/or amended from time to time, with appropriate consultation as required."

Former recognition agreement

- 13.5 There was a recognition agreement in place dated 30 September 2018 ('Former Recognition Agreement') (page 142) and this governed the relationship between the Respondent and the three trade unions from this date until it was terminated with effect on 21 February 2021 (see below). It terms of the structure of the recognition in place it provided for a Joint Negotiating Committee ('JNC') consisting of all the accredited trade union representatives (up to a maximum of 9) and members of the Respondent's executive team. The JNC was established to "discuss,

consult or where appropriate negotiate” issues which included the annual pay review. The Former Recognition Agreement also provided that it could be terminated by either party giving six month’s notice in writing.

- 13.6 The annual pay award negotiations took place each year at the Respondent and TH led on those negotiations from the Respondent’s perspective from approximately 2016 onwards. The annual pay award would normally take effect from 1 April each year (which was the start of the Respondent’s financial year) and negotiations started from approximately the previous October. This was just after release of the consumer price inflation (CPI) figures for September. The Respondent, as a Registered Provider, is able to set (increase) rents by CPI + 1% each April using the CPI figure from the preceding September. As rental income was the Respondent’s main source of income this increase would give an indication as to what income would be received during the next financial year. The Respondent asked the trade unions to put forward a joint pay claim for the forthcoming financial year in October which was then discussed at Board level via a committee, the Governance and Remuneration Committee (‘GRC’). A benchmarking exercise would also be carried out by the Respondent to determine what others in the sector and within the Respondent’s locality were paying their employees. The GRC would revert to the trade unions with the Respondent’s response i.e. acceptance of their offer or a revised offer. Negotiations would then continue with a view to reaching agreement.

2020/21 pay negotiations

- 13.7 TH told us that in 2020 the relationship between the Respondent and its trade unions had deteriorated (in particular its relations with Unison). The pay negotiations for the 2020/21 pay award (which was due to take effect from 1 April 2020) did not result in agreement by the time the pay award should have taken effect. On 20 March 2020, TH sent an e mail to JJ, SA and MA (page 402-3) expressing disappointment at the way the local representatives had handled the pay negotiations. This e mail referred to difficult economic circumstances that the Respondent was facing. It stated that TH was “*staggered*” that the trade unions were unwilling to accept the Respondent’s offer of a 2.5% pay increase for that year. It went on to note that the Respondent’s board were considering suspending negotiations until the Autumn but were considering implementing the 2.5% pay increase with effect from 1 April 2020. In e mail communications about this (in the context of discussions about the Covid 19 response) after this increase was implemented, TH informed JJ and the trade unions “*There will be no negotiated 2020/21 pay award*” (see page 410). When asked about this approach in cross examination TH agreed that it was a “*robust approach*” and that this was because the pandemic had just started and it was an uncertain time. On 30 April 2020, GF wrote to all employees to inform them that the pay increase of

2.5% that had been offered had been rejected by the trade union ballot process. It went on to state:

“Against this backdrop, the Board and the Group Executive Team believe that it would be inappropriate to approve a pay award for any colleagues or for the Board and Committee Members. We must ensure that the business remains financially robust, that we can deliver services to our customers and at the same time, protect the jobs of our colleagues. As we work through business recovery we will gain a clearer understanding of the financial impact on the organisation and the Board will then take a view on whether a pay award can be afforded, without placing undue financial strain on the business. I know this is disappointing news but I am sure you will appreciate that, at the current time, we need to focus on ensuring the longer term stability of the business and safeguarding jobs.”

- 13.8 There were no further negotiations on the pay award after this e mail was sent.

Notification of pay award for 2020/2021

- 13.9 On 16 July 2020, TH notified JJ, MA and SA by e mail (page 417) that the Board had approved a 2.5% pay award to be backdated to 1 April 2020 and would be processed in August. On that same date GF sent an e mail to all employees (page 418-419). It stated as follows:

“Just before lockdown began at the end of March, the Trades Unions rejected a pay award offer of 2.5% following a ballot of their members. At that time the Board took the difficult decision to withdraw the pay offer. This was due to the financial uncertainty resulting from the pandemic, the need for us to focus on delivering services to our customers and to make sure that we were keeping colleagues safe. During this period there have been no further negotiations with the Trades Unions.”

It went on to inform employees that the financial impact on the Respondent had become clearer over the last few months and that a revised budget for 2020/21 had been presented and approved by the Board. It went on to inform them that a consolidated pay award of 2.5% had been approved by the Board and would backdated and awarded to all employees with effect from 1 April 2020. There were then no further discussions with the trade unions about the pay award and the issue of pay was then not raised again by the trade unions that year. When asked about this in cross examination, TH agreed that the terms of the recognition agreement in place were not being adhered to and that a pay award in this situation was “*simply imposed*”. TH told us that the situation at this time was exceptionally difficult as a result of the pandemic and this step taken by the Respondent was “*not ideal*”.

- 13.10 Following this announcement RS, e mailed JJ to express concern that industrial relations had become strained and suggested a meeting (page

420). It appears that similar requests were received from JJ and the Unite representatives and JJ responded on 23 July agreeing to attend a meeting (page 421). This meeting took place on 12 August 2020 as at page 422 we saw an exchange of emails between TH and JJ referring to such a meeting. It appears that during this meeting it was communicated by TH that the Respondent had decided to end the Former Recognition Agreement.

Notice to terminate the Former Recognition Agreement

13.11 On 12 August 2020 the Respondent gave notice to terminate the Former Recognition Agreement by attaching similar letters to e mails sent by TH to JJ (page 422) and RS (page 422). The letter was issued to GMB, Unite and Unison (pages 147-48;149-50 and 151-52) and made reference to the relationship between the Respondent and the trade union having "*deteriorated significantly*" making reference to the response to Covid 19 and a feeling that there was an inability to "*work together constructively*". The letter also made reference to the current arrangement not serving the Respondent well and that the Respondent believed that "*membership levels are declining and that the trades unions no longer represent the views of the majority of our workforce*". It went on to state that during the notice period the Respondent was "*happy to discuss entering into a new, more modern agreement with one or more trade unions and would be happy to engage ACAS to help facilitate this*". It further stated that "*any such agreement will need to recognise our intention to put in place broader arrangements for all colleagues to have their voices heard on key matters affecting how the business operates*". On 13 August 2020, TH received a response from JJ (page 422) thanking her for her honesty at the meeting and that members would be notified but "*not at this time as we are attempting consultations to look at other proposals*". RS responded on 13 August expressing his disappointment with the decision but stating he could understand why the Respondent had made it. He also indicated that Unison were "*more than happy to discuss a new agreement*" asking JJ to draft suggested wording.

Current recognition agreement

13.12 On 22 October 2020 a meeting was held between the Respondent and the trade unions about the possibility of a new agreement (minutes at page 153-4) where it was agreed that TH would draft a set of principles and circulate. This was done and a document setting these out was at pages 155-6. This included a principle of a "*no surprises*" communication strategy. In April 2021, a new recognition agreement was finalised and put into place ('the Recognition Agreement') and this was shown at pages 178-186. It contained various provisions around the arrangements for the relationship including the following general provisions:

“The purpose of this agreement is to establish and maintain good and effective industrial relations throughout whg that supports and maintains a successful business. It is the right of any individual to belong or not to belong to any Trade Union.

The signatories to this Agreement fully support the system of collective bargaining and believe in the principle of encouraging harmonious industrial relations by discussion, joint problem solving and, when possible, agreement through the development of effective negotiating and consultative machinery.

The signatories to this Agreement agree that whilst genuine and committed efforts will be made to resolve matters of mutual interest through consultation and negotiation, the ultimate responsibility for the planning, reward, organisation, appraisal and review of the whg workforce rests with whg”

- 13.13 The provisions around pay negotiation were contained at paragraph 3.1 of the recognition agreement which provided that the Respondent:

“...recognises Unison, GMB and Unite as trade unions for the purpose of:

- *Consulting and negotiating on the annual pay award, and terms and conditions of employment on behalf of all directly employed colleagues, with the exception of the Group Executive Team...”*

It confirmed that the JNC would be the main forum for meetings. It also confirmed that whilst the agreement was not intended to be legally enforceable that all parties endeavoured to observe the *“spirit and intention”* behind it. The agreement was subject to a 6 months termination clause. It contained a Code of Conduct in Appendix 1 which contained amongst other provisions the following clause:

“If the issues cannot be resolved or the parties need help to do so then the matter may be referred to an independent specialist or facilitator for support, e.g. ACAS or IPA” and

“Where the internal avoidance of disputes procedure has been exhausted and a failure to agree has been registered in writing, all parties agree to use the services of ACAS, or any other agreed party.”

- 13.14 We did not hear in any detail about the negotiations for the 2021/22 pay award to take effect on 1 April 2021. However an award of a 1.5% increase and a £300 non consolidated payment was made (see e mail at page 244). A non consolidated payment meant that this sum was paid to each employee for that year only. A consolidated payment meant that the sum was added to the employee’s salary and thus was paid each year thenceforth.

2022/23 Pay award discussions.

- 13.15 On 14 October 2021, the Joint Negotiating Committee (JNC) met (minutes at page 199 to 203). A number of matters were discussed at that meeting but in particular it was noted that

“Pay Award 2022/23

GF updated members following the recent Government & Remuneration Committee. It had been agreed to delay discussions on the pay award until the end of the calendar year, when we will be in a more informed position regarding CPI, pay and awards in the sector. We will also know whether the Board has decided to levy the full rent increase, and will have a clearer picture on the key budgetary pressures such as reaching carbon zero and meeting new building safety regulation.”

We accepted the unchallenged evidence of TH that this delay took place because inflation was rising rapidly and the September CPI figures were about to be released. These were released on 20 October 2021 and the figure was 3.1% (which although down from 3.2% in the year to August was a 2.4% increase from the figures for CPI released in March 2021). On 15 December 2021 the November CPI figure was published showing inflation of 5.1%.

- 13.16 On 20 December 2021, GMB sent out a communication to its members asking for submissions on the pay award for 2022 (page 205). It asked members to indicate on a form the three most important items that they wished GMB to raise in relation to the pay claim, asking for responses by 4 January 2022. On 10 January 2022 the three trade unions put in their claim for the pay award for the 2022/23 financial year (page 206). This was sent in an e mail from PG who indicated that a percentage increase in pay and allowances of 7% was being sought and this was *“an average figure across the 3 unions”* which the unions felt was a *“fair and reasonable expectation”*. TH’s reaction at the time was that she felt that this claim was not realistic and was told by RS that this was *“pie in the sky”* and that the unions knew that this would not be agreed.

- 13.17 On 13 January 2022, the Respondent’s Governance and Remuneration Committee (GRC) met to discuss the pay offer (see extract from minutes at page 208-9). These minutes noted that TH had expressed her surprise at the claim and explained to the GRC that the Respondent did not want to be *“out of step”* with the rest of the housing sector which was proposing an increase of 3%. There was a note of a discussion involving the Respondent’s Finance Director who explained that the starting position for the Respondent’s budget was the CPI inflation data from September the previous year which was considered along with benchmarking data. It further noted the Finance Director referring to the Respondent having an increase in income of £1.8 million but that the overall cost base (including a proposed salary raise of 3.1%) would increase by £2.3 million. It noted that the Finance Director *“advised that we should refrain from paying our colleagues more than the*

benchmarking levels as we have asked our customers to pay the full rent increases". In response to a question, the Finance Director stated that in total rent increase was offset by salary cost increases.

- 13.18 When asked about what the fallback position was if the trade unions rejected an offer of 3.1%, TH is noted as saying that "...since September there has been concern with the increasing fuel and energy costs" and that "consideration had been given to making an additional non-consolidated payment". She went on to state that the GRC should "avoid recommending that as 3.1% was a good offer and in line with sector benchmarking" mentioning that the new CPI rate for December was due soon and if that was higher "it could add pressure". There was a discussion about differential pay but ultimately the minutes recorded the following decision of the GRC:

"The Committee AGREED to the proposed 3.1% pay award increase with the caveat that if the Trade Unions decline, the Committee will consider whether to review the decision. The Committee NOTED that differential pay has been considered but we are not proceeding with that at present."

- 13.19 On 19 January 2022, there was a meeting of the JNC (minutes shown at page 210). At that meeting Sangita Surrige provided a summary of the financial challenges that the Respondent was facing. She explained that a rent increase of 4.1% was being applied but increased rental income was offset by a reduction in sales income and lower availability of grants. She went on to explain other budgetary challenges including increase in employers national insurance contributions and employer pension contributions. She mentioned that sector benchmarking was indicating pay awards for 2022 were "expected to be between 2% and 3%". The minutes went on to record that:

"The 7% requested by the Unions would increase the pay costs by £3m and cuts in planned spending across the organisation would be needed to fund this. [GF] confirmed that such a percentage would not be agreeable to the Board."

- 13.20 On 27 January 2022, the respondent's Board of Trustees met (extract from minutes of that meeting were shown at page 213). There was a discussion about the previous recommendation of the GRC that a pay increase of up to 3.1% should be made. TH acknowledged that since this recommendation, the CPI inflation rate had increased further and the sector benchmarking had been undertaken some time ago. It went on to note that TH advised that "she had spoken to peers, who have mainly said that they are considering at least 3%". It went on to record:

"In recognition of current challenges. we are considering a one off payment of £300 to colleagues in addition to the percentage uplift."

There was some discussion about how this payment would operate with TH confirming that it would be a non consolidated payment. It was also noted that *“the situation in late January felt different to that in November, but we cannot predict how the economy will progress by June”*. The minutes went on to record that Board approved *“the annual pay award parameters up to a maximum of 3.1% with an additional non consolidated one off payment of £300”*.

We accepted TH’s evidence that as at 31 January 2022, the Respondent had money left in its 2021/22 budget to meet the cost of paying all employees a one off £300 payment but that this had not been provisioned for in its budget for the financial year 2022/23 starting on 1 April 2023.

- 13.21 On 31 January 2022, TH communicated the decision of the Board in respect of the pay award to the local trade union representatives (page 219-210) following an email requesting this from PG. This noted:

“After a lengthy debate, the Board has set the upper parameter for next year's pay award at 3.1%. Rather than start with a lower figure and work our way upwards I have agreed with Gary that we will be completely transparent and make our best offer.

I understand that this falls short of your claim of 7% but, as I know you appreciate, we have to balance all of the competing financial demands that we are facing as a business. An award of 3.1% stands up well when compared to our peers and will add almost a million to the salaries budget, on top of the half a million extra in employers NI contributions.

We appreciate that the rising cost of living, particularly fuel prices, is having a disproportionate impact on lower paid colleagues and in view of this we have managed to secure the approval of the Board to offer a non-consolidated, one off payment of £300 from this year's budget on top of the 3.1%. This would cost an additional quarter of a million and would be dependant on reaching agreement before the end of the financial year; we have not made any provision for such a payment in next years' budget.

Let me know if you want to discuss or want any further information.”

TH explained that the decision of the Board had been to be transparent with the union and provide the best offer for the pay award up front to avoid the discussions becoming *“protracted”* which she did not consider would be helpful to employees because of the cost of living crisis.

- 13.22 On 31 January 2022 PG responded to that e mail at 17:29 (page 219) as follows:

“Thanks for the quick response, the feeling amongst the staff I have spoken to this year tells me that the offer of 3.1% would be rejected and

it's not an offer we would be comfortable presenting to members, the £300 non consolidated offer was pretty unpopular amongst staff I spoke to the last time it was accepted.

We ask that any increase is made as part of a % increase so that it benefits people year on year and isn't just a one off bump to the new year paypacket.

If an offer of 5% had been made I would have had no hesitation in putting it forward to ballot and I would comfortably recommend it to our members."

When it was put to TH that this was not an outrageous counter offer, she told us that this e mail had not been taken by her as a serious counter offer on behalf of the three unions as it had come from just one union representative and not made it clear that it was an offer on behalf of all three. Whether or not this was the case, we accepted that TH and the Respondent did not take this e mail as a formal counter offer.

13.23 On 2 February 2022, TH responded to that e mail (page 218) as follows:

"I am sorry but it appears that we will not be able to meet the trade unions expectations this year. The Board has been clear with us that 3.1 % is the maximum award that they are willing to consider. Even at this level our costs next year will be increasing more than our income which means that our financial position will have weakened.

3.1% is a fair offer. It is in line with sector benchmarking and is higher than pay awards in the private sector which are expected to be an average of 2.5%. It is also higher than public sector awards are likely to be.

We have been given a very clear steer from the Board that we cannot go above 3.1% so on this basis I request that you ballot your members.

Please note that the offer of a non-consolidated payment of £300 to all colleagues, including those whose pay is linked to the NMW/NLW, is made on the basis that we can pay it this financial year.

There is no provision in next year's budget.

Please keep me posted on the ballot arrangements."

TH acknowledged at this time that the cost of living situation in the economy and country more generally was getting worse with this being a daily news item in particular with respect of household energy costs.

13.24 The e mail discussion continued mainly around the arrangements for balloting members. PG confirmed the text of the ballot paper which he

confirmed was the same for all 3 unions and that no recommendation would be made to accept or reject.

Communication of status of pay negotiations

13.25 On 9 February 2022, GF sent an e mail to all staff (page 221-2) to inform them of the offer that had been made to the unions during the pay negotiations. It summarised the negotiations that had taken place noting that a joint request for a pay award of 7% had been received and that after consideration an offer of a 3.1% pay increase had been made. It also went on to state:

“The Board has also proposed a non-consolidated, one-off payment of £300 be made to all colleagues. This is in addition to the 3.1% pay award and is in recognition of the difficulties many colleagues, particularly those on lower incomes, are facing. This payment will be made only if the pay award is agreed this financial year; there is no provision for it in next year's Budget.”

The e mail went on to explain the rationale for the pay offer from the Respondent's perspective stating that the Board recognised that the costs of living was increasing adding financial pressure and explaining that the Respondent was a 'not for profit' organisation. It also provided further financial information about the Respondent including how its income and costs were impacted. It further mentioned that benchmarking data for the housing sector suggested that most providers would be giving pay rises of between 2.5 and 3%.

Ballot on pay offer

- 13.26 The results of the ballot held by the trade unions was determined by 1 March 2022 with Unison approving the Respondent's pay offer and Unite and GMB rejecting it (see e mails at page 223 and 224).
- 13.27 On 8 March 2022 a meeting was held to discuss the pay ballot outcome (page 225) attended by JJ, DW and JOT (for GMB); RS, SP and PG (for Unison); MT and DL (for Unite) and TH and VR (for the Respondent). The notes of that meeting were at pages 225-227. There was some discussion about how different types of workers within the Respondent appeared to be responding to the pay offer referring in particular to discontent from trades colleagues. MT stated that Unite had a high turnout from their ballot and noted that the dissatisfaction from their members was around how the £300 payment was non consolidated and so would not affect their pension. TH acknowledged in response that the £300 one off payment was “*not ideal*”. She went on to say that the budget was tight and again referred to benchmarking data and comment that the other terms and conditions at the Respondent were better than the majority of the housing sector (in relation to sick pay and pension). MT went on to challenge how a 4.1% rent increase translated to a 3.1% pay

increase to employees. TH explained that it would be “*unpalatable*” to increase rent for customers and pass it straight to employees and that it would not be agreed by the Regulator.

- 13.28 SP asked what movement there might be from the Board on the offer of 3.1% and “*what could be done to get this agreed*”. TH then responded:

“..the Board are highly unlikely to offer any movement on the 3.1% as it cannot be afforded without making cuts to services. There may be a possibility that the Board could increase the non-consolidated payment and Gary Fulford would be in support of this decision, however there is no guarantee that the Board would approve an increase.”

We accepted that TH used the term “highly unlikely” rather than “wouldn’t” because she could not be sure of the Board’s position without reverting to them for a decision.

- 13.29 JJ raised the concern that as a one off payment, there is no guarantee that this would be received again and provide security and that there was therefore “*no alternative but to return to members*”. At this stage it was noted that TH “*reminded Union Reps that the non-consolidated payment is to be made from this financial year and will be withdrawn on March 31.*” When it was put to TH in cross examination that this was an indication that the entire discussions on the pay award were time limited, TH disagreed with this and reiterated her position that her statement here related to the non consolidated payment only and the pay negotiations “*took however long they took*”. She agreed that the offer of the £300 was at this point being used as a “*bargaining chip*” to try and reach agreement on the pay award but that she was also being honest about the status of the one off payment. The meeting concluded by noting that the unions would await the response from the GRC and that TH would e mail that following Friday with the outcome of the GRC meeting.

GRC Meeting on 10 March 2022

- 13.30 The GRC met on 10 March 2022 and the minutes of this meeting were at pages 228 to 230. TH informed the GRC that the pay offer had been rejected and no indication had been given by the trade unions about what they would accept (although she said that 5% had been quoted). She went on to state:

“The issue we are being faced with currently is the £300 non-consolidated amount was budgeted in for this financial year, however if the pay award continues to take longer, we may lose the option to offer the non-consolidated amount in the new financial year”

- 13.31 TH informed the GRC about changes to benchmarking which suggested that most housing associations locally were paying around 3%. A question was asked as whether in the past the Respondent had “gone

against what the Trade Unions had requested” and TH said that this had been done but it was not the preferred approach and that the risk of standing firm with the original offer was that GMB and Unite may ballot for industrial action. TH went to recommend that the GRC stand firm with the original offer. A question was asked about whether an increase to 3.5% could be afforded to which GF said this would cost around £120,000 more. There was then a discussion about how much of the workforce the trade unions represented and a question was asked as to any benefits were gained from the trade unions with GF stating that on balance the Respondent did “*not receive many benefits*”. It was then noted that GF stated that “*it may be appropriate to agree the £300 non consolidated payment now regardless of what the increase will be to ensure it comes out of this year’s budget.*”

- 13.32 The ultimate conclusion of the meeting was that the Respondent should revert to the trade unions and ask them to agree to the proposal by a specific date or that the £300 non consolidated payment would be removed. This decision was communicated to the trade unions by TH by an e mail sent on 11 March 2022 (page 231). It stated that the offer of 3.1% could not be increased and that if agreement could not be reached before the end of the financial year, that the offer of the £300 non-consolidated payment would have to be withdrawn, explaining that this was because the £300 payment was being made from this year’s budget. It went on to explain the financial pressures of the Respondent and asked the trade unions to take soundings from members “*with a view to gaining support and acceptance of the offer*”. The email also stated:

“Many colleagues will be banking on receiving an additional payment of £300 in their April salary and we will need to alert them to the fact that this payment may not materialise. However I will delay doing so until the end of next week in order to provide you with the opportunity to reconsider your collective position.”

TH told us that she was expecting that following this e mail that the trade unions would push for an increase in the non consolidated payment or that they would suggest that the percentage increase be implemented and revisited later in the year or thirdly that there would be some discussions about how agreeing to this increase might impact the pay award from last year. We accepted this evidence.

- 13.33 On 15 March 2022, GMB wrote to members informing them of the Respondents position (page 233-4). It informed members of a proposed meeting on 22 March 2022. It mentioned that GMB were considering lodging a formal dispute, also mentioning the possibility of a consultative ballot for industrial action

Offer to pay a £300 non consolidated payment (‘First Offer’)

13.34 By 21 March 2022, TH had not received a response from the trade unions to her e mail of 11 March 2022 asking for a reconsideration of the position and stating that the offer of a £300 would be removed. The Respondent at this point took the decision to make that payment to its employees in any event and take this item out of the pay negotiations. TH told us that this was to ensure that employees were not financially disadvantaged because of the decision of a “*minority of colleagues*” to reject the pay offer. She explained that this reflected her view that the majority of GMB and Unite members were trades colleagues (making up less than 1/3 of the workforce) and that the trades colleagues were unhappy with changes being made to other elements of their pay (call out rotas and rates) which was influencing their decision on the pay award more generally. She told us that she did not want these particular issues to prevent all employees receiving the £300 payment (which needed to be spent before 31 March 2022), in particular because of the cost of living crisis. When it was put to TH that she did not want to enter in discussions on the £300 with the union because it was too slow, TH said it was directly because there was a deadline for making this particular payment that the decision was made to pay it at this time. When asked whether this prevented the trade unions from coming back and asking for a higher non consolidated payment to be made TH stated that she fully expected the unions to come back and ask for another payment to be made. We accepted this evidence.

13.35 On 21 March 2022, TH sent an e mail to JJ, DW, LOT, DL, MT, RS, PG and SP (page 235) informing them that the Respondent had decided to take the £300 non consolidated payment out of the pay negotiations but that the £300 would be paid in the March payroll. It stated as follows:

“In the absence of any formal response from Unite or GMB to my previous emails, we are removing the £300 non-consolidated payment from the pay negotiations. However, to ensure that our colleagues are not financially disadvantaged as a result of the views of a minority of colleagues, we will be making the £300 payment in the March payroll run, regardless.”

The e mail went on to state that the unions should inform members that the pay offer for 2022/23 had reverted to a “*flat 3.1%*” and asked for the outcome of taking soundings with members. Later that same day GF e mailed all employees communicating this to them (page 236)). This stated:

“During our negotiations with the trades unions, we advised them that the offer of the £300 payment was based on agreement being reached this financial year, so that it could be paid from this year’s budget and therefore not impact on our financial position next year. Over the past couple of weeks it has become clear that we will not reach agreement with the trade unions on the pay award for the forthcoming financial year in time to process the one off payment this financial year.

We are acutely aware of the financial pressures colleagues are facing as a result of increases in the cost of living, but are also aware that the next 12 months and beyond are going to be extremely challenging for us as a business. Our reality is that the increase in the costs of delivering our services is outstripping the increase in our rental income and we therefore need to manage our costs carefully. As custodians of a charity providing essential services to customers, many of whom are facing significant financial difficulties, we have to balance our desire to give colleagues a competitive pay award with the need to continue to invest in our homes and services. We believe that the pay award offered, along with the one off payment, achieved this and is more generous than most other organisations' pay settlements.

We have therefore taken the decision to remove the one off payment from the negotiations so that colleagues do not suffer as a result of the current impasse with the trades unions. This means we will make this £300 payment to all colleagues in the March payroll and the pay offer for the forthcoming financial year remains at 3.1%.”

- 13.36 On 24 March 2022 this decision was approved by the Respondent's Board (see extract from minutes at page 237). Here it was recorded that GF had decided that “ *it was not fair to withhold the £300 payment for everyone due to the decision of a minority of colleagues*” and so a decision was made to pay it in March. The Board also made a decision to “*hold the line*” on the current pay offer. When a point was made that bargaining power had been given away by paying the £300 lump sum it was noted as follows:

“However the Corporate Director of Finance pointed out that the budget for next year had already been set and that there was no scope to pay the lump sum in 2022/23 but it was available in 2021/22.”

Earlier that day, JJ had e mailed TH (page 238) to confirm that their stance on the pay offer remained the same and that a further ballot would not be held as the offer remained the same and had already been rejected. She also stated:

“Please accept this e mail as notification of a formal dispute with whg. As per the terms of the recognition agreement, myself and UNITE will be happy to enter into discussions with the aim to resolving this dispute in a timely manner”.

TH had referred to this e mail during the Board meeting that took place later that day.

- 13.37 The sum of £300 was paid to all of the Respondent's employees in the pay run on 28 March 2022 and this was labelled on payslips as “Bonus” (see page 239).

Continuation of pay discussions

13.38 On 31 March 2022 TH e mailed JJ and NA (page 240) with an e mail headed "*Pay Dispute*" which referenced that the earliest point a meeting could take place to discuss the dispute was 12 April 2022. In this e mail she stated that although the Respondent was happy to meet with the unions, that at the recent Board meeting, the decision was that there would be "*no movement on the offer of 3.1%*". It went on to mention benchmarking that had been carried out and that the pay and benefits offered by the Respondent were in the upper quartile and "excellent" when compared to peers. The e mail questioned the value of having a meeting stating:

"As you are unable/unwilling to persuade your members to accept our offer (despite the fact that your unions have agreed lower pay awards in other housing associations) and we are not prepared to bring anything else to the table, we would question whether there is any point going ahead with the meeting as this will only cause additional delays in the process. We are already receiving very clear messages from the majority of our colleagues who choose not to belong to a trade union that they are extremely disappointed with the stance that GMB and Unite are taking and want the pay award to be processed as soon as possible."

13.39 JJ responded on 1 April 2022 (page 241-2) expressing disappointment that the Respondent was not improving on its offer. She stated that it was the members that had chosen to reject the offer and that she would not act to persuade members to accept "*a below par offer especially one so much lower than the current rate of inflation (RPI or CPI)*". She expressed that she was happy to meet with the Respondent but that if there was no change to the original offer, that they had "*nothing to go back to the members with to encourage them to change their minds*" and it was not possible to keep holding ballots on the same offer until the result was what the Respondent wanted. TH responded on 4 April stating that as the meeting was just a week away, it should "*go ahead and at least explore whether there was any room for compromise.*" She went on to state that she would e mail employees to inform them that there was a dispute with the trade unions and that the pay increase would not be paid with April salary.

13.40 On 5 April 2022 TH then sent an e mail to the Respondent's employees informing them of the formal dispute and that the pay award would now no longer be able to be paid in April (page 371). It went on to state:

"Regardless of the outcome of the meeting the pay award will not be processed in April as previously hoped. I appreciate that this will be disappointing for the majority of colleagues as they are not union members, but under the terms of the Employee Relations Agreement we are bound to attempt to reach agreement with the trade unions on the annual pay award."

13.41 On 12 April 2022 a formal dispute meeting was held attended by TH, VR, JJ, DW, LOT, NA, MT and DL. The minutes of that meeting were shown at pages 245-48 and the notes taken by JJ of that meeting were shown at pages 249-50. TH summarised the stage the negotiations had reached and stated her view was that the “*vast majority of colleagues*” were in favour of the proposed award or had not had the opportunity to vote as not members of the unions. TH acknowledged that some employees would be unhappy that the pay award had not been agreed but that there was a recognition agreement that needed to be followed. TH then commented that the Respondent ‘chose’ to follow the agreement. When it was put to her in cross examination that this was a veiled threat of derecognition, TH said this was not the case as the Respondent had willingly entered into a new Recognition agreement in 2021 and were trying to make it work. We accepted this evidence. There was some discussion on the level of the pay offer in relation to inflation with JJ noting that members were unhappy that the offer was below the current CPI rate of inflation. TH stated that pay increases were always at or above the CPI rate but it was the rate from the previous October that was always used as that is when the figure for rent increases for the year was determined. It was noted by TH that “*no-one was expecting*” the increases in inflation at this time. There was a discussion about the overall terms and conditions offered at the Respondent and what had been done in other organisations regarding a pay increase. The non consolidated payment of £300 was raised and GF confirmed that this was “*a way of controlling the pay bill but also a way of putting more money into colleague’s pockets that better benefits lower paid colleagues*”. JJ suggested that employees wanted this increase year on year rather than a one off. When asked by TH what pay increase offer would be approved, JJ confirmed it would need to be “*something around 6.2%*”. TH confirmed that this would not be agreed by the Board as “*they had already been pushed to the limit*” which GF also restated. The discussion concluded with it being noted that:

“We might be in a position where Trade Unions are going to have to ballot their members for industrial action as there is no more leeway with the Board. Negotiations can be revisited but they will not increase the offer.”

13.42 Following a short adjournment, JJ confirmed that there was a “*stalemate*” stated that they could not return with no increased offer, but could reballot to see what members are prepared to accept. It was noted that if there was a revised offer, they would take it back and it was agreed that the Respondent’s benchmarking data would be shared. It was also noted that TH and GF would have “*another conversation with the chair of the board and get a further steer from him on their position.*”

13.43 On 27 April 22 VR e mailed the attendees at the dispute meeting enclosing the benchmarking data (page 252) On 29 April 2022 TH e

mailed the group and confirmed that there was *“no movement from the Board on the offer of 3.1% and the £300 (which has already been paid)”*. She made reference to the benchmarking data stating that the salaries for most trades roles were upper quartile and that the Respondent had a generous pension scheme. She went on to state:

“On this basis, along with the fact that over the past 5 years our pay wards have generally been higher than CPI, can you confirm whether you are prepared to advise your members that they should accept the pay award.”

The e mail asked for a response by 6 May 2022. TH agreed in cross examination that this e mail was effectively asking the trade unions for a different answer to the same question but that she was hoping that having seen the benchmarking information that they may be able to see that in the round with other terms and conditions, that these were better than most of the Respondent’s peers. She stated that she did not expect the trade unions just to say ‘yes’ but that the Respondent may have to move its position which may involve consideration of a number of options, including a discussion about this years and next year’s award or an additional consolidated payment. We accepted this evidence.

- 13.44 Our attention was drawn to an email exchange which took place between TH and VR between 4 and 5 May 2022 (pages 377-380). On 28 April 2022 SP sent an e mail to Lisa Lawrence at the Respondent responding to an e mail she had sent to union representatives asking for items to be added to the agenda for the next meeting of the JNC (that had been due to take place on 21 April 2022 but had been cancelled). In his e mail SP listed a number of matters to be added to the agenda, including at item 1 *“Pay 2022/2023”*. It also added 4 other items, including Charging of Equipment Update; Unions attendance at New Induction Sessions and Uniform Tax Relief/Allowance - for Trades. LL forwarded this to TH and VR stating that the next meeting of the JNC was not scheduled until 20 July but that as TH was off for most of June, it was not worth moving. TH then sent a reply to VR stating firstly:

“Oh God, make it stop!

I think we should close down most of the items by e mail and just stick with the next meeting July.

I have not received a response from Justine and Nathan and if I haven’t heard anything by Friday I am going to tell them that we are processing it in May (can you get Vicky prepared for this – the final deadline is 13 May)”

It went on to address the points raised about power tool charging, attendance at induction, restructures, tax relief and hybrid working. VR then replied to that e mail adding her contributions on each of the points

raised in red text and suggested TH e mail in response. In that e mail she added:

“I resisted saying you tell us re: Pay 2022/2023” and then went on to address how implementing a pay rise that month could be done with there then following a discussion about whether it should be paid in May or June and in one or two tranches. The exchange ended with TH noting:

“Hmm, tactically it is probably better to just tell the TUs on Monday/Tuesday and process it the following day before they have time to respond.”

I think on balance unless we hear from them by Monday we will probably have to do it as two separate exercises.”

13.45 TH told us that her comment *“Oh God make it stop”* was not referencing the mention of the pay award in SP’s e mail but was in response to the issue of charging and allowances being raised by SP. She told us that this issue was discussed continuously and had been discussed and “shut down” 3 or 4 times already. She denied that this was a direct response to the first item on the agenda. On balance we accepted this evidence as there was a separate discussion later in the e mail about the item of pay which was not addressed in the same tone at all.

13.46 On 5 May 2022, the Bank of England raised its interest rates and issued warnings of a recession and 10% inflation. On this same date RS e mailed TH, JJ and NA asking for an update on the pay award (page 264) pointing out that Unison members voted to accept the offer and were asking when the pay rise would be implemented. He stated:

“As the deadline for this months payroll is looming can I assume this months pay will include either an uplift or a deadline for when this matter will be sorted.”

Decision to pay 3.1% increase to employees (‘The Second Offer’)

13.47 TH told us that on 6 May 2022 she had a discussion with GF; the Chair of the Remuneration Committee and the Chair of the Board about the pay award negotiations. This took place outside any formal meeting and it was during this discussion that the Respondent made the decision that it would implement a 3.1% increase in salary and process this in the May payroll. TH gave evidence that this was because of the worsening cost of living crisis meaning that employees needed to receive a pay rise as soon as possible. She knew that the Board had given their approval to a 3.1% rise and felt that this could be implemented as it had been approved. TH told us that the decision to implement this increase now was made:

“for financial reasons; the Respondent had budgeted for and could afford to implement a 3.1% uplift; this was the minimum that employees were

going to receive and the Respondent's employees wanted that increase to be implemented now due to the increasing cost of living and economic pressures."

She also said that despite this decision, she knew that this was "*not the end of the matter*" and that discussions on the pay award would need to continue but may take some time. TH told us that making this payment was not about ending the dispute with the unions or bringing the negotiations to a close but that it was done:

"to ensure that the Respondent's employees received a pay rise when they needed it most and were not disadvantaged by the ongoing negotiations"

No minutes of this discussion were taken but TH told us that she recalls it taking place on this date because it was the same date that GF was already meeting with the Chairs of the Board and the Remuneration Committee for his annual appraisal. We accepted that TH gave an accurate account of the decision making, not least because it was recorded in the minutes of the GRC meeting which was held within a week (see below)

- 13.48 On 10 May 2022, TH sent an e mail to JJ and NA (copying RS, GF and VR) (page 265) informing them that the Respondent would be applying a 3.1% uplift to salary in the May payroll. She referred to the benchmarking data that had been shared and the information about how previous pay awards correlated with CPI rate as at the previous September. It went on to state:

"I was hopeful that this information would trigger another conversation with your members and acceptance of the offer on the table, however in the absence of any response from you, I can only assume that your position has not changed.

As we believe that the vast majority of our colleagues, including the majority of Unison members, are in support of the offer that has been made and want it to be paid as soon as possible, I can confirm that we will be applying a 3.1% uplift to our salary points (with the exception of those which are linked to the NMW/NLW) as part of this month's payroll, backdated to 1st April"

TH agreed in response to questions from the Tribunal that she did not in this communication with the trade union make any reference to the payment being made on an interim basis pending negotiations continuing.

- 13.49 On 11 May 2022, TH sent an e mail to all employees informing them of this offer (page 266). It stated:

I am pleased to confirm we are raising salaries by 3.1% as part of this month's payroll, backdated to 1 April. This is in addition to the one-off payment of £300 paid to all colleagues in March."

It went on to state:

"We are making this pay award in recognition of the hard work of our colleagues — thank you for your continued dedication to our shared mission. Whether you work in a customer-facing or central services team, together we make a positive difference to the lives of our customers and communities.

We are acutely aware of the financial pressures facing colleagues caused by cost of living increases and want to continue to pay competitive salaries and provide excellent terms and conditions, including a defined benefit pension scheme. We must balance this with the need to invest in our homes and services to support customers, many of whom face significant financial and other difficulties."

It went on to mention the financial difficulties facing the Respondent and concluded with the following statement:

"Finally,. a brief note to update you on the formal dispute registered by GMB and Unite trade unions after their members voted to reject the pay award. (UNISON members voted in support of the offer.) Despite our best efforts to engage there has been no movement and so an agreement appears unlikely in the foreseeable future. Whilst our preference is to always try and reach an agreement, we believe most colleagues, including the majority of UNISON members are in support of the 3.1% offer and want it to be paid as soon as possible - hence today's announcement."

TH agreed in cross examination that this communication to employees did not state that the decision to apply the 3.1% increase was an interim measure pending reaching agreement with the union on a final pay award, but she was of the view that the reference in the communication to the fact that an agreement was unlikely "*in the foreseeable future*" and the reference to having a preference to reaching agreement made it clear that the Respondent was still in negotiations. She told us that the Respondent wanted to communicate to employees that the pay negotiations were "*getting nowhere fast*" and as the Respondent knew that 3.1% was the minimum they would have to pay it made the decision to pay this into employees' bank accounts so that they had the benefit of this whilst the Respondent continued to negotiate with the unions. We accepted this evidence which is again supported by the later but still contemporaneous GRC minutes.

- 13.50 The increase was applied to payroll and paid to employees (with back pay for April in the payroll on 27 May 2022 (see page 275). It was put to

TH that the reason the Respondent wanted to process this so quickly was because the longer they waited to seek agreement with the trade unions, with higher inflation, it was more likely that a higher award would need to be agreed. TH disagreed with this proposition stating that the Board wanted to be a “good employer” and make the payment as the Respondent knew that this increase had been budgeted for and could be afforded so wanted to pass this on to employees who were experiencing a cost of living crisis.

- 13.51 On 11 May 2022 JJ sent a response to TH on behalf of GMB and Unite stating as follows:

“It is extremely disappointing that the management of Walsall Housing Group have totally disregarded the recognition agreement and are about to impose (a rejected) 3.1% pay increase, despite a majority of Trade Union members voting to reject it. The management are unlawfully acting outside the terms of the agreement, which will now escalate the situation to dispute.”

She went on to mention that ballots on the same offer could not take place and that they would return to the members to see what action they wanted to take next.

- 13.52 On 12 May 22, a GRC meeting took place where the decision to make the offer of the pay increase (made on 6 May 2022) was recorded and approved (page 269-270). It firstly acknowledge that there had been a dispute and that data on benchmarking and terms and conditions had been provided to the trade unions but not acknowledged. It then went on to record the following:

“The Group Chief Executive and the Corporate Director of People and Learning met with the Chair of the whg Board and the Chair of the Governance and Remuneration Committee to agree a way forward. We agreed that if we did not hear back from the Trade Unions we would process the 3.1% increase so that colleagues were not disadvantaged whilst we were in dispute, which we did.”

The meeting went on to discuss what may happen next in terms of industrial action and its likely impact and concluded that the GRC had “NOTED the verbal update on the colleague pay award”.

- 13.53 On 27 May 22 Unite and GMB wrote to their members (page 272-4) informing them that a consultative ballot was being held on the possibility of industrial action relating to what was described as being “to challenge the recent intentions of the company to impose a pay offer without further negotiations”. It stated that in the event of a low response to this ballot, that no further action would be taken and there would be no further discussions on pay for 2022 but that if a majority was in favour of proceedings, a formal industrial action ballot would commence. The

outcome of this ballot was communicated to members and at page 276-7 we saw a text of that communication. This informed members that the results were in favour of moving to a ballot for industrial action and also went on to state:

“For many years, you have had poor pay increases and attacks on your terms and conditions. Contracts are already changing for new starters and we are keen to ensure that we retain and improve the working lives of all employees at WHG.”

- 13.54 On 9 June 2022, JJ informed TH and GF by e mail (page 278) that the results of the consultative ballot were in favour of holding a formal industrial action ballot. It went on to note:

“GMB and UNITE are keen to resolve this dispute and if you are willing to discuss this further, please contact myself and Nathan to arrange a meeting as soon as practicably possible.”

At this time TH had been on annual leave and remained on so until 24 June 2022 (she had at this time already resigned and was serving a period of extended notice to allow her replacement to be recruited and start working). In her absence on leave, GF was responsible for communications with the trade unions.

- 13.55 On 17 June 2022, GF responded to JJ and NA (page 279-82). In that letter he stated:

“I agree wholeheartedly that it is disappointing to have reached this stage, especially given the information we have provided to the trade unions explaining the basis of our pay offer. This has included details of pay awards being made by similar employers and how our salaries and terms and conditions (T&Cs) of employment compare favourably in the marketplace.

In your email to me, you indicate that both GMB and Unite are keen to resolve this dispute and suggest a meeting for further discussions. My colleagues and I are of the same view and we are happy to meet with you.”

The e mail then went on to address some comments in the communication that was sent to members with the result of the consultative ballot. In particular it referenced the statement (set out at paragraph 13.53 above, about there being poor pay increases for many years; attacks on terms and conditions and that contracts for new starters were changing. GF referred to this as *“inflammatory and factually inaccurate information”* and said that a meeting could not take place until the *“misinformation was corrected”* to members. It went on to set out the Respondent’s position on these matters. It concluded by raising the issue about language used in communications with union members making

reference to "*fight/fighting*" stating that it did not feel this was within the spirit of the Recognition agreement and asked JJ to take a more constructive approach moving forwards.

- 13.56 On 20 June 2022 VR sent an e mail to the respondent's Executive team sharing information about pay awards across the sector (page 283). That e mail concluded with the following statement:

"Organisations that settled early in the year, and were able to implement from April did so before the cost of living crisis was so prevalent in the news, prices weren't as high as they are now and inflation wasn't as high as it is now. Things could be very different if in the same position as us and negotiating in the current environment."

- 13.57 JJ responded to GF's letter by e mail on 24 June 2022 (page 285) disputing that the comments in the communications were factually incorrect. It went on to state that members had decided to ballot for industrial action but reiterated that both GMB and Unite were willing to try and reach an amicable solution and suggested a meeting be held. Notice of that ballot was sent to GF on 28 June 2022 (page 287-295). GF sent a response to JJ's e mail by a letter 1 July 2022 (page 296-7), again raising some of the issues about the information contained in communications and expressed disappointment that industrial action was being balloted but understood this. It finished by stating that the Respondent would be happy to meet to resolve matters suggesting that this took place as early as possible the following week. On 5 July 2022, the Respondent sent an e mail communication to its employees about the industrial action ballot (page 298-9) setting out its position on the issues raised. It referenced some talks with the trade unions that had recently concluded about travel time with no agreement being reached but went on to state "*Please note these talks are unrelated to the pay award dispute and are not linked to the ballots.*" It further stated when referencing possible industrial action:

"We hope not to reach that point and we have been clear that we are still willing to continue negotiations with the unions in an attempt to come to an agreement."

- 13.58 On 25 June 2022, the GMB claimants commenced early conciliation with ACAS in relation to the GMB Claims. It is not clear when contact was made from ACAS to the Respondent but it appears that this was at some time before 1 July 2022.
- 13.59 TH's employment was due to end on 8 July 2022 with LW commencing her employment on 11 July 2022. Before LW commenced her employment on 1 July 2022, TH informed LW of the pay award negotiations and the intention of the trade unions to ballot members for industrial action. TH told us that she anticipated that LW would need to meet with the trade unions to continue discussions. TH in fact did not return to work after 1 July 2022 due to the sudden death of her husband.

There was then no further discussion or handover between LW and TH and LW commenced her employment on 11 July 2022. LW told us that she realised (and agreed with the view of GF in his e mails above) that a meeting needed to be held to “conclude the 2022/23 pay award process”. She told us she was of the view that the 3.1% pay award already implemented was an “interim solution to support employees” but that further negotiations were needed. She also reached the view that matters had not been progressed by TH in May and June 2022 because TH was shortly leaving the organisation and was on leave for much of this time and accordingly “momentum in continuing the negotiations had stalled”. It was put to LW that in fact the decision to restart negotiations with the trade unions was more an offer to appease them and settle an industrial dispute and a legal claim. LW denied that this was the case and said this was a decision to get back round the table to continue negotiating pay. We accepted this evidence from LW and found her account of the discussions very convincing.

- 13.60 The ballot for industrial action resulted in a vote in favour of this taking place which was notified to the Respondent on 25 July 2022 (page 300-306). LW notified the outcome of this ballot to all employees in an e mail dated 27 July 2022 which e mail stated:

“It is naturally disappointing to have reached this position. We however remain committed to averting industrial action which has the potential to cause disruption, inconvenience, discord and risk to both customers and colleagues.

We are continuing to discuss the position with the unions and hope to reach a resolution that satisfies all parties in the coming weeks and will, of course, keep you updated.”

- 13.61 A meeting took place on 5 August 2022 attended by LW, GF, JJ, NA and RS (extract from minutes of that meeting at pages 311-316. Following that meeting LW communicated a proposal (page 310) to resolve the dispute involving the offer of a £1000 non consolidated payment to all employees on top of the 3.1% pay increase paid and the £300 non consolidated payment. This was expressed as being subject to the removal of industrial action (and in the case of the GMB the claim in these proceedings that had at this time been presented). On 9 August 2022, LW wrote to all employees to inform them of the offer made (page 317-8). This e mail started with a summary of what had taken place to date stating:

“You will likely recall that the ongoing negotiations relate to this year’s colleague pay award. In brief, Unite and GMB did not accept the offer made earlier this year of a 3.1 % pay award and £300 one off payment per colleague. Unison did accept the offer. The award was made to support people through the rising cost of living, while negotiations continue.”

It informed employees that this offer would now be put to trade union members in a ballot. It went on to explain the difference between a consolidated and a non consolidated payment.

- 13.62 On 5 August 2022, the EC certificate in respect of the GMB Claimants was issued (page 22-33). The claim form was then presented to the Tribunal on 2 September 2022 by the GMB Claimants. On 10 August 2022, early conciliation was commenced by the Unite Claimants (page 67-71). This process was concluded and the EC certificate was issued on 21 September 2022. The Unite Claim was started by a claim form presented on 20 October 2022.
- 13.63 On 23 August 2022, the Respondent was notified of proposed industrial action by GMB (pages 320-322) and on 25 August 2022 by Unite (page 327-9). On 24 August 2022, the Respondent was notified that GMB members had voted to reject the new pay proposal (page 323) and on 25 August 2022, the Respondent was notified that Unite members had voted to reject it (page 325). LW informed employees that the revised pay offer had been rejected by an e mail sent on 25 August 2022 (page 330) stating that the £1000 would not be paid and that strike action would take place. It further stated that the Respondent was still trying to resolve the matter and was "*committed to constructive negotiation with trade union representatives*". Some industrial action does appear to have taken place in September 2022. ACAS became involved in the discussions (see e mail from LW to JJ asking for them to attend to "*support the pay negotiations*" at page 428). The discussions appear to have continued (with an offer of a £500 consolidated and a £500 non consolidated payment being made on 12 September 2022 – see page 426) and a further offer was made on 4 November 2022 of a consolidated payment of £800 and a non consolidated payment of £200 (page 334-5). That offer was put to ballot and the results of the ballot of both GMB and Unite communicated on 18 November 2022 were that the offer would be accepted (see page 337). The payment was made in the December payroll.

2023/24 pay negotiations

- 13.64 The pay award negotiations for the following financial year were concluded quickly. LW told us that "*on the back of the previous pay award*" the Respondent made 20 colleagues redundant to pay for the increased award. The trade unions put forward a pay claim of an 11% increase and the Respondent informed them that they had budgeted for a 6-7% increase (with anything more requiring further redundancies to pay for it).

The Relevant Law

- 13.65 Section 145B of TULRCA provides:

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.*

13.66 Section 145D of TULRCA provides:

145D Consideration of complaint

- (1) *On a complaint under section 145A it shall be for the employer to show what was his sole or main purpose in making the offer.*
- (2) *On a complaint under section 145B it shall be for the employer to show what was his sole or main purpose in making the offers.*
- (3) *On a complaint under section 145A or 145B, in determining any question whether the employer made the offer (or offers) or the purpose for which he did so, no account shall be taken of any pressure which was exercised on him by calling, organising, procuring or financing a strike or other industrial action, or by threatening to do so; and that question shall be determined as if no such pressure had been exercised.*
- (4) *In determining whether an employer's sole or main purpose in making offers was the purpose mentioned in section 145B(1), the matters taken into account must include any evidence—*

- (a) *that when the offers were made the employer had recently changed or sought to change, or did not wish to use, arrangements agreed with the union for collective bargaining,*
- (b) *that when the offers were made the employer did not wish to enter into arrangements proposed by the union for collective bargaining, or*
- (c) *that the offers were made only to particular workers, and were made with the sole or main purpose of rewarding those particular workers for their high level of performance or of retaining them because of their special value to the employer.”*

13.67 The parties also made reference to (and we have considered) the following authorities during submissions (specifically referring to the passages within those judgments as set out in the summary of their submissions below):

Wilson, Palmer and Doolan v United Kingdom [2002] IRLR 568, 35 EHRR 523, ECtHR ('Wilson');

Kostal UK Ltd v Dunkley [2021] UKSC 47 [2022] ICR 434 ('Kostal');

INEOS Infrastructure Grangemouth Ltd v Jones [2022] EAT 82 [2022] IRLR 768 ('Ineos')

Degnan & Ors v Redcar & Cleveland Borough Council [2005] EWCA Civ 726 ('Degnan')

Submissions

13.68 The Respondent conceded that the First Offer and the Second Offer had the result (i.e the prohibited result) that the Claimants' 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. That concession was clarified to be that the Respondent accepted that the from the date of the First Offer and the Second Offer respectively until the pay award for 2022/23 was concluded on 18 November 2022, the term of "pay" in the terms of employment of the Claimants was not determined by the Recognition Agreement. The GMB Claimants allege that in making the First Offer and the Second Offer the Respondent's sole or main purpose was to achieve the prohibited result. The Unite Claimants do not contend that in making the First Offer the Respondent's sole of main purpose was to achieve the prohibited result and do not pursue a complaint in respect of the First Offer. The Unite Claimants contend that in making the Second Offer the Respondent's sole or main purpose was to achieve the prohibited result.

Submissions on the First Offer by the GMB Claimants

- 13.69 On behalf of the GMB Claimants, Mr Mensah submitted that that the First Offer did have the sole or main purpose of achieving 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, pointing out that the burden of showing the sole or main purpose lay on the Respondent. It was submitted that the imposition of the £300 regardless of the views of the majority of Union members against this was done "*maliciously*" to circumvent the Recognition Agreement and to induce members to steer away from collective bargaining. He submitted that the mischief that section 145B TULRCA was intended to prevent was the bypassing of collective bargaining before the collective bargaining process had been exhausted. He notes that at paragraph 34 of *Kostal* no minimum length of time is needed for the prohibited result to have effect. He submits that by making this payment directly to workers the Respondent was removing this payment from the collective bargaining (and communicated this to workers on 21 March 2022 – see paragraph 13.35 above). He submits that doing this was in the Respondent's interests (as it could unilaterally decide the amount of this payment) and the reason this was done. The fact that the employee received a benefit from it was a "*convenient collateral consequence*" but not the purpose. He submits that the Respondent's purpose was to ensure this was paid swiftly avoiding facing the prospect of higher inflation and preventing the unions from negotiating a higher sum.
- 13.70 Mr Mensah further submits that it was clear that the collective bargaining process had not been exhausted relying on provisions in the Recognition Agreement at section 7.1 and Appendix 1 (see paragraph 13.31 above) as no dispute resolution mechanism had been exhausted by the parties. He further contended that although direct evidence of the type seen at paragraph 15 of *Ineos* of a desire to 'get rid' of the union was not available in this case, the Tribunal should draw an inference from other evidence in particular what he says was an attempt by the Respondent to apply pressure on the union, using the £300 it as a 'bargaining chip'. He points out that the Respondent was aware on 31 January 2022 that this would be unpopular (when PG asked for a percentage increase - see paragraph 13.22 above). He also states that three other possible avenues mooted by the Respondent to avoid hardship during its Board discussions (to increase the overall pay percentage offer; to make a further payment later or to set up a hardship fund) were never explored which he suggests that the Respondent did not have the purpose of benefiting its employees as alleged.

Submissions on the Second Offer by all the Claimants

- 13.71 On behalf of the Unite Claimants (which submissions were also adopted with agreement by the GMB Claimants) Ms Veale submitted that the

Tribunal must adopt a purposive approach to section 145B TULRCA to consider what the legislation aims to prevent. In particular she suggests that what is set out at paragraph 61 of Kostal is precisely what the Respondent did in that it dropped in and out of the collective process as and when to suit its purpose. She suggested that it dipped out in May 2022 and only dipped back in in August 2022 when there was a Tribunal claim and a threat of industrial action. She suggests that the Respondent always intended to pursue the purpose that the percentage increase in pay for that year was removed from the collective process (which is ultimately she says what happened as the offers after the return to negotiations in August were all around single payments as it was of the view that salaries had already been determined. She suggests that the continuance of negotiations over pay only ever meant over additional payments not a percentage increase in salary and the intention in making the Second Offer was to block the unions from negotiating at all on a percentage increase in the pay award.

13.72 She further suggested that the contention that the Second Offer was a 'temporary solution' to an impasse does not assist the Respondent as a result of paragraph 36 of Kostal (that no minimum length of time is required in order for the prohibited result to have been constituted). She suggested that the main purpose of the Second Offer in May 2022 was to achieve the prohibited result even if it later realised the unlawfulness of its actions and decided to revive the negotiations in July. The Tribunal was further directed to the response to the public consultation reviewing the Employment Relations Act after Wilson which suggested that the intention behind section 145B was to prohibit offers "*with the aim of undermining or narrowing the collective bargaining arrangements*" and Ms Veale submitted that the removal of the percentage pay rise had the intention of doing this. She also made submissions on the point that the collective bargaining process had not been exhausted at the point the Second Offer was made. She suggested that the respondent knew that a deal could be reached with negotiation but instead of meaningfully engaging TH took the view that the unions would have to agree to the 3.1% offer or she would impose it.

13.73 She contends that the impasse in negotiations at the end of April was not sufficient to support the Respondent's arguments that its main purpose in making the Second Offer was to assist workers struggling with the increased cost of living due to the delay in agreeing a pay award. She suggests that the overall picture is that the Respondent was "*determined to thwart the bargaining process*" as referred to at paragraph 129 of Kostal, persisting with the 3.1% offer despite knowing it was not going to be agreed. She suggests that this stance showed a refusal to engage as anticipated at paragraph 58 in Kostal. She further points to evidence of the Respondent (TH in particular) becoming increasingly frustrated with having to negotiate with unions, and suggested that veiled threats of derecognition were made in the 12 April 2022 formal dispute meeting.

She points to the e mail response of TH in May 2022 (see paragraph 13.44 above) and suggests that this “Oh God, make it stop” comment was about the pay negotiations, not anything else.

- 13.74 In relation to the Respondent’s purported purpose of assisting workers, Ms Veale submits that this would have been achieved by accelerating the negotiations and engaging meaningfully and any impact on workers due to a delay would be alleviated as any pay increase could be backdated. She suggests that the Respondent did not agree a stop gap measure and the Second Offer was never presented as this either to the unions or the workers. Her submission is that the reference to an agreement with the unions being unlikely in the foreseeable future, meant she did not foresee an agreement on the pay award at all. She asks the Tribunal to call on its industrial experience and conclude that denying employees the opportunity to have their unions negotiate on a pay rise, can not have been in the interest of its workers. In relation to the purpose of seeing a pay rise swiftly and avoiding delay was really something mainly in the Respondent’s interests, not the workers. She points out that growing inflation meant that the longer the negotiations on pay went on, the more unattractive its 3.1% increase would look and thus the purpose of the Second Offer was to avoid collective bargaining and an inevitable higher pay rise, not to assist workers. She finally submitted that what the Respondent was doing in making the Second Offer was repeating the “*successful strategy*” it adopted in 2020 of bypassing a collective bargaining process.

Submissions of the Respondent

- 13.75 Mr Leiper KC on behalf of the Respondent submitted that Kostal does not particularly assist if the question before the Tribunal is determining whether the employer’s purpose is to achieve the prohibited result. He acknowledges that Kostal is authority for the proposition that an offer can have the prohibited result whether temporary or permanent but that is not in issue here as the prohibited result is accepted. He directs the Tribunal to paragraphs 5 to 9 of Kostal illustrating what was done by the employer in Kostal and points out that the ‘offers’ made here were backed with a ‘threat’ that if not accepted a Christmas bonus would not be paid and ultimately notice of termination of employment would be served. He submits this explains why the issue of purpose never came up here as it was clear the employer in Kostal never had a proper purpose which was very different to the circumstances of this case. He went on to submit that following Wilson it was key to the introduction of section 145B that in order to amount to unlawful conduct, the offer made had to have the prohibited effect as its main purpose. He directed the Tribunal to paragraph 23 and 55 of Kostal where this was made clear. He further asked the Tribunal to consider the minority judgment of Lady Arden at paragraph 113 which touched on the issue of purpose (which did not form part of the majority decision in Kostal as it was not of significance to

the appeal). He submits that this makes it clear that you cannot infer from the fact that an offer made had the prohibited result that this was the purpose of it, and these were completely disengaged questions.

- 13.76 He also referred the Tribunal to Ineos but asks the Tribunal to consider that although purpose was in issue here, the factual underpinning was entirely different. He referred us to paragraphs 15-17 to explain what factual findings the Tribunal in Ineos made about the illegitimate purpose of the offer (which included a contemporaneous statement that the employer wanted to “*engineer a way to get rid of*” the union and the offer being made at the same time as notice being served to terminate the collective bargaining agreement). This led the EAT to conclude the Tribunal was entitled to reach its conclusion on the purpose of the offer. He submits that the situation regarding the offers made by the Respondent was entirely different pointing out that 2022 was a difficult year financially with rents and income having been fixed by the Respondent based on CPI figures in September 2021, it then faced increased costs due to inflation. He also pointed out that the Respondent was an organisation run by a Board of Trustees and had a charitable purpose at its heart. He points out that the key question is the purpose of the Respondent actually had, not what the Claimants, or GMB or Unite concluded about they believed the purpose was which may be ‘skewed’.
- 13.77 In relation to the First Offer, he submits that (as the Unite Claimants also accept) the underlying purpose was clear and legitimate and it was to ensure that the £300 found in the 2021/22 budget was spent before that financial year ended in March 2022. He submits that in no sense was this trying to undermine the overall pay negotiations as this sum needed to be paid if it was to be utilised from the relevant budget otherwise it would be potentially lost. He submits that TH carried on with the pay award negotiations and fully expected a request for a further payment. He suggests that it was telling that no written objection to the payment of this sum was made at the time and submits that this was because everyone involved in the pay negotiations knew why it was being paid at that time and that it was for the purpose suggested by the Respondent.
- 13.78 In relation to the Second Offer, he submits that the purpose of this was to ensure that the workforce had the immediate benefit of the least amount of pay rise that would have to be paid by the Respondent given that negotiations had been protracted and because that 3.1% increase had already been budgeted for. He suggests that the allegation that the purpose was to shut down negotiations and prevent further discussions does not work. He points out that the e mail communicating the Second Offer stating that it is being made in circumstances where agreement with the union was unlikely in the foreseeable future is only consistent with the ongoing possibility of reaching agreement. He submits this is consistent with TH’s evidence that she intended to continue discussions. JJ accepted in cross examination that this was what the e mail said,

although she did not read it that way but her perception was not the question we needed to answer. He also states that if the Respondent did intend that the Second Offer was to bring an end to the pay discussions, this would have been explicitly stated (which was done when the pay award for 2020/21 was implemented) and referred us to page 410 (see paragraph 13.7 above).

- 13.79 In particular he suggests that the minute of the GRC meeting at page 269 (see paragraph 13.52 above provides a complete answer as to the Respondent's purpose and should be an end to our enquiry as contemporaneous evidence of purpose. He submits that it was not put to TH that this minute was inaccurate or invented and thus it acts as an accurate contemporaneous record of the reason why the 3.1% increase was implemented, namely that employees should not be disadvantaged whilst the Respondent was in an ongoing dispute with the unions about pay.
- 13.80 He submits that the Respondent's recognition by the time of the Second Offer that 3.1% did not look like such a good offer due to rising inflation supports the fact that it cannot conceivably have intended or anticipated that the offer would end or thwart the negotiations. He asks us to take into account that by 9 June 2022 both unions recognised that there was an ongoing dispute (page 278 – see paragraph 13.54 above). He submits that the Respondent through GF also recognised on 17 June 2022 (page 279-80 – see paragraph 13.55 above) that there was a dispute which he was keen to resolve by meeting. He also refers us to the later e mail on 20 June 2022 from VR (page 283 – see paragraph 13.56 above) which refers to the Respondent "negotiating" on pay and contains information on pay data which suggests that just one month after the Second Offer the Respondent recognised that negotiations were ongoing and was inconsistent with a suggestion that the Respondent had closed down the dispute or the pay issue by making the Second Offer. He also points out that at the time of TH leaving and LW joining, both were very clear that there was a dispute about pay for this year which was completely inconsistent with suggesting that the intention of the Second Offer was that the negotiations were at an end or were closed down.
- 13.81 He also makes the point in relation to both offers that the submission that the aim of making them was to remove that particular element of pay from the collective negotiations (a non consolidated payment of £300 in relation to the First Offer and the question of a percentage increase in pay in relation to the Second Offer) was focusing on the wrong legal question. He submitted that section 145B required the Tribunal to consider the purpose in relation to "*terms of employment, or any of those terms*" and that the "*term*" in question in all cases was pay, in particular pay for the 2022/2 financial year. It was wrong to further subdivide that into whether a pay increase consisted of a percentage increase or a fixed sum (consolidated or non consolidated) which was irrelevant. Whether a

fixed sum was consolidated or non consolidated was important he submits (and became the crux of negotiations from July 2022 onwards) but at all times the relevant term he submits is pay not its constituent parts (referring the Tribunal to Degnan as authority for that proposition more generally).

Conclusions

First Offer

- 13.82 In relation to the First Offer, we preferred the submissions of the Respondent and conclude that the Respondent has shown that its sole or main purpose in making the First Offer was not to achieve 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. We were entirely satisfied in light of our findings of fact above that the Respondent's purpose in making the First Offer was to ensure that the £300 allocated to pay in 2022/23 from the 2021/22 budget was spent before that financial year ended in March 2022. The first communication which mentioned the £300 payment on 31 January 2022 (paragraph 13.21) stated that this payment had come from the 2021/22 budget. On 2 February 2022, it was further communicated to the unions that the offer of the £300 was conditional on it being paid in the current financial year (paragraph 13.23). The restriction of this payment in the current financial year was also stated clearly in the communication to all employees on 9 February 2022 (paragraph 13.25). The deadline for payment was further communicated during the pay ballot meeting on 8 March 2022 (paragraph 13.29) and mentioned again at the GRC meeting as an issue on 10 March 2022 (paragraph 13.30-13.31) with it being acknowledged that the Respondent may need to pay it regardless of what the increase in pay was because of this need to come out of that year's budget. The issue around the payment deadline was mentioned again to the unions in an e mail on 11 March 2022 (paragraph 12.32).
- 13.83 There was nothing to suggest to us that in ultimately deciding to pay this £300 without the agreement of the Union to the overall pay offer made, that there was any intention to even temporarily stop pay as a whole being determined by the Recognition Agreement. The offer of £300 had been initially used as a bargaining chip in the pay negotiations but the Respondent no longer had that bargaining chip once made the First Offer and paid £300 to its employees. We were satisfied that it fully intended to carry on with pay negotiations after the First Offer and this was communicated to employees when the First Offer was made (see paragraph 13.35 above). There was a contemporaneous record of the reason why the First Offer was made in the Board Minutes recording the decision on 24 March 2022 (paragraph 13.36). The Respondent carried on with the pay negotiations with the trade unions straight after the First Offer was made (albeit that the pay negotiations had moved into a more formal dispute mode) – see paragraphs 13.38 to 13.43. We agree that it

is telling that in all communications after the First Offer was made, there was no further mention or complaint about it by any of the trade unions and all further discussions focussed on the pay award for 2022/23 more generally.

- 13.84 We also did not accept the narrower contention that by making the First Offer, the purpose was to remove the issue of the amount of a one off non consolidated payment (if not the issue of pay more generally) from the collective bargaining process. We were satisfied that the Respondent always anticipated that a further or increased one off payment may be sought both before and after the First Offer (see paragraphs 13.28; 13.32; 13.34 and 13.43). The intention was not to prevent the unions from negotiating a higher sum and this is ultimately what occurred to resolve the pay dispute (see paragraph 13.63). In any event for the reasons set out below, we did not accept that this was a correct reading of the definition of “*term of employment*” in the context of the wording of section 145B. We did not accept that any inferences as to a malicious intent in making the First Offer could be drawn by any of the findings of fact we made about the payment of the £300 and we were simply satisfied that this was made in order to pass on a sum of money to employees that had been found from an existing budget, before the deadline for making that payment passed.
- 13.85 The complaint that an unlawful inducement relating to collective bargaining was made contrary to section 145B TULRCA when the First Offer was made is therefore dismissed.

Second Offer

- 13.86 In relation to the Second Offer, although the position was more nuanced and required a deeper examination of the evidence before the Tribunal, ultimately we preferred the submissions of the Respondent. We conclude that the Second Offer was not made with the sole or main purpose 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. We conclude that the Respondent has proved that the sole or main purpose of the Second Offer was to ensure that the workforce had the immediate benefit of the least amount of pay rise that would have to be paid by the Respondent given that negotiations had been protracted and that the 3.1% increase had already been budgeted for. We conclude this in light of our findings of fact above relating to the run up to the decision to make the Second Offer. The Respondent was operating in difficult financial circumstances as the budget for 2022/3 had been set on the basis of CPI data from the previous September (which determined the level of rent increase). At the time the pay negotiations were taking place CPI inflation was already much higher (see paragraph 13.15). We were satisfied that this led to the decision to go straight to the offer of 3.1% rather than start at a lower point and take the time to negotiate up (see paragraph 13.21). As this level of increase had already

been approved by the Board (see paragraph 13.20) it was already 'baked in' to the finances for 2022/23. The Respondent knew it could pay this level of increase irrespective of where the negotiations went.

13.87 The initial discussions on this were from the Respondent's point of view focused on explaining to the trade unions why this proposed increase was fair (see paragraph 13.21). When it became clear that this offer was not agreed, the negotiations continued albeit that they shifted towards a pay dispute (see paragraph 13.23). Whilst a hardline approach was being taken in the negotiations, we were satisfied that the Respondent fully intended to continue to engage with the unions (see paragraphs 13.27 to 13.29). The GRC discussed the pay negotiations and how they would proceed on 10 March 2022 and the possibility of a further increase was raised (see paragraph 13.31) although deciding to keep the offer as it was. On 31 March 2022 after the First Offer had been made, we were satisfied that negotiations on pay were still continuing (albeit in the context of a dispute at this time – see paragraph 13.38). TH stated on 4 April that the Respondent still wanted to see if there was any possibility of compromise (paragraph 13.39) and on 5 April 2022 (paragraph 13.40) communicated to all employees that the Respondent was required to attempt to reach agreement with the unions on pay. Even at the time of the formal dispute meeting on 12 April 2022 (see paragraph 13.41) and the subsequent offer on 27 April 2022, we were not satisfied that the Respondent had in fact closed its mind to any change being made at this time. Despite the somewhat uncompromising wording, TH was fully expecting the trade unions not to accept the offer and the Respondent having to move its position (see paragraph 13.43). We find that the e mail exchange that took place on 4 and 5 May 2022 supported the fact that pay was still under discussion and were not convinced that the flippant comment made by TH had any connection with the pay discussions (see paragraph 13.45). It is clear that the HR team were expecting a response from the unions as shown by VR's comment "*you tell us*". Even when the exchange shifted to discussions about processing a pay rise in the May payroll, there was no indication at least in this exchange that processing the increase meant that the pay discussions (then in dispute) were being concluded, even on a temporary basis.

13.88 The contemporaneous evidence recording the decision to make the Second Offer contained in the GRC minutes at page 269 (see paragraphs 13.47 and 13.52) was persuasive in shedding light on the purpose of it. This records that the decision was made to process the increase if there had been no response from the unions and this was "*so that colleagues were not disadvantaged whilst we were in dispute*". There are two important elements to that comment. Firstly the reference to not wanting employees to be disadvantaged by not receiving pay at an increased level. Secondly this explicitly referenced the ongoing dispute. It is clear from this alone that the Respondent did not see the matter of pay for 2022/23 as concluded but ongoing, and it processed the pay increase

it was prepared at that time to pay, whilst the final issue of pay for 2022/23 was still being resolved. The Respondent no doubt hoped (and may have even expected) that this would have been resolved by it staying at the same level of increase, but this does not mean that the negotiations had been stopped (even temporarily).

- 13.89 In terms of the communication of the Second Offer itself to employees (paragraph 13.49), we concluded that the reference to an agreement being unlikely in the foreseeable future, was an express acknowledgment of agreement still being possible, not a communication that this was the end of the matter. The Respondent's communication of its plan to make the Second Offer to the trade unions the previous afternoon made no reference to payment being made whilst negotiations continued (paragraph 13.48) and it may have been better if some indication of this being the case had been alluded to. Clearly the Respondent's actions in making the Second Offer meant that the negotiations on pay and the relations with the trade unions deteriorated and this triggered the ballot process for industrial action (see paragraph 13.51). However what took place after again satisfied us that the Respondent intended that the pay negotiation process was still alive and ongoing. TH was on leave by 2 June 2022 and remained so until 24 June 2022 (see paragraph 13.54), ultimately only working a few more days after this. During that period there was some communication and both the unions and GF indicated the possibility of meeting (see paragraph 13.54 and 13.55) with GF's e mails really focusing in on pay and making reference to "*further discussions*" again suggesting a continuation of what had already taken place, rather than a discussion about a new or different matter. The remaining content of his e mail about communications and factual accuracy is in relation to what this Tribunal had to decide a side issue not of direct relevance as was much of the discussion about the "*no surprises*" communication policy and each side's views about the others lack of respect for it. As at 20 June 2022 the Respondent was actively gathering current data on pay awards and making reference to negotiating (see paragraph 13.56). All of this supports the conclusion that negotiations were always intended by the Respondent to continue. The arrival of LW in July 2022 clearly escalated the process as she took on the negotiations from the Respondent's side and these discussions ultimately resulted in an agreement (see paragraphs 13.59 to 13.63). However this was far from quick and it still took a further 5 months for negotiations to conclude and the pay award to be implemented.
- 13.90 In relation to some of the persuasive submissions made by Mr Mensah and Ms Veale, we have considered these very carefully and make a few points. Firstly we were not persuaded by the suggestion that the Respondent had the purpose of removing the amount of a non consolidated payment in making the First Offer (leaving only a percentage increase available for negotiation) and the issue of a percentage rise in pay in making the Second Offer (leaving just the issue

of a payment available for negotiation). This we conclude is an artificial distinction as the term of employment that was the subject of the collective negotiations was pay and the negotiations were about how pay might be increased (not just whether that would be increased by a percentage amount). The suggestion that the issue of a percentage increase being off the table (even if that were correct) automatically led to a conclusion that the Respondent intended that pay would not be determined by collective agreement is not accepted by this Tribunal. The award of a consolidated fixed payment (which was ultimately what was agreed) was in reality more akin to a percentage increase as that sum is added to salary for each year thereafter. It is the level of pay for employees that is up for collective negotiation not the mathematical method by which that pay increases. We did not accept that the fact that the Respondent did not move on the percentage pay increase offered disclosed an intention of “*narrowing*” the collective negotiation as ‘pay’ was always the matter under discussion.

- 13.91 In relation to the points made that the Respondent had not exhausted the collective negotiation process at the time the Second Offer was made, this does not really assist us. The Respondent does not contend that the collective negotiation process had been exhausted and in fact contends the opposite, that it was still ongoing. Kostal posits that if there was a belief that collective negotiation had been exhausted, this would preclude the Respondent having the necessary purpose but this is not the only matter that is relevant or that can be relied on by the Respondent to show that it did not have that purpose. In this case, the Respondent relies on a different explanation as to its purpose as is set out above.
- 13.92 Finally the suggestion that the Respondent was implementing the same strategy that it adopted in 2020 and thus shows it has the required purpose does not stand up to closer examination. Our findings of fact about what took place during the pay negotiations in 2020 show a very different scenario to the events of 2022. Having failed to reach an agreement during initial negotiations, the Respondent effectively suspended negotiations (paragraphs 13.7-13.8). It then implemented a pay rise of 2.5% without further reference to the trade unions at all and TH agreed that this amounted to the Respondent imposing a pay award without involving the unions at all. Moreover directly after this was done, the Respondent served notice on the Former Recognition Agreement (see paragraph 13.11). This is more akin to the type of evidence that might show an intention to no longer be bound by the terms of a collective agreement relating to pay negotiations and has some similarities to factual matrix behind Ineos. However what happened in 2020 is not what we are determining in these proceedings. Since that time, an entirely different Recognition Agreement was recognised and thus, the events of that time are really not of assistance to us in determining purpose in March and May 2022. There was clearly an ongoing frustration about how the relationship with the trade unions

operated (particularly on the part of TH who felt that the trade unions did not reflect the make up of the workforce). However despite this, the Recognition Agreement was put in place after the Former Recognition Agreement had been terminated, and there was no real evidence that there was any intention on the Respondent's part to end this arrangement in 2022.

- 13.93 For all of the above reasons, the complaint that an unlawful inducement relating to collective bargaining was made contrary to section 145B TULRCA when the Second Offer was made is therefore also dismissed.

Employment Judge Flood

Date: 3 May 2024

Notes

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Recording and Transcription

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

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

SCHEDULE 1
The GMB Claimants

1. David Burgoyne
2. Hersharen Bajway
3. Yusuf Patel
4. Andrew Pheasant
5. Fay Wood
6. Chris Austin
7. Chris Baker
8. Mark Banks
9. Alan Beeley
10. Jason Beeley
11. Tim Bentley
12. Stephen Billings
13. Robert Bull
14. Ammo Chana
15. David Chapman
16. Neal Chard
17. Darren Cook
18. Darren Cross
19. Ian Davies
20. Bunny (Bernard) Day
21. Jane Sargeant
22. Robert Drury
23. Philip Dunn
24. Matthew Edgar
25. Paul Ellis
26. Michael Elsmore
27. David Fox

28. Darren Francis
29. Antony Gayle
30. Matthew Gleeson
31. Andrew Green
32. Gary Growcott
33. Christopher Harris
34. Stuart Hayes
35. Mark Hayward
36. Aaron Hiley
37. Mark Hill
38. Gary Hurst
39. Paul Jackson
40. Liam Johnson
41. Simon Kelly
42. Ian Kendrick
43. Andrew Lester
44. Stuart Lines
45. Gary Mason
46. Jonathan Mason
47. John Lee Mills
48. Lee Mills
49. Peter O'Callaghan
50. Luke O'Toole
51. John Preece
52. Craig Price
53. Jacqueline Reece
54. Martin Reilly
55. Kevin Riggs
56. Philip Rushton

57. Mark Saunders
58. David Stead
59. Ian Sweet
60. Jason Walker
61. David Walters
62. Alan Wells
63. Jennifer York
64. Gary Reid
65. Mark Charlesworth
66. Andrew Fletcher
67. Darren Russell
68. Jasvir Viridi
69. Mark Farrington
70. Craig Bentley
71. James Colbourne
72. Danielle Purshouse
73. Laura McComiskie
74. Kulwant Chahal
75. James Toft
76. Joshua Adams
77. Ken Adams
78. Sheena Johnson
79. Jack Cunningham
80. Julie Ketiey
81. David Griffin
82. Robert Tiernan
83. Raymond Narme
84. Leigh Dickens
85. Emily Watkinson

86. Ricky Sadler
87. Parmajit Kumar
88. Robert Smith
89. Patrick Harriett
90. James Wright
91. Aaron Coulson
92. Wayne Horney
93. Michelle Webber
94. Darren Ryder
95. John Llewellyn

SCHEDULE 2
The Unite Claimants

1. Lee Instone
2. Stephen Lyons
3. Lee Lunn
4. Andy Hourihane
5. Paul Wainwright
6. Mark Robinson
7. Peter Phillips
8. Dave Yates
9. Shaun Plant
10. Debbie Round
11. Tymon Bensley
12. Doug Swain
13. Mark Wassell
14. Brian Durber
15. Dave Shaw
16. John Cummins
17. Mark Webster
18. Andrew Franks
19. Lee Wiggan
20. Christopher Askey
21. Martina Lydon