EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104467/2023

Held in Glasgow on 21, 22, 23 & 24 May 2024

Deliberations: 28 and 29 May 2024 and 5 June 2024

Employment Judge D Hoey
Members L Brown & P Findlay

Ms F Abbott	**Claimant** **Represented by:** **Mr Mulvernan - Solicitor**
Browns Manufacturing Ltd	**Respondent** **Represented by:** **Mr Wynne - Counsel [Instructed by Messrs Dentons]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claim is ill founded and it is dismissed.

REASONS

1. The claimant raised a claim for breach of section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992. The respondent disputed the claim.

2. At a case management preliminary hearing, matters had been focussed and it was agreed a full hearing would be convened. The full hearing took place in person with the parties having been given time to prepare submissions and to speak to them.

3. The hearing began by a reminder of the overriding objective and the need for both parties to work together to assist the Tribunal in ensuring that everything that was done was fair and just with due regard to cost and proportionality.

Case management

4. The parties had worked together to focus the issues in this case. The parties were able to agree timing for witnesses and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality. The case was able to conclude within the allocated time with the parties using one of the days to focus the issues and facts agreed and in dispute.

Issues to be determined

5. The issues to be determined were discussed in detail and focussed by the parties. The issues to be determined were agreed to be as follows.

    a. For each claimant (which would be determined in event the claim was determined in the lead claimant's favour): was that claimant a member of the union at the relevant time; was that claimant paid hourly at the relevant time; and was that claimant employed by the respondent at Kirkconnel and if so, for what period.

    b. It was not in issue that the respondent recognised a trade union for collective bargaining purposes in respect of all hourly paid employees at the Kirkconnel site under a Recognition and Procedural Agreement.

    c. It was also not in dispute that the posting of Group Pay Rates on 1 April 2023 was an 'offer' within section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 (the "Offer")

    d. It was also agreed that the Offer that was made achieved the prohibited result in section 145B(2), namely that the workers' terms of employment as to their pay will not or will no longer be determined by collective agreement.

e. The key issue that was in dispute was whether the respondent's sole or main purpose in making the Offer was to achieve the prohibited result. The respondent argued it was to ensure compliance with national minimum wage requirements, ensure that all its employees received some pay increase during the cost of living crisis and/or to implement a pay increase on the normal anniversary date to maintain the differentials in the 2019 Agreement pending determination of pay by collective bargaining. The claimants argued the main purpose was to achieve the prohibited result.

f. If the claim was successful, a declaration would be made together with an award under section 145E of £4,554 (per claimant).

6. It was agreed that the first issue, determining each claimant's status, ought to be a matter capable of being agreed between the parties, with the claimant's agent providing a copy of correspondence from the union confirming the position. If agreement could not be reached, a separate hearing would be fixed, if needed, to determine that issue. This Hearing was therefore focused on the sole or main purpose of the respondent in making the Offer.

Evidence

7. The parties had produced a joint bundle of 242 pages. Regrettably this was printed single sided.

8. The Tribunal heard from Ms Noble, (then HR Director), Mr Bowie (then Finance Director), Ms Abbott (lead claimant), Mr Young (Shop Steward) and Mr Bennett (regional union officer). The witnesses each gave oral evidence and were cross examined and asked further relevant questions.

Facts

9. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are strictly necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict

was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case with regard to what was written and said at the time (when viewed in context). The Tribunal is grateful to the parties for focussing the issues and agreeing key facts and making it clear what the disputed position was in relation to such facts.

Background

10. The respondent was a company that, among other things, manufactured food products. Each of the claimants was employed by the respondent.

11. The lead claimant was employed by the respondent in the period from 23 March 2023 to 23 August 2023 (the "relevant time") and was a member of the relevant union during this period.

12. The respondent recognised a trade union for collective bargaining purposes in respect of all hourly paid workers at the Kirkconnel site under the Recognition and Procedural Agreement. A further draft Recognition and Procedural Agreement was in the process of being discussed during 2023 but had not been completed though the parties were working in line with it.

13. The lead claimant was employed at the respondent's Kirkconnel site and was paid hourly.

The collective agreement

14. The Recognition and Procedural Agreement between the respondent and the union provides, among other things, a procedure for collective bargaining on matters relating to pay. The Agreement recognises the union as the sole bargaining agent for those employees who are within the scope of the agreement on matters relating to, among other things, wages/salaries and all associated payments.

15. The collective agreement existed to ensure the respondent and the trade union worked together for certain purposes, including pay. The documents recognise that negotiation is the process of collective bargaining to reach a

settlement. If, following negotiations, agreement is not reached, a process to determine the dispute is set out, including involving ACAS, if agreed.

16. Up to and including 2021, annual pay negotiations took place between the respondent and the union in advance of the anniversary date of 1 April with the new rates that were agreed having effect from 1 April each year.

Annual pay increases

17. The collective agreement meant that agreement would be reached with the union as to levels of pay and pay differentials for various roles by reference to a fixed sum above a base rate. This was implemented in the agreements implemented on 1 April 2020, 1 April 2021 and 1 April 2022.

18. On 28 November 2022, the union submitted a pay claim to the respondent requesting a substantial increase in pay (across all grades and allowances), alignment of pay anniversary dates to December 2022, an increase in the hourly rate of pay to £13 per hour and paid tea breaks.

2023 pay negotiations

19. On 9 February 2023, at a negotiation meeting, the respondent proposed to the union, among other things, to increase the hourly rate for food operatives, over the age of 18, to £10.67 per hour. The meeting was detailed and explored both parties' positions.

20. At the relevant meetings at which pay discussion took place, Ms Noble attended on behalf of the respondent. Ms Noble was HR Director at the time and was able to communicate the respondent's position at and subsequent to each meeting.

21. On 14 March 2023, at a further negotiation meeting, following the result of a consultative ballot of members, the offer of £10.67 per year was rejected and the respondent agreed to report to its Board and update the union with the respondent's response.

22. By an email to the union on 17 March 2023 the respondent increased its offer to £10.70 per hour, with differentials for other roles as previously agreed. The

email stated that: “The Directors have asked me to contact you to advise that the Board have reconsidered their previous offer and are proposing to round this up to £10.70 per hour. The Directors also wish to continue to explore and have dialogue with you on the other matters raised in the coming months. I would be grateful if you could let me know when you will be able to come back to the company with your response to the revised offer.”

Notice board communication – imposed rates

23. Without any further discussion or communication with the union or staff, the respondent posted a notice on the notice board at the Kirkconnell site headed “Group Pay Rates from 01 April 2023” (the “Notice”).

24. Ordinarily a notice with the rates was placed on the notice board following conclusion of the collective bargaining process. The notice would say the rates were agreed with the union and have signatures of the trade union representatives and business. The notice in April 2023 was simply headed “Group Pay Rates from 1 April 2023” (making no reference to the trade union or that the rate was temporary or that matters were still under discussion).

Increased rate paid

25. On 1 April 2023 the respondent increased the pay rates of employees across the respondent's Group, including the Kirkconnel site. The hourly base rate was increased to £10.70 per hour from 1 April 2023.

26. All of the claimants, including the lead claimant, were paid in accordance with the rates set out in the new Group Pay Rates from 1 April 2023.

Further meetings to discuss pay – April 2023

27. A meeting between the respondent and the trade union took place on 3 April 2023, which was when the trade union reverted to the respondent following its offer of £10.70 pursuant to the email of 17 March 2023. The meeting began by the union explaining the offer had been rejected. The company’s position was that “the offer of £10.70 was as high as the business felt was sustainable”. The rate was said to be comparable to competitors and the increase had been

the highest in percentage terms. The company said the increase was what the Group felt was viable. The business was undergoing challenging times and in some areas job losses were a possibility. The cost of living crisis was discussed as was the impact upon the business in terms of higher costs.

28. At the end of the meeting it was said by Ms Noble on behalf of the respondent that the company had explained its position on the offer of £10.70 which it felt was a good offer and the business wanted to continue to engage with the union. The union agreed to consider matters and "take it from there".

29. On 11 April 2023 the regional officer of the union (Mr Bennett) contacted the respondent to note that no improved offer had been made. He said he was willing to discuss the matter further. The email had as its subject "Pay Negotiations 2023". Mr Bennett said the offer of £10.70 did not meet members' aspirations. Mr Bennett stated that: "As previously discussed, I understand the company will have to increase rates as of 1 April to meet current NMW legislation. However, it is my understanding this offer of £10.70 has now been confirmed by the company as a final offer. This being the case, the union will move to conduct a consultative ballot for industrial action."

30. Ms Noble replied by email headed "Pay Negotiations 2023" stating: "We would be very happy to go to the third stage of discussing this with you before we close our negotiations as per the agreement and also possibly look for mediation if we cannot agree before going to industrial action." A meeting was proposed and arranged.

Another meeting to discuss pay – 27 April 2023

31. A meeting took place on 27 April 2023 which the regional union representative attended, It was noted that there had been a number of meetings in connection with pay negotiations with the initial offer of £10.67 being rejected with a further offer of £10.70 being made, which was rejected. The meeting was "for both sides to put forward their current position and discuss next steps". Mr Bennett noted that 97% of those voted had voted in favour of industrial action.

32. It was said on behalf of the respondent that "the company employs a lot more people than those who are in the union and felt it was important to pay what the company had offered and not just the minimum wage". Had no increase been paid, minimum wage would not have been paid.

33. One of the shop stewards noted that when he had asked why the notice had been put on the notice board during negotiations, he had been told that the wage rates had applied across the Group and not just the area affected by the collective agreement. The shop steward had asked the notice be taken down as negotiations were still underway. Ms Noble explained that the respondent had wanted to be fair to all employees maintaining the differential that previously been agreed, on a base rate of £10.70.

34. Mr Bennett suggested that the approach taken made it look like the rate of pay was being imposed on everyone and the meeting was "worthless".

35. It was said on the respondent's behalf that there was no malice behind the decision and there were 600 people on site who were affected and the Board felt it was the right thing to do. It was said that the decision had not affected pay negotiations and changing the rate of pay for everyone at the same time made it easier from a payroll point of view. Ms Noble said that although the rate had been changed, no one had ever said negotiations were closing.

36. It was noted that there had never been a situation where the minimum wage rate had changed before agreement was reached and this was a new situation. A discussion took place as to the rates and it was suggested that the company rates were low and that had they been higher, the company would not have had to increase the rate to satisfy the legislation. Reference was made to other businesses' rate of pay. The union said that if another offer was not going to be forthcoming, the next step was ACAS conciliation. The union's view was that without another offer, the talks would be meaningless

37. It was said that the company had already offered an increased hourly rate and the business was facing considerable challenges. Lengthy discussion took place as to the rate and other businesses and the increase that had been offered. It was agreed that the matter would be taken back to the Board.

The Board responds to the pay claim

38. A few days later, the Board provided a written response following the meeting of 27 April 2023 which was headed "Response to the Union position in the pay claim meeting on 27 April 2023". The communication noted that the Board had met to discuss the points raised. The company said it was seeking a sustainable solution that allows the business to remain economically viable.

39. The Note said that the significant increase in the minimum wage had to be absorbed into the business and that the £10.70 offer was what the business could commercially afford. Other areas of the business had suffered job losses and it hoped this could be avoided. A commitment to working with the union was given. The Note ended: "We want to continue negotiations with the union to look for a way to mitigate against/avoid any industrial action that might be necessary and so we would look to now conciliate with ACAS to see how we can find a way through this".

Trade union formally fail to agree

40. On 9 May 2023 Mr Bennett wrote to the respondent a letter headed "Failure to agree". He said he found the company's response disappointing given 97% had voted for industrial action. The increase proposed (and implemented) had fallen short of members' aspirations. He said he was formally recording a failure to agree and suggested matters proceed via ACAS. It was agreed that industrial action be paused pending ACAS discussions.

ACAS meetings

41. An ACAS conciliation meeting took place on 7 June 2023 at which the respondent produced a paper headed "Proposals" which set out the background including the challenges the business faced and the national wage rates. It also explained how the £10.70 offer had been decided upon, taking account of benchmarks, financial viability and commitment to the Scottish Governments' Fair Work framework. Other similar businesses and their situation was also set out. There was no reference to any issue with regard to fixing minimum wage with regard to time worked.

42. Under the heading “Future Options” it said: “We fully understand that the pay claim is a request for an increased hourly rate of pay. We have closed the gap and hoped to move to the real living wage. However, no one anticipated the jump in hourly rate would be as high as 9.7% We did consider moving the base rate to £10.42, however, to be fair to our employees to compete in our marketplace and to continue our journey towards the real living wage, we took the decision instead to move it to £10.70”. Different shift patterns were set out and how that could result in increased pay.

43. By letter dated 7 June 2023 the respondent set out an offer which included a retention bonus (with no increase in hourly rate) and reiterated its commitment to work towards the real living wage.

Wage rate notice removed from notice board

44. On 12 June 2023 Mr Bennett sent an email to Ms Noble headed “Pay claim 2023” asking that the Notice be removed from the notice board immediately. Ms Noble replied saying that she did not intend to cause any issue by placing that on the notice board and the ACAS conciliator had felt there was no reason not to retain it but it was taken down.

A second ACAS meeting

45. At a second ACAS meeting on 21 July 2023 the respondent presented an updated paper which set out the future proposal which had been offered at the earlier meeting which was said to equate to an increase in 11p per hour.

46. On 27 July 2023 union members voted in a formal industrial action ballot. 99.23% voted for strike action.

Final ACAS meeting

47. A further meeting with ACAS took place on 8 August 2023 led to a further offer being made (with an increased hourly rate of £10.90). The union agreed to suspend the first week of notified strike action to allow its members to consider a revised offer.

Agreement reached

48. On 14 September 2023 a revised offer was formally made. Strike action was suspended pending the results of a ballot. The ballot closed on 5 October 2023 when the members voted to accept.

Issues with HMRC and pay rates

49. In 2021 the respondent had identified a potential issue with regard to how hourly staff were paid and the interplay with the national minimum wage legislation. The time staff spent changing had not been included in the calculation for which payment was made. Discussions between the respondent and HMRC had taken place in 2022 and then in 2023.

50. In March 2023 a draft calculation was issued setting out the impact of the review. A notice of underpayment was likely to be issued but that was under discussion and review. The respondent was challenging the calculation of the relevant time.

51. In April 2023 the HMRC said it intended to issue a notice of underpayment. Arrears were to be set out and paid.

52. The respondent had determined that in order to meet their liabilities in terms of minimum wage, it would be necessary to pay workers £10.70 an hour. They believed that would result in compliance with the legislation from April 2023. At no stage had the respondent communicated this to the union.

Observations on the evidence

53. The Tribunal found each of the witnesses generally to be credible. They did their best to recollect the position and set out the position as they saw it.

54. **Ms Noble** explained that she was seeking to negotiate with the union on behalf of the respondent. She had been advised by the Board as to the offers and had set out the position. She was absolutely clear in her evidence, including when challenged, that the respondent wished to reach agreement with the union as to the position (and had not closed its mind). While the respondent imposed the original offer, without communication with the union, Ms Noble explained this had been done because the pay rates applied across

the Group and it would have been too difficult to exclude from the increase those covered by the collective agreement. There was no evidence to suggest this was not in fact correct or that the board had in fact wished to avoid the collective bargaining machinery by so doing (even if that was what the union believed the position to be). It was of particular importance that the claimant's agent said that no particular issue was taken with her evidence in relation to credibility and reliability (even if, it was said, her evidence was "retrospectively angled towards protecting the decisions made at the time").

55. In assessing the question necessary to determine the claim, the evidence of Ms Noble was crucial since it was Ms Noble who was explaining what the sole or main purpose of the respondent was when making the Offer. The Tribunal found that Ms Noble's evidence in that regard was credible and reliable

56. **Mr Bowie** explained the financial position and confirmed that he had played no part in the collective bargaining process.

57. **The claimant** also set out the position as understood as did **Mr Young.** Mr Young was clear that upon seeing the notice with the new rates, it appeared to him that the respondent had decided to impose their final position.

58. **Mr Bennett** also gave a detailed account of the position as he saw it. Counsel for the respondent argued that Mr Bennett was "an evasive witness who contradicted himself and insisted on the existence of obviously false facts. He appeared to see his role as being to argue his agenda, not to provide an honest account of facts". The Tribunal did not agree with that summary of Mr Bennett's evidence. While on occasions Mr Bennett was confused, his evidence was generally clear and heartfelt.

59. The first example relied upon was Mr Bennett's assertion that "everything but pay was discussed after 23 March 2023". Mr Bennett's position was that in reality the respondent was not prepared to engage in negotiation about the rate of pay and instead was focussing on other matters, having decided to make no further offer.

60. Mr Bennett also argued that meetings after industrial action had been threatened were not about pay, when the industrial action was all about pay and resolving that was all about paying more. Again Mr Bennett's belief was that the respondent was only discussing pay because it faced industrial action and was not doing so because it was genuinely and in good faith continuing the collective negotiations.

61. Mr Bennett had argued meetings prior to 11 April 2023 were about industrial action, when it had not been mentioned at that stage and to that extent the Tribunal considered Mr Bennett to be mistaken. Mr Bennett clearly fundamentally believed in the cause and was trying his best to secure an agreement.

62. The Tribunal did not accept the submission that Mr Bennet's agenda was to try to persuade the tribunal that the 1 April 2023 pay rates posted on 23 March were a final offer, with the respondent having no intention of discussing pay any further, and with no further discussions actually happening, such that the bargaining agreement was no longer complied with. The Tribunal found Mr Bennett to be doing his job and explaining the position understood by him.

63. Mr Bennett knew there was discussions ongoing but believed that the posting of the rate on the notice board, without any explanation, was an attempt to avoid the collective bargaining machinery. Mr Bennett candidly accepted that the respondent had to ensure it paid the minimum rate. He also candidly explained that had this been made clear there would have been no issue. His concern was the respondent making an offer to all staff at a time negotiations were ongoing, with no communication to the union or explanation about this. That was a reasonable concern for Mr Bennett to have given the central role the trade union had on this important issue.

64. There were no specific factual disputes that the Tribunal required to resolve and the key issue was determining what the respondent's sole or main purpose in making the offer was (determined principally from Ms Noble's evidence in light of the context and what others could say around the time the Offer was made).

65. One issue the claimant noted was the suggestion that a “final offer” had been made on 23 March 2023 which was suggested by Mr Bennett. This had never been mentioned by the respondent who had been awaiting the union’s response. Mr Bennett concluded from the material before him that the offer was a final offer since the union had not been advised. The Tribunal took into account that the Offer was not a final offer, in assessing its purpose.

Law

66. The appliable law is section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992:

“(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. …..

(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.

145D …..

(2) On a complaint under section 145B it shall be for the employer to show what was his sole or main purpose in making the offers. ….

(4) In determining whether an employer's sole or main purpose in making offers was the purpose mentioned in section 145B(1), the matters taken into account must include any evidence–

(a) that when the offers were made the employer had recently changed or sought to change, or did not wish to use, arrangements agreed with the union for collective bargaining,

(b) that when the offers were made the employer did not wish to enter into arrangements proposed by the union for collective bargaining, or

(c) that the offers were made only to particular workers, and were made with the sole or main purpose of rewarding those particular workers for their high level of performance or of retaining them because of their special value to the employer."

67. The Employment Appeal Tribunal in **Kostal UK Ltd v Dunkley** 2018 ICR 768 set out a summary of these factors and their relevance in these cases: 'There is an infinite spectrum of facts that might have to be considered in a section 145B case: at one end of the spectrum there may be cases where the employer has sought to change collective bargaining arrangements and then, without entering into collective negotiations or acting precipitately in the midst of such negotiations, and absent some pressing business aim, makes offers that would have the effect that all employment terms will be agreed directly if accepted. At the other end of the spectrum will be employers who have engaged in lengthy and meaningful collective consultation and reached an impasse before considering making direct offers; or who can demonstrate a strong history of operating collective bargaining arrangements with the union and/or have no wish to avoid entering into such arrangements when the offers are made; and there will be cases where employers can show genuine business reasons (unconnected with collective bargaining) for approaching workers directly outside the collective bargaining process. There may also be difficult cases in the middle where the employer has mixed aims or objectives it seeks to achieve, or the evidence is unclear. The question in each case is a question of fact and degree. As with other detriment cases, where an employer acts reasonably and rationally and has evidence of a genuine alternative purpose, tribunals are likely to be slower to infer an unlawful

purpose than in cases where the employer acts unreasonably or irrationally or has no credible alternative purpose.'

68. The Employment Appeal Tribunal's decision was overturned by the Court of Appeal, and the case eventually reached the Supreme Court, which allowed the union members' appeal and restored the Tribunal's conclusion that the employer had offered unlawful inducements — **Kostal UK Ltd v Dunkley** 2022 ICR 434. The majority in the Supreme Court focused on the nature of the 'prohibited result' and allowed the appeal on that basis. The majority, like the Court of Appeal, was unconvinced by the Employment Appeal Tribunal's suggestion that an employer who acts reasonably and rationally and can show evidence of a genuine business purpose will be able to avoid an adverse finding as to its purpose in making the offer.

69. In **Ineos Infrastructure Grangemouth Ltd v Jones** 2022 IRLR 768, the Employment Appeal Tribunal upheld a Tribunal's reliance on the employer's decision to terminate the existing collective bargaining arrangements as evidence of an impermissible purpose. One of the findings that worked against the employer was that it had told employees that it was terminating the collective bargaining agreement with the union in light of the 'unsatisfactory' way in which the union had conducted pay negotiations. It stated that it was happy to negotiate with a works council or another trade union. The Tribunal found that the employer made an offer that had the prohibited result. The result of the offer was that the employees' terms would not be collectively bargained for the period of the 2017 pay award in circumstances where there was a real possibility that, had the offer not been made and accepted, the terms would have been determined by a new collective agreement. The Tribunal went on to find that the employer's purpose was to achieve the prohibited result. It was a business decision to conclude collective bargaining unilaterally because the employer considered that negotiations had gone on long enough, and it did not wish to re-enter negotiations where two out of three unions had accepted the pay offer.

70. There was no attempt to reconvene the collective process or consult its members about next steps in light of the decision to reject the pay offer. It was

not the result of a genuine belief on management's part that collective bargaining was already at an end; it was a decision by management because it did not wish to continue collective bargaining and, therefore, in order to implement the pay award, it would impose it unilaterally. That was the purpose in making the offer. It was immaterial whether the employer's decision was reasonable or unreasonable, or whether the union had acted reasonably or unreasonably; the only issue was the employer's subjective purpose.

Burden of showing purpose is on employer

71. It is for the employer to show what its sole or main purpose was in making the offer. Mrs Justice Simler, summarised the correct approach to the burden of proof in **Kostal UK Ltd v Dunkley** 2018 ICR 768 (which reasoning was not challenged on appeal). She stated that, by analogy with detriment cases it is for the claimant to raise a *prima facie* case and, if that is made out, the employer must prove on the balance of probabilities that it had an alternative, proper purpose which was either its only purpose or at least an equally important purpose in making the offers.

Discussion and decision

72. The parties had worked together in this case such that the central issue for the Tribunal was whether the "sole or main purpose" for the respondent imposing new rates of pay on 1 April 2023 was to achieve the prohibited result – where the terms of employment (ie pay) would not be determined by collective agreement for the pay award

73. In considering what the sole or main purpose was the Tribunal must assess the evidence before it and determine what the sole or main purpose of the respondent was in making the offer on 1 April 2023. The claimant can only be successful if the sole or main purpose was to achieve the prohibited result.

74. The claimant argued that the sole or main purpose was to avoid collective bargaining for the purposes of the pay award and impose the award.

75. The respondent's case was that this was not the sole or main purpose (and not at all a purpose) and instead the purposes of imposing the new pay rates

on 1 April 2023 were to ensure compliance with national minimum wage requirements; to ensure that all its employees received some pay increase during the cost of living crisis; and to implement a pay increase on the normal anniversary date to maintain the differentials in the 2019 Agreement pending determination of pay by collective bargaining.

76. In this case the respondent did not reveal to the trade union or its employees at the time the respondent imposed the pay increase, what its now stated purposes were. Further, even when discussing the rate that had been imposed shortly following its imposition, the respondent still failed to disclose the reason now being advanced for its actions, even although the discussion was specifically about the rates of pay.

77. The fixing of pay was a major part of the trade union's role in the workplace and the Recognition and Procedures Agreement recognised the union's central role in that negotiation.

78. One of the areas of dispute in this case related to whether or not the respondent continued to negotiate in respect of the rate or whether it had closed its mind to the negotiation. This was relevant because the claimant said closing its mind showed the purpose the respondent had in making the offer was to avoid collective bargaining machinery.

79. Counsel for the respondent argued that continuing to discuss pay (and the reasons why an increase was not affordable) was evidence of negotiations continuing. The respondent did continue to meet with the trade union and to discuss pay even if no offers were immediately forthcoming and even if the reasons now stated to be the real reasons were not set out at the time.

80. The regional officer of the trade union, however, believed that negotiations had ended and the respondent was simply seeking to justify what it had done.

81. The respondent did continue to work under the recognition agreement, save for imposing new pay rates on 1 April 2023 at a point when pay was not yet agreed with the union, when discussions were continuing. This included when the union agreed that negotiations had ended and a dispute arose. The

respondent believed negotiations were continuing and it was clear that the trade union did not agree given the context. The union's position was that a final offer had been made, the respondent having closed its mind to making any further offer via negotiation and that the dispute machinery within the recognition agreement had to be applied.

82. The offer was made and the sums then imposed on staff with effect from 1 April 2023. There was no evidence as to why this was done without explanation. The absence of any explanation at the time for the offer being imposed introduced a lack of clarity. The absence of any attempt to explain to the union or staff that the imposition was temporary pending conclusion of the negotiations is important. It is relevant in assessing what the respondent's purpose at the time in making the offer was.

83. It was clear that the respondent was awaiting a response from the union as to the offer given the discussion that took place at the meeting on 3 April 2023 at which pay rates were discussed. In other words the respondent had not abandoned the collective bargaining machinery; the respondent was in fact engaging with it (even if not being candid and clear and even if there was no intention of making any further offer).

84. The key issue for the Tribunal is to assess whether or not the respondent in making the Offer and posting the rates which were effective from 1 April 2023 had as its sole or main purpose that the pay rate would not be determined by collective agreement. The context is important and the fact discussions around pay continued is relevant, but that did not mean the respondent could not have had as its sole or main purpose in making the offer a desire to achieve the prohibited result. The Tribunal carefully considered what was said and done at the time the offer was made informed by the context.

85. Following imposition of the Offer, discussions continued and ultimately agreement was reached following a ballot for industrial action some months later. In previous years, agreement had been reached before 1 April each year and the failure to agree in 2023 was unusual. How to handle a failure to agree by 1 April was not dealt with in the Recognition Agreement and the

respondent decided to impose figures it now says was to comply with the law (and previous differentials that had been agreed). That decision was despite the absence of any intimation to the union of that purpose and shortly following a lower offer having been made.

86. There was no dispute that the respondent had to ensure it complied with the law but the respondent could have paid the increased hourly rate for each worker in respect of each hour worked (rather than paying more for fewer hours worked). That would have avoided any issue arising as to paying the correct rate for time worked. It was equally possible for the respondent to have paid the same increased minimum rate to all staff (unless staff were already being paid the new minimum rate). It was not correct therefore to say that there were no alternative options open to the respondent to comply with the law. While it may be perceived to have been unfair to have changed the differentials or the way payment was made, it was still an option. The respondent could have communicated its decision to all involved and made it clear why it was imposing the rates (particularly making it clear the decision was pending conclusion of negotiations and was a temporary measure).

87. The Tribunal did not accept the respondent's agent's submission that the respondent "had no real choice" but to pay the £10.70 rate from 1 April 2023 to comply with the law. The respondent had a number of alternatives open to it, had it wished to do so, including paying the minimum rate for each actual hour worked or by communicating the position with the union at the time. Nevertheless the fact there were other ways to meet minimum wage liabilities did not necessarily mean the sole or main purpose of the respondent in making the Offer was not to meet its minimum wage liabilities.

88. The Tribunal did not accept the submission that "there was no credible suggestion that the reason for the increases was to bypass trade union consultation, rather than to meet legal requirements". The claimant's case was predicated upon the respondent having imposed the new rates in an attempt to avoid collective agreement. In other words, it was said that the sole or main purpose in imposing the rates was to try and avoid matters being agreed collectively, the respondent's final position having been set out in

March 2023 (and then explained subsequently). The respondent's purpose in making the Offer was to be determined at the point the Offer was made – when the notice was placed upon the noticeboard (with subsequent matters being relevant in assessing that purpose). This required careful consideration by the Tribunal and was finely balanced.

89. The respondent wished to agree the pay rate with the union and discussions continued but the issue was whether in imposing the rate when it made the Offer, the sole or main purpose was to avoid collective bargaining. The Tribunal must consider what the purpose of the respondent was at that time. The purpose in so doing is discerned from the evidence of Ms Noble since it was not disputed that she was representing the respondent when applying the collective bargaining machinery. There was no dispute to her evidence being the evidence from which the purpose in making the Offer is determined.

90. The evidence from those present following the Offer being made is relevant but not determinative since the Tribunal must assess what the purpose of the respondent was in making the Offer at the time it was made. The purpose is something which obviously existed when the Offer was made, which was something to which Ms Noble spoke. The claimants' witnesses had no direct knowledge of the respondent's sole or main purpose and their evidence was relevant as to their understanding and the context which was considered.

91. The Tribunal analysed the evidence and considered the context in assessing the reason for imposing the 1 April 2023 pay rates. The Tribunal accepted that the reasons for imposing the rate (ie making the Offer) were the reasons given by Ms Noble. The Tribunal considered her evidence very carefully.

92. The Tribunal did not find the approach the respondent took to be properly cognisant of the importance of the trade union in making decisions as to pay. The respondent was lacking in candour in places in setting out its position during the discussions as to pay.

What was the sole or main purpose in making the Offer

93. This claim is determined by assessing whether in making the Offer the respondent had its main (if not sole) purpose the prohibited result. From the evidence, the Tribunal concluded that the main purpose of the Offer was not to seek to achieve the prohibited result, ie have terms of employment (pay) determined other than by collective agreement. The collective agreement and collective bargaining machinery were still being followed, even if the respondent failed to communicate its position to the union fully and even if there was no desire at the time to increase the offer that had been made.

94. The Tribunal took account of the fact that the notice board had been used before to intimate new rates following conclusion of negotiations. Staff seeing the notice could assume that was the final position there being nothing to indicate negotiations were ongoing or the rate was temporary. However, the Notice differed from the occasions where agreement had been reached when the relevant rates were obviously permanent (and having been reached via consensus). That was a relevant consideration in determining what the purpose of the Offer was but that had to be considered in context. The Tribunal also took into account the points made by the claimant's agent in his submissions and how the respondent conducted themselves.

95. The onus is on the respondent to show what the sole of main purpose in making the Offer was and the Tribunal considered the evidence before it. The assessment is to determine what the purpose of the Offer was, when it was made, informed by what happened at the time and after the Offer was made.

96. The Tribunal took account of the context and in particular the offers that had been made in February and March 2023. The fact that discussions were ongoing was a relevant consideration, including what was said at the two April meetings, which included nothing about the reason now being advanced as the reason for the change. In fact the main reason given at those meetings was that commercially the respondent was unable to increase its offer at that time. The respondent had never fully set out the position now being advanced, with the focus being on the commercial position. The union and staff only learned of the issue with regard to paying the minimum wage (and the HMRC audit) when this claim was lodged.

97. The Tribunal took into account the collective bargaining machinery that was being applied by the parties and what was said and done at the time. There were ongoing meetings and the respondent had asked the union for a response to the offer. The Tribunal did not accept the claimant's agent's submission that the further discussions that took place following imposition of the Offer "were not a continuance of earlier discussions" not least given the discussions were directly in response to the Offer the respondent had made during which discussions the respondent set out its rational for its approach (and continued to do so at a further meeting with the union).

98. In continuing to apply the collective bargaining machinery the respondent had shown that it intended the pay rate to be concluded through that process, even if the respondent had, in the interim, imposed the Offer. The Tribunal accepted Ms Noble's evidence that the respondent's intention was to continue to engage with the trade union, even although the respondent had shown poor judgment in its approach to the union in imposing the Offer and failed to be open and transparent at meetings discussing the position. The respondent had only increased the offer following conciliation in the face of industrial action but that did not mean the respondent had the prohibited result as its sole or main purpose when the Offer was made.

99. The Tribunal found the respondent had shown complying with the minimum wage was the main reason for the Offer. This was the main reason Ms Noble had given for the respondent's decision to impose the Offer. The respondent's view was that the sum imposed was what they considered the minimum amount required in order to comply with the minimum wage. Ms Noble had said that the intention was to continue to speak with the union (under the auspices of the collective agreement) with a view to reaching agreement. The respondent had shown that it wished to maintain the pay differential that had previously been agreed (and thereby respected the position that had been collectively agreed). That was why the different pay rates were imposed as part of the Offer. The Tribunal found that the respondent had shown that ensuring all employees received some pay increase was a reason.

100. The Tribunal took into account that the offer was made to all staff. That included all union staff and others within the affected constituency and in this case all staff within the Group. The Tribunal took into account what the shop steward believed and what he had been told. The respondent was imposing the Offer for all staff engaged by the Group and not just those covered by the collective agreement. Ms Noble continued to meet and engage with the union and seek agreement as to the rate, even if no further offers were made at that time. It was clear discussions were taking place, even if agreement had not been reached. In making the Offer, the respondent had acted unilaterally but it did not have its sole or main purpose seeking to have the pay award implemented by means other than the collective bargaining machinery which the respondent was continuing to apply.

101. The Tribunal took into account that the respondent had asked the union for its response to the Offer in March and continued to discuss the position after imposing the Offer (and did so at two formal meetings in April). This was not a case of the Offer being made and no attempt being made to engage with the union. Nor was this a case of the respondent ignoring the collective bargaining machinery. The spirit of the collective agreement had not been followed (which was clearly what had led Mr Bennett to consider a final offer had been made) but it could not be said from the evidence that the respondent had sought to impose the Offer such as to avoid having the pay award determined by the collective agreement (since the respondent was engaging with the union and seeking to persuade it as to the commercial position underpinning the Offer). The continued discussion with the union, even if an attempt to persuade the union to accept the position, showed that the respondent wished to follow the terms (if not entirely the spirit) of the collective agreement *vis a vis* the pay award.

102. On balance and having carefully assessed the evidence, and in particular utilising the benefit of the industrial experience of the non-legal members, the Tribunal concluded that from the facts, the respondent's sole or main purpose in making the offer in this case was not to achieve the prohibited result. The respondent had shown on the facts that it had another purpose in making the

offer. The respondent had satisfied the Tribunal that the respondent's sole or main purpose in making the Offer was not to achieve the prohibited result.

103. The Tribunal analysed the evidence assessing what the respondent's purpose was at the time the offer was made, viewing the evidence in context. The Tribunal assessed the evidence and considered the submissions. The Tribunal did not find the claimant's agent's submissions to have merit. The Tribunal concluded the sole or main purpose was not to achieve the prohibited result. The respondent had satisfied the Tribunal the main purpose of the Offer was to ensure compliance with minimum wage requirements and to maintain the differentials that had previously been agreed with a view to reaching agreement via the collective bargaining process.

104. It could be said that by making the Offer in the way it did, the respondent could have been seeking to encourage union members to accept the award when matters were discussed with the union (since the respondent did not know at the time it imposed the Offer whether or not the union was going to accept it). But by continuing to meet with the union and discuss the position, even absent any intention of increasing the offer, the respondent had shown that it wished to impose the pay award via the collective agreement since the respondent was applying the collective agreement and working with the union, even if the respondent had not been open and transparent (and even if the union believed a final offer had been made and even if the respondent did not consider an increased award to be commercially feasible).

105. The respondent's approach could be considered disingenuous given its lack of candour and failure to fully engage with the union (both in imposing the Offer and in the discussions that followed the imposition). The Tribunal found the respondent's failure to communicate the position with the trade union surprising and disappointing.

106. Notwithstanding the respondent's poor approach to industrial relations with regard to the Offer, the Tribunal did not find from the evidence before it that the sole or main purpose of the Offer was to achieve the prohibited result. The claim is therefore ill founded and it is dismissed.

Employment Judge:	**D Hoey**
Date of Judgment:	**10 June 2024**
Entered in register:	**10 June 2024**
and copied to parties	