



EMPLOYMENT TRIBUNALS

Claimants: Mr Alun Williams
And others

Respondent: Kingspan Limited

Heard at: Cardiff via CVP **On:** 8, 9 and 10 October 2025
(hearing) and 12 December 2025
(in Chambers)

Before: Employment Judge R Havard

Members: Ms J Forecast
Ms D Hebb

Representation:

Claimant: Mr T Rushton (Counsel)
Respondent: Mr S Robinson (Solicitor)

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. The claims of those Claimants listed in Schedule 1 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;

2. The complaints of Mr D Baker (1601319/2023) and Mr J Hughes (1601345/2023) are struck out on the basis that they have not been actively pursued.

REASONS

Introduction

- 1 Claim forms dated 14 July 2023 were presented, following a period of Early Conciliation between 3 May 2023 and 14 June 2023.
- 2 Initially, claims were pursued by 92 Claimants listed in a Schedule of Claims.
- 3 In the course of these proceedings, a number of claims have been dismissed either on the basis that they have been withdrawn or because they have not been actively pursued.
- 4 As at 8 October 2025, the claims being pursued with the Lead Claim of Alun Williams (hereinafter referred to as “the Claimant”) (1601314/2023) are set out in the attached Schedule 1.
- 5 As for the claims of Daniel Baker (Case No. 1601319/2023) and Joel Hughes (Case No. 1601345/2023), these two claims are struck out because they have not been actively pursued.
- 6 At a Preliminary Hearing on 1 April 2025, the Tribunal noted that on 17 May 2024, the solicitors for the Claimants, Slater and Gordon, confirmed that they no longer acted for Messrs Baker and Hughes together with one other Claimant.
- 7 On 1 April 2025, the Tribunal ordered that, within 28 days of the directions being sent to them, Mr Baker and Mr Hughes may send to the Tribunal and copy to the represented Claimants and the Respondent, any evidence they wished to rely on in support of their claim and which was not already in the hearing bundle and/or addressed in the witness statements.
- 8 At the commencement of this hearing, neither Mr Baker nor Mr Hughes had submitted any evidence on which they intended to rely.

- 9 When notice of this hearing was sent out, it is understood that the Tribunal had failed to send the notice to Mr Baker and Mr Hughes. However, Mr Rushton confirmed that his instructing solicitors had sent notice of the hearing to both Mr Baker and Mr Hughes. Mr Robinson also informed the Tribunal that he had arranged for the notice of hearing to be sent to Mr Baker and Mr Hughes.
- 10 Further, in the course of the first morning of this hearing, and in the absence of a phone number for either Claimant, the Tribunal sent an email to both of them informing them of the hearing and requiring them to make contact with the Tribunal. At no stage during the 3-day hearing did either Mr Baker or Mr Hughes endeavour to do so.
- 11 In the circumstances, the Tribunal concluded that neither Claimant had actively pursued their claim and for these reasons, their claims are struck out.
- 12 Consequently, the case numbers and names of the Claimants continuing to pursue their claim and represented by Mr Rushton appear in the attached Schedule. They are all members of Unite the Union (“Unite”) and the common complaint is that the Respondent made an unlawful inducement relating to collective bargaining contrary to Section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992.

List of Issues

- 13 At the commencement of this hearing, Mr Rushton and Mr Robinson confirmed that there was an agreed List of Issues which are as follows:
- (i) Does the Respondent have a collective agreement with Unite Union for the purpose of collective bargaining connected to pay as per Section 178 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the Act)?
 - (ii) Did the Respondent, on 2 March 2022, make an offer to the Claimants within Section 145B of the Act?
 - (iii) If so, did or would acceptance of such offer have the prohibitive result under Section 145B(2) of the Act, that the Claimants terms of employment, or any of those terms, would not (or would no longer be) determined by collective agreement?
 - (iv) If yes, was the Respondent sole or main purpose in making the relevant offer to achieve that prohibitive result? When considering paragraphs 3

and 4 when the Respondent made the offer, did the Respondent genuinely believe the collective bargaining process has been exhausted?

Remedy

(v) Are the Claimants entitled to a declaration under Section 145E(2)(a) of TULRCA 1992?

(vi) Are the Claimants entitled to an award under Section 145E(2)(b) of TULRCA 1992?

Evidence

14 The Claimant, Alun Williams, gave evidence on behalf of himself and the other Claimants named in the schedule. Mr Jono Davies, full-time Regional Officer for Unite, also gave evidence on behalf of the Claimants.

15 The Respondent called:

(i) Mr Mike Jones, Operations Manager;

(ii) Mr Peter Bullough, Divisional Finance Director for the Respondent from 2005 until February 2024 and currently a Director of Kingspan Fastener Solutions Limited.

16 All those who gave evidence had provided written witness statements. The Tribunal was also provided with a written witness statement of Ms Pam Mulliner who, at the material time, was Human Resources Director for the Respondent; she has subsequently left the Respondent's employment.

17 An agreed bundle had been prepared and submitted, together with an index. This ran to 236 pages.

18 Unless otherwise stated, any page references in this Judgment refer to the page numbers in the bundle.

Submissions

19 At the outset, the Tribunal had been provided with an undated document entitled "Claimants' Skeleton Argument" drafted by George Pollitt of Counsel.

20 At the conclusion of the evidence, Mr Robinson submitted written submissions which he supplemented with some brief oral submissions. Mr Rushton relied

on the Skeleton Argument provided by Mr Pollitt and made oral submissions to the Tribunal.

Findings of Fact

- 21 The Respondent describes itself as a global leader in advanced insulation and building envelope solutions. Its activities include the design and manufacture of high-quality fire safe insulated roof, wall and façade systems for the construction industry.
- 22 It operates from a number of sites in many different countries but the site which is relevant to these proceedings is the one at Holywell in Flintshire, North Wales.
- 23 In the documents provided for the Tribunal, there is also reference to sites at Sherburn in North Yorkshire and Kingscourt in the Republic of Ireland.
- 24 Over and above those individuals who had provided a witness statement for the purposes of these proceedings, reference is also made to the following in the documentation:
- (i) Gilbert McCarthy (Divisional Managing Director);
 - (ii) Phil Smith (UK and Ireland Managing Director);
 - (iii) Tony Kiernan (Operations Director);
 - (iv) Jemma Whitehouse (HR Manager), and
 - (v) Chris Hicks (Unite)
- 25 The workforce at Holywell is made up of salaried staff and hourly-paid staff. Salaried staff are primarily those who are more office-based, dealing with administration and managing the site.
- 26 Hourly-paid staff are those who work on the shop floor.
- 27 The salaried staff are not unionised but there is a working forum which carries out negotiations with the Respondent.
- 28 As for the hourly paid staff, the Tribunal was informed that there were approximately 200 who fall into that category. Whilst both Mr Jones and Mr Bullough indicated that they were not entirely sure of the number who were members of Unite and those who were not, it was anticipated that there were

approximately 80 union members. The balance of the hourly-paid staff would be represented by a Partnership Forum when negotiating with the company with regard to issues such as pay. Whilst the Tribunal noted what had been said by Mr Jones and Mr Bullough with regard to their lack of knowledge of the number of union members, this did not appear to be consistent with what is said by Ms Mulliner at paragraph 8 of her statement when she stated that the Respondent's employees outside of the collective bargaining unit (i.e. the union members) had agreed a cost of living pay increase.

- 29 Negotiations with Unite were required to be conducted through a "Recognition and Procedural Agreement" ("the Recognition Agreement") (pages 76 to 82).
- 30 Negotiations with regard to pay have been conducted between the Respondent and the Union since approximately 2010. The first Recognition Agreement was put in place in about 2014.
- 31 The Recognition Agreement which is material to these proceedings is the one dated 5 May 2017 which was signed on behalf of the Respondent by Ms Mulliner.
- 32 Whilst the Tribunal had taken account of the entire content of the Recognition Agreement, of particular relevance to these proceedings are sections 7.5 and 7.6.

"Annual JNC Negotiations:

The company and the union shall meet annually to review the terms and conditions detailed in clauses 2.1.1 2.1.2 and 2.1.3 of this agreement.

- *Prior to commencement of negotiations, normally September each year, the Company will give a financial briefing to the Joint Negotiating Committee.*
- *Following the financial briefing the Union representatives will be given opportunity to communicate with members and to prepare a proposal which will be submitted in writing to the Company's Head of HR.*
- *The Joint Negotiating Committee will then convene a first meeting to discuss the Union representative's proposal as soon as is possible.*
- *The Joint Negotiating Committee will seek to come to an agreement.*

- *Proposals will be submitted to the workforce for a decision on acceptance which will be by simple majority vote through a secret ballot of members within the Bargaining Unit.*
- *During the process, Union representatives will be afforded sufficient time to consult with members by prior agreement with the Company.*
- *Any agreement affecting the pay, hours and holidays of Employees in the Bargaining Unit, which the Company and Union enter into following negotiations will be put in writing and signed by the Regional Officer and Company Representative.*
- *Where agreement cannot be reached, the Union representatives may request the participation of the Regional Officer and the Company representatives may request the presence of an additional Company representative at a Joint Negotiating Committee meeting.*
- *A further meeting of the Joint Negotiating Committee will be convened to discuss the outcome of the review and will agree one of the following outcomes:*
 - *Agreement*
 - *Further negotiation by the Joint Negotiating Committee (which may with the agreement of both parties include conciliation by an external party).*

7.6 *The Company and the Union recognise the importance of adhering to the arrangements outlined in 7.5 for the annual negotiations and will endeavour to ensure that the negotiations are concluded within the timescales specified. However, it is recognised that circumstances may occur that give rise to a requirement to vary the arrangements. The Company and the Union agree that any variation will be reasonable in all circumstances and will be by agreement between the parties.”*

- 33 The Tribunal noted that terms of the Recognition Agreement can only be varied by agreement between the parties.
- 34 The process of negotiating pay between the Union would commence in or about September or October of any particular year. It would begin by the Respondent providing a financial briefing to the Union member of the Joint Negotiating Committee ("JNC").
- 35 Section 7.2 of the Recognition Agreement stipulates that the JNC will be comprised of three representatives from the Respondent and three representatives from Unite. However, having heard from the Claimant and Mr Jones, the Tribunal finds that, in practice, the negotiation took place between the two of them with Mr Jono Davies, as Regional Officer, being involved but not as a member of the JNC. There is also reference to Mr Hicks of Unite in certain of the email correspondence and also Jemma Whitehouse of the Respondent. However, the Tribunal finds that, insofar as it related to the JNC, it was, in reality, a negotiation primarily between the Claimant and Mr Jones as representatives of Unite and the Respondent respectively.
- 36 As the Respondent's representative on the JNC, Mr Jones would give the financial presentation and he recalls doing so to the Claimant and to the Regional Officer for Unite, Mr Jono Davies. Mr Davies confirmed that he was involved with the pay talks from the outset which, taking account of the terms of clause 7.5 of the Recognition Agreement, was unusual. Ordinarily, in accordance with bullet point 8 of section 7.5, it was only when agreement in negotiations cannot be reached that the Union representatives, in this case the Claimant, may request the participation of the Regional Officer at a meeting of the JNC.
- 37 The Respondent had included PowerPoint slides of the presentation that Mr Jones said that he gave at the outset of negotiations. However, the PowerPoint presentation that had been provided (pages 117 to 124) is dated February 2023 which was at a time when negotiations were well-advanced and therefore clearly this did not represent the PowerPoint presentation that had been made in or about September or October 2023. Mr Jones was unable to provide an explanation for that error.
- 38 Nevertheless, the Tribunal was satisfied that such a presentation did take place as Jono Davies said that he attended the representation. He said that, having been involved in presentations such as this before, it came as no surprise that

the Respondent presented the future financial prospects of the company as bleak. Indeed, Mr Davies described the presentation as, “*a proper sob story*”.

- 39 In any event, having been provided with this presentation regarding the future finances of the Respondent, the next step in the negotiations, as prescribed by the Recognition Agreement, would be for Unite to communicate with its members and prepare a proposal to be submitted to the Respondent.
- 40 This was done when, in or about November 2022, the Union proposed a wage increase of 13.5%.
- 41 The first JNC meeting took place on 17 November 2022, by which time the national concern with regard to the cost of living and the high level of inflation was an issue which was highly relevant to both the Union and the Respondent in the course of these negotiations.
- 42 The Tribunal had noted the internal correspondence between Jemma Whitehouse and Mr Jones (page 92) regarding the cost-of-living issue and the impact on members of staff.
- 43 In approaching negotiations, Mr Jones confirmed that he was only able to operate within the level of authority provided to him by the directors. Negotiations were also ongoing at other sites operated by the Respondent, for example Kingscourt (page 95).
- 44 The initial counter-proposal put forward by the Respondent on 17 November 2022 was that the Union members should receive an increase in pay of 4.5% and a one-off £1,000 cost-of-living payment.
- 45 Mr Bullough who, at the time, was Divisional Finance Director, had responsibility for reviewing the financial proposals put forward by the Respondent in the course of the negotiations. He stated, and the Tribunal found, that in his years as a finance director, the proposal to offer an increase in pay and a one-off cost of living payment was unique and exceptional. However, it was recognised by the Respondent that many businesses were adopting this approach as a result of the very high levels of inflation which were leading to many members of staff suffering financial hardship.
- 46 In the event, this proposal by the Respondent was rejected.

- 47 On 27 November 2022, the Claimant had met and had further discussions with Mr Jones at which point a counter-proposal was made by the Union for an 11.4% wage increase.
- 48 Having been provided with the parameters for negotiations, on 8 December 2022, Jemma Whitehouse sent an email (page 112) to the Claimant and Chris Hicks of Unite to confirm what had been discussed earlier and repeated an offer of 4.5% increase in pay and a one-off cost-of-living payment of £1,000. However, on 22 December 2022, this was rejected by the Union.
- 49 It was intended that a JNC meeting would take place on 19 January 2023 to continue negotiations. However, Mr Jones was not available on that date and he was also waiting to hear from his board members with regard to his authority to negotiate with the Union.
- 50 On 9 February 2023, a revised offer was made by Mr Jones, having received authority to do so from his board members. The revised offer was for a pay increase of 6% and a cost-of-living payment of £750 described as taxable non-consolidated. This was broadly consistent with offers which had been agreed at other sites. For example, on 30 January 2023, Ms Mulliner sent an email to members of the board and Mr Jones (page 115) confirming that, at two sites, Basildon and Glossop, a pay rise of 6% and a one-off payment of £500 had been agreed with Unite.
- 51 This offer was put by the Union to its members in a ballot and was rejected. This was confirmed in an email from Chris Hicks of the Union to Jemma Whitehouse on 14 February 2023 (page 144).
- 52 Mr Jones sent a written message to staff on 13 February 2023 to provide them with information regarding the current position in the pay negotiations (page 141).
- 53 The proposal of 6% pay increase and a £750 cost-of-living payment having been rejected, the Respondent reviewed its offer and concluded that it was not prepared to increase that offer.
- 54 At the instigation of an email from Jemma Whitehouse dated 17 February 2023, a further meeting of the JNC took place on that day involving Mr Jones and the Claimant. At that meeting, on behalf of the Union, the Claimant made a counter-proposal of a 7.5% wage increase plus a one-off cost-of-living payment of £500.

- 55 On 17 February 2023, Mr Jones sent an email to the board, Ms Mulliner and Ms Whitehouse (page 147) and informed them of the proposal that had been put forward by the Claimant on behalf of the Union of an increase of 7.5% and a cost-of-living payment of £500. He suggested that, on 21 February 2023, Ms Whitehouse would write to the Union confirming the Respondent's final offer of 6% pay increase with £750 cost-of-living one-off payment. She would invite the Union to process a final ballot on that offer.
- 56 In that email, Mr Jones says as follows:
- "I will ask payroll to pay this offer in the end of March payment. If the Union reach an agreement, we can communicate this positive news, if not, we will draft a communication stating we have not reached an agreement, so we feel it is only fair to issue an increase to help with the current cost of living increase."*
- 57 On 21 February 2023, Miss Whitehouse duly communicated with the Claimant and Mr Hicks of the Union (page 149) stating that their counterproposal of 7.5% plus a one-off lump sum of £500 was not acceptable and that:
- "the company's full and final offer stands at 6% increase to all rates, plus a £750 lump sum one off payment".*
- 58 Miss Whitehouse invited them to proceed to conduct a ballot on that full and final offer.
- 59 On 24 February 2023, Mr Jono Davies sent an email to Miss Whitehouse (page 150) confirming that a ballot had been undertaken and that the Respondent's final pay offer of 6% plus £750 non-consolidated lump sum payment was rejected and he says, *"we have now reached a failure to agree."* He went on to say that he would be conducting a consultative ballot of intent for industrial action and that he would notify Miss Whitehouse of the outcome in due course.
- 60 It was suggested by Mr Jones in his oral evidence that, once the final offer made by the Respondent had been rejected, he considered the negotiations were over. It was also suggested by Mr Jones that the final offer was made on the basis that, based on the Respondent's "P & L" and order book, he had been told by the board that the Respondent could not afford to increase the offer.
- 61 This was not consistent with the evidence of Mr Bullough, who stated that the difference between the Respondent's final offer of 6% pay increase and a £750

cost of living payment, and the counterproposal of the Union of an increase of 7.5% and £500 cost of living payment, was the price of “*a cup of coffee per week*”.

- 62 However, the Tribunal found that the Respondent’s concern was that, by this time, save for the Unite members at Holywell, pay settlements had been reached not only with the remainder of staff at Holywell but also at the Respondent’s other sites such as Sherburn, and to accede to the Union’s demands in Holywell would cause difficulties with non-union staff at Holywell and elsewhere. The Tribunal also accepted Mr Bullough’s evidence when he said that, whilst an increased pay rise may have been affordable in that particular financial year, it may present difficulties with regard to negotiations in future years.
- 63 In the circumstances, the Tribunal found that, by this time, the Respondent considered negotiations with regard to pay had been concluded.
- 64 On 24 February 2023, Jono Davies wrote to the Union members (page 151) informing them of the position and that, having reached a “*formal fail to agree stage*”, the next stage was a consultative ballot of intent for industrial action. He explained to the members that it did not automatically mean there would be industrial action but more an enquiry into the members’ preparedness to take industrial action which could be in a number of forms, and which could ultimately lead to strike action.
- 65 The Claimant sent an email to Ms Whitehouse on 24 February 2023 (page 155) informing her that there was an intention to conduct a consultative ballot of the members with regard to the intent for industrial action.
- 66 On 27 February 2023, Ms Mulliner wrote to Ms Whitehouse and Mr Jones (page 156) indicating that the operations staff would need to be informed about the current position and also to confirm that the Respondent would be paying the amount offered to the Union, namely 6% plus £750, in March 2023.
- 67 An employee update was drafted, confirming that the pay rise of 6% and the one-off cost-of-living payment of £750 had been accepted by the Partnership Forum earlier that month but that the Unite members had rejected it.
- 68 Before that update was distributed, Jemma Whitehouse sent a text to the Claimant asking him to contact her as the Respondent intended to make an

announcement. In the course of the subsequent phone conversation, the Claimant indicated that he wished to see the proposed update.

69 Later that day, the Claimant received a call from Mr Jones who read out the proposed Update. The Claimant was concerned that the content of the update may influence the Union members with regard to the ballot and he therefore requested Mr Jones to send to him a hard copy of the draft update.

70 On 28 February 2023, Ms Whitehouse sent to the Claimant the proposed employee update (pages 164 to 165).

71 Having received the email and the proposed update, the Claimant stated that he was concerned that this may influence any ballot in relation to whether or not to take industrial action.

72 On 1 March 2023, the Claimant forwarded the email with the draft update to Mr Jono Davies for his advice. Mr Davies agreed with the Claimant's interpretation of the draft update. He requested the Claimant to notify Mr Jones that Unite was seeking legal advice with regard to what was intended by the Respondent in making the payments and notifying all staff, including Union members, of their intention to do so. Indeed, the Claimant indicated that Jono Davies had informed him that this may amount to an inducement. Mr Davies stated that he had said as much to Mr Jones who disputed that it amounted to an inducement. Mr Jones maintained that the Respondent was within its rights to do it.

73 The Respondent has an intranet system called Dayforce and this platform was used by the Respondent to enable Mr Jones to send a communication to all staff on 2 March 2023 informing them of the increase in pay and one-off payment (pages 171 to 175). The communication is headed, "*Employee Update – Holywell Pay Negotiations 2023*" and said as follows:

"Dear Colleague,

We wanted to give you an indication of where we are with the current cost of living pay negotiations.

Conversations have been ongoing with both Unite and the Partnership Forum to agree a suitable deal for 2023. The offer from the company is for a 6% pay rise, and a one-off payment of £750. We believe this is a reasonable offer which compares well with the local market and also other Kingspan sites and

divisions. This offer was accepted by the Partnership Forum earlier this month. However a recent ballot of Unite members has resulted in a rejection of this offer, and we have reached the point of an official failure to agree. Unite will therefore now be balloting members on intent for industrial action.

As we are approaching March without an agreement in place, we will be implementing the above pay increase for all employees at the Holywell site, including those in the collective bargaining unit. For clarity the increase will be a 6% increase in pay plus a £750 one-off cost of living payment. This will be reflected in your March pay, and will be back-dated to January.

We are all aware and undoubtedly feeling the effects of cost of living increases. We do not wish any employees to go without the pay increase that all other sites in UK and Ireland have received. For this reason, we have decided to ensure that no employees suffer financially as a result of the failure to agree. This decision is of course without prejudice to any further negotiations with Unite which we will continue with a view to reaching an agreement where possible.

In the meantime, should you wish to discuss any of the above or need more information please do not hesitate to contact me or any member of the Holywell management team.

Mike Jones

Operations Manager”

- 74 There had been some internal exchanges of emails on 2 March 2023 involving Mr Jones, Pam Mulliner, Phil Smith, Peter Bullough and Tony Kiernan of the Respondent to ensure that there was agreement with the content of the Update. In adding the content set out above, Ms Mulliner said in an email on 2 March 2023:

“the worse that can happen here is that we are found to be in breach of our agreement, on this basis, I have amended the notice, the main change being the paragraph below:

“We are all aware and undoubtedly feeling the effects of the cost of living increases. We do not wish any employees to go without the pay increase that all other sites that in the UK and Ireland have received. For this reason, we have decided to ensure that no employees suffer financially as a result of a

failure to agree. This decision is of course without prejudice to any further negotiations with Unite which we will continue with a view to reaching an agreement where possible.” (Page 166).

- 75 On 8 March 2023, Mr Jono Davies sent an email to Mr Jones, Mr Clarke and Ms Whitehouse of the Respondent (pages 176-178) and stated as follows:

“I am notifying you all, the indicative ballot of intent for industrial action has been accepted to progress to the next stage of the process which will be managed by an impartial company, Civica.

Whilst this news may be undesirable to Kingspan I must reference the management emails sent on your internal platform to the all employees. This was to notify our members the unaccepted final company proposal of 6% plus the non-consolidated £750 will be payable in March’s pay. This is received in bad light as it undermines the process of negotiation, the efforts of our reps and the Recognition Agreement, for the avoidance of doubt we did not agree to the variation of the agreement.

Understanding the company’s sentiment of the offer, however the 6% plus the non-consolidated £750 was made on 17 February 2023. With that in mind, Kingspan had sufficient opportunity to release that same email from management, however to release the email in the middle of our ballot of intent for industrial action in my mind could have influenced the mindset of our members. This was made clear to you by Alun in the form of inducement on the same day the notification was released. Although no employee has received the unsettled pay uplift, therefore no act of inducement has occurred, nevertheless we have notified our legal department who are pursuing this as a potential breach of the Recognition Agreement. However the industrial relations between Kingspan and Unit the Union have been unnecessarily damaged.

In terms of the following stages we remain committed to settle this pay dispute without the need for any form of industrial action up to and including strike action, we are available at your earliest convenience to discuss. The indicative ballot results stands and we will be in touch in due course for the required notifications.” (Page 177).

- 76 On 10 March 2023, Mr Jones sent an email to Mr Jono Davies (page 184) and said *“I look forward to hearing from you regarding dates to meet with the JNC.”*
- 77 In the letter that was attached to that email dated 10 March 2023 (page 188), it stated at follows:

“Dear Jono

Thank you for your email of 8 March and update of the current position.

We note the comments made in relation to the payment of the company’s wage offer in March and subsequent communication to this effect. Please be aware that it was never the intention of the business to undermine the due process of negotiation with Unite. The communication was sent to Kingspan employees. We have no visibility as to who is a Unite member and have an obligation to communicate with all of our employees on matters such as this.

Given the current unprecedented economic climate we feel we have acted reasonably in ensuring our employees receive a timely increase to assist with the cost of living hikes whilst the negotiations are ongoing. Additionally the feedback we are receiving from employees is that they are struggling with these unprecedented cost of living rises.

The pay negotiations are concluded at all other UK and Ireland sites, and the employees forum negotiations at Holywell are also agreed. Had we not taken this action, the hourly paid employees at Holywell would be the only group of employees not to receive a pay increment, and so we felt this was the right decision in the circumstances.

We do of course remain committed to the continuance of talks with a view to avoiding any industrial action, a fact we made clear in the initial communication that went out. We do not believe there has been any breach of the agreement.

If you can now send over some dates when you are available to continue discussions we would endeavour to make ourselves available in order to continue the negotiation process.”

78 On 27 March 2023, Miss Mulliner and Mr Jones met with Jono Davies and the Claimant. The Tribunal noted that neither the Claimant nor Jono Davies make reference to this meeting in their statements. However, the Tribunal was satisfied that such a meeting did take place as there is a minute of that meeting which includes a short summary of what was discussed (page 193).

79 The minute says as follows:

“Jono stated he was unhappy with the recent notification by the company that a pay increment would be applied to all workers despite the pay agreement not having been concluded, but he felt that this undermined the process.

Mike responded that the decision in no way affected the ongoing pay talks, the 6% pay award and £750 one off payment have been applied to all employees across UK and Ireland at this time. The Partnership Forum in Holywell have agreed it for employees not in the collective bargaining unit who had expressed concern around the rising costs of living.

Given the pay increment was due on 1 January, the company had taken the decision not to penalise those employees in the bargaining unit or cause anyone to suffer hardship and so had made the decision to uplift everyone.

This had been communicated to Unite prior to issue. The notice clearly stated this and that pay talks were ongoing.

Jono noted the timing of the notice – that it had gone out in the middle of the ballot.

Mike asked Jono for his thoughts around where they were in relation to the pay deal. Jono stated Unite were looking for a significant uplift to the offer.”

80 The Tribunal noted that Jono Davies said that they were looking for a significant uplift to the offer, although no specific amount was indicated. Furthermore, whilst the Union stated it was seeking a significant uplift, in monetary terms, the difference between the proposal of the Respondent and the counterproposal of the Union was relatively small.

81 Indeed, following the meeting, Ms Mulliner reported on its outcome to the board, indicating that there was no movement on the part of the Union and that *“the intent ballot”* indicated that the members were prepared to proceed with industrial action.

82 Mr Bullough responded as follows (page 191):

“Thanks Pam but absolutely crazy.

If you compare the offers of what we proposed of 6% + £750 or what Unite want 7.5% + £500, then for someone on £35k the difference is £275 or on £40k then £350. (Both before tax!)

If people vote to go on strike for that amount it's nuts!! (Accept there is a minor compounding effect).

I know we've upset them already but if payroll modelled these type of scenarios for take home pay for a few 'typical' employees and we published it I can't believe people would vote for a strike.

It doesn't feel right — maybe a bit political??”

83 On the same day, 27 March 2023, all employees at Holywell received the 6% increase backdated to 1 January 2023 together with the cost-of-living payment of £750 in that month's payroll.

84 The Tribunal's findings thus far are largely based on or verified by the documentary evidence.

85 In terms of the Respondent's motivation for making the payment in March 2023 to include those Union members with whom agreement had not been reached, the Tribunal found, on the balance of probabilities, that the primary motivation for making such a payment was to ensure that the Union members were not financially disadvantaged in comparison with the remaining staff who had agreed terms, particularly at a time of high inflation and the nationally-described *“cost-of-living crisis”*.

86 The Tribunal reached this finding because the Claimant had stated very fairly in his oral evidence that he accepted that the reason the payment was made,

was to ensure that employees did not suffer as a result of increased cost of living and the failure to agree.

87 The Tribunal also noted in the email of 8 March 2023 from Mr Jono Davies to Mr Jones (page 182 to 183) that he recognised the reason the payment was being made.

88 Mr Jones had referred to a number of employees, some of whom were in the collective bargaining unit, who had approached him to express their concerns regarding their financial circumstances. Whilst hearsay, the Tribunal had read the short statements from certain members of staff that supported what Mr Jones had to say on this issue.

89 In the email of 17 February 2023, Mr Jones had confirmed that making the payment in March 2023, was “to help with the current cost of living crisis” (page 147)

90 Finally, in an email from Tony Kiernan to Mike Jones and others on 9 November 2022 (page 87), there had been an agreement to pay a full bonus to staff prior to Christmas. The Tribunal accepted Mr Bullough’s unchallenged evidence that this was as a result of the impact of the cost of living; normally bonus payments were made at the end of the financial year and once the audit had been concluded. He also confirmed that, as pay increases for 800 or 900 employees’ pay increases had been resolved, it would be unfair not to pay approximately 80 employees at such a critical time.

91 With regard to exchanges of emails between members of the board, the Tribunal considered the following to be contextually relevant.

92 On 2 December 2022 (pages 109 to 111), Tony Kiernan sent an email to Ms Mulliner, Peter Bullough and Phil Smith saying:

“The plan is to very much slow down the Holywell discussion and focus on Sherburn. Much greater chance of getting a deal on Sherburn closer to our agreed target. 5% and £1,000 has now been offered in Sherburn. Unite were not recommending it and it is very likely to be rejected by ballot. However we need to go through that process and engage again with a final offer in the New Year. Hopefully a reduction in inflation during this period would also help us.

The Kingscout ballot is next Tuesday and Wednesday on 6% plus £500 reasonably confident it will get through.”

93 On 13 December 2022, Peter Bullough replied saying:

“Thanks Tony.

Delay is the name of the game now. I think we get new inflation data tomorrow and interest rate decision on Thursday.

Let’s see how things look in the New Year.”

94 The Tribunal concluded that such exchanges were to reflect the efforts being made to resolve the pay negotiations across the sites and that it was a commercial decision, for example, to delay any decisions in the hope that the rate of inflation would decrease which would make proposals from the Respondent more acceptable.

95 The Tribunal had considered the various references to the fact that the offer of 6% plus £750 was a full and final offer. The Tribunal found that this was so in terms of the pay increase and cost of living payment; nevertheless, the email correspondence, both internal within the Respondent, and between the Respondent and the Union, did not support a finding that this meant the end of negotiation. Whilst the headline proposal of 6% plus £750 was final, Mr Bullough indicated that there may be other areas of negotiation which may resolve the dispute such as working practices, holiday entitlement, and long service awards. Mr Bullough expressed his surprise that these sorts of factors had not been introduced into the negotiation, as they had formed part of negotiations in the past.

96 The rationale for the Tribunal’s finding that the Respondent offered a pay increase of 6% plus a cost-of-living payment of £750 was a full and final offer was, once again, predicated on the fact that the remaining staff on Holywell site had accepted this offer along with staff working at other sites operated by the Respondent. The Tribunal accepted Mr Bullough’s evidence and found that, to award a higher pay increase to the Unite members at Holywell would have led to considerable difficulties in other parts of the business.

97 The Tribunal found that, once the full and final offer of 6% plus £750 had been made, there was no suggestion in any of the correspondence that the Respondent had any intention of increasing the offer irrespective of the indication from Unite that it intended to carry out an indicative ballot with regard to industrial action.

- 98 The Tribunal also noted the terms of the email from Mr Bullough of 27 March 2023. Once again, there was no suggestion that the Respondent was prepared to move from the offer it had made.
- 99 Following the offer being made, reference has already been made above to the meeting which was held between Mr Jones and the Claimant and Mr Davies on 27 March 2023. At that meeting, again there was no suggestion from the Respondent that there would be any movement in relation to the pay award. The Tribunal noted that, at that meeting, whilst not being specific with regard to the amount, Mr Davies stated the Unite *“were looking for a significant uplift to that offer”*. It was not clear what Mr Davies meant by this, save that it should be remembered that Unite had indicated a willingness to accept 7.5% pay rise plus £500 which could not be described as “a significant uplift” compared to the offer made by the Respondent.
- 100 On 3 July 2023, Ms Mulliner sent an email to Jono Davies agreeing that it would be sensible *“to get around the table and keep talking.”*
- 101 Following the meeting which was held on 6 July 2023, Ms Mulliner sent an email to the board and Mr Jones, confirming that, at the meeting, she emphasised to the union that there was no further monetary offer on the table, encouraging the union to think about alternative ways in which the situation could be resolved (page 196).
- 102 On 6 July 2023, a further update on the pay dispute was distributed to staff (page 198). It stated:

“Dear Employee

We wanted to give you an indication of where we are with the current cost of living pay negotiations.

The offer from the company for a 6% pay rise, and a one-off payment of £750 was rejected by Unite. As we previously stated we feel this is a reasonable offer which compares well with the local market and also other Kingspan sites and divisions.

Many of you will be aware that our current order intake and production volumes are low and the outlook for the rest of 2023 into 2024 looks to be very uncertain. Shift patterns and overheads are being reviewed weekly and adjusted to meet the current demands.

Unite have balloted their members on intent for industrial action and we have been advised of the results as follows:

Yes for strike action: 36 members

No for strike action: 29 members

We have not yet been served with notice of any industrial action. There is a mandatory two week notice period required before any action can take place. This threat of industrial action is damaging for the Holywell site and puts future investment plans on hold. The management team are now looking at contingency plans to minimise the impact on our customers.

We met with Unite to discuss this result today and advised that there is no opportunity for the offer to be improved. We are currently exploring whether there are any other avenues that we can look at together as an alternative to industrial action and will keep you updated on further talks.

We will continue to keep you updated on the situation and understand this is an unsettling time for everyone. We will also continue our dialogue with Unite in the hope that we can bring this to an amicable resolution as soon as possible. In the meantime should you wish to discuss any of the above or need more information please do not hesitate to contact me or any member of the Holywell management team.

Mike Jones

Operations Director”

- 103 *A further update was sent on 25 July 2023 (page 202). It included the following paragraph: “We have informed Unite that we are still willing to keep talking and explore any other avenues to resolve this situation as an alternative to industrial action, and will keep you updated on further talks should they take place.”*
- 104 In terms of compliance with the terms of the Recognition Agreement, and specifically with regard to section 7.5, the Tribunal found that there had been compliance with bullet points 1 to 7. There was considerable discussion about whether there had been compliance with bullet points 8 and 9.
- 105 Bullet point 8 indicates that both the union and the Respondent had a discretion whether to request the participation of the Regional Officer or an additional

Company representative respectively. The Tribunal did not consider that much turned on this particular bullet point. As stated, it was discretionary, and in any event, it was accepted by Mr Davies that, as Regional Officer of Unite, he had been involved in the negotiations from the outset.

- 106 As for compliance with bullet point 9, namely a requirement that a further meeting of the JNC would be convened to discuss the outcome of the review and would agree on one of the following outcomes, namely agreement or further negotiation by the JNC, it was maintained by the Claimant that no such further meeting of the JNC had taken place and, on this basis, the process of negotiation had not been exhausted. However, the Tribunal had found that meetings had taken place between the Claimant and Mr Jones on 17 November 2022, 27 November 2022 and 17 February 2023, at which negotiations took place.
- 107 Consequently, as well as reaching a finding that the primary motivation for making the payment in March 2023 was to ensure that all members of staff benefited from an increased payment to reflect the cost of living crisis, the Tribunal also found, on the balance of probabilities, that the Respondent genuinely believed that, as at February 2023, the collective bargaining process had been exhausted in terms of pay.

The legal framework

- 108 Section 145B is in the following terms:

“145B Inducements relating to collective bargaining

(1) A worker who is a member of an independent trade union which is recognised, or seeking to be recognised, by his employer has the right not to have an offer made to him by his employer if –

(a) acceptance of the offer, together with other workers’ acceptance of offers which the employer also makes to them, would have the prohibited result; and

(b) the employer’s sole or main purpose in making the offers is to achieve that result.

(2) The prohibited result is that the workers’ terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union.

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

(4) ...

(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.”

109 Section 145D provides that:

“145D Consideration of complaint

(1) ...

(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 offer.

(3) On a complaint under section ... 145B, in determining 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 the 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.

110 The object of section 145B, broadly stated, is to penalise offers made by employers to workers who are trade union members which, if accepted, would

have the result that one or more terms of their employment will not (or will no longer) be determined by collective bargaining; and second, the three key concepts within section 145B are (1) offer; (2) prohibited result; and (3) prohibited purpose. The second and third concepts are in issue in these proceedings.

111 The meaning and proper interpretation of section 145B has been determined by the Supreme Court for the first time in Kostal UK Ltd v Dunkley and others [2021] UKSC 47.

112 In Kostal, an employer had a formal Recognition and Procedure Agreement with the Unite trade union which set out a specified bargaining procedure. During collective bargaining which had not resulted in an agreement about pay, the employer made two sets of pay offers directly to its workforce which would allow employees to receive their Christmas bonus but would not have been collectively bargained. When it made the offers, the final stage in the agreed bargaining procedure had not taken place. The issue before the Supreme Court was whether the offers would have the prohibited result within sections 145B(1)(a) and (2); it was conceded that the employer had made offers within section 145B(1), and that if it was established that the offers would have the prohibited result, the employer's purpose fell within section 145B(1)(b). In consequence, the Supreme Court did not analyse the concepts of offer or purpose in detail.

113 The key conclusions of the Supreme Court were as follows:

113.1 The exercise of statutory construction of section 145B sits within the context of "the modern case law", including, in the field of employment law, the decision in *Uber BV v Aslam* [2021] UKSC 5, emphasising the central importance of identifying the purpose of the legislation and interpreting the relevant language in the light of that purpose (paragraph 30).

113.2 Where a trade union is recognised, the right not to have an offer made by the employer applies where the result of acceptance would be that one or more terms of employment either (i) will not or (ii) will no longer be determined by collective agreement negotiated by or on behalf of the union (paragraph 33).

113.3 It is crucial to have in mind section 145B(1)(a), which, when read together with section 145B (2), defines the "prohibited result". It is that result which represents the mischief which the legislation aims to prevent or deter (paragraph 31). No minimum length of time is specified or can reasonably be

read into section 145B(2) for which that result would have to persist in order to constitute the “prohibited result” (paragraph 34). It is sufficient that, on the particular occasion, the result will be the prohibited result, even if there is no long-term intention to end collective bargaining. The focus is on the result, not the content of the offers.

113.4 To determine whether the result is the prohibited result defined in section 145B(2), it is necessary to look forwards from the notional date of acceptance of the offers to what will or will not happen thereafter. The period during which one or more terms will not be determined by collective agreement may be time-limited or open-ended, but it starts to run when the offers are assumed to have been accepted. It follows logically that the prohibited result is not a result capable of being achieved by the very acceptance of the offers irrespective of what happens afterwards (paragraph 41).

113.5 The employer has a defence if it shows that its sole or main purpose in making the offers was not to achieve that result. The purpose of achieving the prohibited result is the “prohibited purpose”. It is, however, important to note that what constitutes the prohibited purpose is defined by reference to what constitutes the prohibited result. For that reason too, although the relevant provisions must be construed as a whole, the primary question must be to identify the nature and scope of the prohibited result.

113.6 Where an employer has negotiated with the union and the parties have exhausted the procedure for collective bargaining without being able to reach agreement, there is no policy justification for preventing or deterring the employer from at that point making an offer directly to workers. There is accordingly no reasonable basis for attributing to Parliament the intention that acceptance of such an offer would have the prohibited result. The legality of such an offer cannot rationally depend on the employer having to show what its purpose was in making it. If the acceptance of such an offer is treated as automatically having the prohibited result just because the worker is being invited to accept terms which have not been collectively agreed, showing the purpose in making the offers cannot anyway provide a secure or stable defence to the employer. It could always be said that achieving a change in terms of employment which had not been collectively agreed was the employer’s main purpose in making the offers. Nor does section 145D(4) provide any basis on which a contrary argument could be made. In particular, section 145D(4)(c) could not apply to an offer made generally to the workforce

after negotiations with the union had ended without a collective agreement (paragraph 46).

113.7 As to where the line might in practice be drawn in deciding whether an employer had 'by-passed' collective negotiation with a recognised union,

"there seems to me a strong case for saying that the obligation of the state to secure the right under art 11 to be represented by a trade union and for that union's voice to be heard entails that an employer which has recognised a trade union for the purpose of collective bargaining and agreed to follow a specified bargaining procedure cannot be permitted with impunity to ignore or by-pass the agreed procedure, either by refusing to follow the agreed process at all or by being free to 'drop in and out of the collective process as and when that suits its purpose' (paragraph 61) .

113.8 Finally, paragraphs 63 to 72 of Kostal state as follows:

"63. There is an important feature of the wording of section 145B which both parties' interpretations of the section leave out of account. In this respect, although diametrically opposed, they seem to me to share a common flaw. In both cases they treat the question whether an offer falls within section 145B(1)(a) and (2) as depending entirely on the content of the offer. On the claimants' preferred interpretation, all that matters is whether the offer is to agree a change which has not been collectively agreed with the union to a term or terms of the individual worker's contract of employment. On the Company's interpretation, all that matters is whether the offer requires the worker to contract out of any collective bargaining rights.

64. Both interpretations fail to reflect the structure of section 145B. What is prohibited by the section is not the making of an offer which, if accepted, would constitute an agreement with a particular content. Rather, what is prohibited is the making of an offer which, if accepted, would have a particular result. Furthermore, and importantly, that result is not defined as one which follows simply from acceptance of the offer by the worker who is the subject of section 145B: it takes account additionally of any offers which the employer also makes to other workers and requires consideration of what would happen if all the offers made were accepted. This indicates that section 145B is concerned not merely with the content of individual offers but with the potential practical consequences of the employer's conduct, considered in the round. The interpretations of section 145B for which the claimants and the Company contend both seem to me incapable of explaining why, in judging whether

acceptance of an offer would have the prohibited result, it is necessary to assume, as required by subsection (1)(a), “other workers’ acceptance of offers which the employer also makes to them”.

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

66. On this interpretation, there is no difficulty in applying section 145B in cases where the union is not yet recognised but is seeking to be recognised. In that situation the employer is free to make individual offers to workers in relation to a particular pay round without any risk of contravening section 145B because, at the time when the offers are made, there is no possibility of agreeing terms through collective bargaining.

67. Likewise, where there is a recognised union, there is nothing to prevent an employer from making an offer directly to its workers in relation to a matter which falls within the scope of a collective bargaining agreement provided that the employer has first followed, and exhausted, the agreed collective bargaining procedure. If that has been done, it cannot be said that, when the offers were made, there was a real possibility that the matter would have been determined by collective agreement if the offers had not been made and

accepted. What the employer cannot do with impunity is what the Company did here: that is, make an offer directly to its workers, including those who are union members, before the collective bargaining process has been exhausted.

68. It was argued on behalf of the Company that it may be difficult to say with certainty whether the collective bargaining process has been exhausted in any particular case and that this interpretation therefore exposes employers to risks which they cannot afford to take and hence would unreasonably restrict their freedom of negotiation. I do not accept this. In my view, employers have two means of protection against that risk. The first is to ensure that the agreement for collective bargaining made with the union clearly defines and delimits the procedure to be followed. The Recognition Agreement made in this case does this sufficiently. I have quoted Stage 4 of the agreed procedure at para 5 above. If in the present case, following the meeting specified at Stage 3, the Company had written to the union representatives stating that the Company did not agree to refer the matter to ACAS, it is clear from the terms of Appendix 1 that the procedure would at that point have been exhausted. A second level of protection is provided by the requirement of section 145B(1)(b) that the section will not be contravened unless the employer's sole or main purpose in making the offers is to achieve the prohibited result. If the employer genuinely believes that the collective bargaining process has been exhausted, it cannot be said that the purpose of making direct offers was to procure the result that terms will not be determined by collective agreement when that otherwise might well have been the case.

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

"that when the offers were made the employer ... did not wish to use, arrangements agreed with the union for collective bargaining." This supports the inference that, where the acceptance of individual offers would by-pass arrangements agreed with the union for collective bargaining, such acceptance would have the prohibited result.

70. In the present case the Company agreed when it entered into the Recognition Agreement to conduct annual pay negotiations with Unite and to follow the procedure outlined in Appendix 1 before making or proposing any change to terms and conditions of employment outside that process. The offers

made directly to employees dishonoured that agreement because they were made before the process had been exhausted. Furthermore, the Company's behaviour, potentially at least, treated less favourably employees who were not prepared to relinquish their right to have the agreed procedure for collective bargaining followed. In the case of each direct offer made during the collective bargaining process, the clear message was that, if the employee did not accept it, he would not receive the Christmas bonus (or an equivalent payment) calculated at 2% of basic salary. In the case of the second offer, there was also a threat to terminate the worker's contract of employment unless the offer was accepted. It is hard to imagine how, on the assumption required by section 145B(1)(a) that all the direct offers were accepted, the negotiations with Unite could as a matter of practical reality have resulted in a better deal than the one which all the workers would thereby already have accepted individually. On the other hand, there was a real likelihood that any worker who did not accept the direct offers would be left financially worse off. That is indeed what happened, as workers who declined both offers did not receive the Christmas bonus (or any equivalent payment) for 2015. In these circumstances the Company's conduct can fairly be characterised as a disincentive or restraint on the use by the claimants of union representation to protect their interests. The relevant use was the exercise of their right to be represented in collective bargaining conducted in accordance with the Recognition Agreement.

71. I conclude that, on the proper interpretation of section 145B of the 1992 Act, an offer would have the prohibited result if its acceptance, together with other workers' acceptance of offers which the employer also makes to them, would have the result that the workers' terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union when, had such offers not been made, there was a real possibility that the terms in question would have been determined by collective agreement. That must ordinarily be assumed to be the case where there is an agreed procedure for collective bargaining in place which had not been complied with."

72. In the present case, on the facts found by the employment tribunal the collective bargaining process outlined in the Recognition Agreement was still continuing when the first and second offers were made by the Company directly to the claimants. In those circumstances the tribunal was entitled to find that the offers were made in contravention of section 145B. I would therefore allow the appeal."

- 114 Thus (1) an employer cannot with impunity make an offer directly to its workers, including those who are union members, before the collective bargaining process has been exhausted; (2) an offer will have the prohibited result if its acceptance, together with other workers' acceptance of offers which the employer also makes to them, would have the result that the workers' terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union when, had such offers not been made, there was a real possibility that the terms in question would have been determined by collective agreement. This is a test of causation. That must ordinarily be assumed to be the case where there is an agreed procedure for collective bargaining in place which had not been complied with; and (3) the effect of section 145B(1)(b) is that the section will not be contravened unless the employer's sole or main purpose in making the offers is to achieve the prohibited result. If the employer genuinely believes that the collective bargaining process has been exhausted, it cannot be said that the purpose of making direct offers was to procure the result that terms will not be determined by collective agreement when that otherwise might well have been the case.
- 115 The Tribunal had also been referred by the Claimant's representatives to Ineos Chemicals Grangemouth Limited v Arnott & Others [2022] EAT 82 which related to a case where there is not a structured bargaining process and so the Tribunal's task was to determine whether, objectively, negotiations were at an end and where the employer's purpose may be relevant to determine whether this was so (paragraphs 64 and 66). The Tribunal had also taken account of Jiwanji & others v East Coast Main Line Co Ltd, London North Eastern Railway Ltd & Hitachi Rail Ltd (1802222527/2018 & others).
- 116 Finally, whilst not binding, the Respondent's representative had made reference to the Employment Tribunal's decision of GMB Claimants & Unite Claimants v Walsall Housing Group Limited (1305512/2022 & 1308455/2022).

Analysis and Conclusions

- 117 Addressing each issue in turn, the Tribunal has carried out analysis of the facts and, applying the legal framework, has reached the following conclusion.

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

of the Trade Union and Labour Relations (Consolidation) Act 1992 (the Act)?

- 118 There was agreement between the parties that the Recognition Agreement signed by the Respondent and the Union on 5 May 2017 represented a collective agreement for the purpose of collective bargaining.

2. Did the Respondent, on 02 March 2022, make an offer to the Claimants within section 145B of the Act?

- 119 Whilst initially it was suggested by the Respondent that the offer coincided with payment being made in the payroll on 27 March 2023, it was subsequently accepted by the Respondent that the offer was made to the Claimants via the communication from Mr Jones on 2 March 2023.

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

4. If yes, was the Respondent's sole or main purpose in making the relevant offer to achieve that prohibited result? When considering paragraphs 3 and 4 when the Respondent made the offer, did the Respondent genuinely believe the collective bargaining process has been exhausted?

- 120 The Tribunal decided that it would be appropriate to take issues 3 and 4 together when providing its analysis and conclusions.

- 121 With regard to the adherence to the process set out in the Recognition Agreement, and, in particular, by reference to the stages identified by bullet points in section 7.5, the Tribunal has found that:

- (i) Prior to commencement of negotiations, the Respondent gave a financial briefing to the Claimant who represented the Union on the JNC. It is relevant that the Regional Officer, Jono Davies, was also present;
- (ii) The Union was given sufficient opportunity to communicate with the members and to prepare a proposal which was duly submitted to the Respondent, namely a claim for a pay rise of 13.5%;

- (iii) The JNC convened a meeting on 17 November 2022 to discuss the Union's proposal.

The Respondent made a counter-proposal of 4.5% together with a cost-of-living payment of £1,000.

On 27 November 2022, the JNC, namely the Claimant and Mr Jones, met again and the Claimant made a counter-proposal of an 11.4% pay increase.

On 8 December 2022, the Respondent confirmed its counter-proposal of 4.5% plus a cost-of-living payment of £1,000, which was rejected by the Union.

On 9 February 2023, the Respondent made its revised offer of 6% plus a cost-of-living payment of £750, which, following a ballot of its members, was again rejected by the Union.

On 17 February 2023, the Claimant attended a third meeting with the Respondent at which the Claimant made a further counter-proposal of 7.5% pay increase plus a cost-of-living payment of £500.

- (iv) The JNC, effectively the Claimant (who liaised with Mr Davies) and Mr Jones (who liaised with, and worked within authority provided to him by, the board), endeavoured to come to an agreement.
- (v) Proposals made by the Respondent were submitted by the Union to its members for a decision on acceptance. The Claimant and Mr Davies kept Mr Jones fully informed of the outcome of ballots of the members with regard to the Respondent's proposals.
- (vi) There was no indication by the Claimant or Mr Davies that they were being afforded insufficient time by the Respondent to consult with their members.
- (vii) As there was no agreement affecting the pay of employees in the bargaining unit, this part of the process did not apply.
- (viii) It is clear that this part of the process was discretionary and it was a matter for the union representatives whether they requested the participation of the Regional Officer. However, the Tribunal has found that the Regional Officer, Jono Davies, had been fully involved in the

process from the outset, beginning with his attendance at the financial briefing and also liaising with the Claimant and the Respondent directly as negotiations took place.

- (ix) It has been maintained by the Claimant that there had been a failure by the Respondent to comply with this part of the process set out at section 7.5 as there had not been a further meeting of the JNC to discuss the outcome of the review.

The process under section 7.5 of the Recognition Agreement provides for a JNC meeting to discuss the initial proposal from the Union. This took place on 17 November 2022 when the Union made its proposal of a 13.5% pay increase.

The only other reference to a requirement to hold a meeting of the JNC is at point 9 of section 7.5 if no agreement has been reached.

However, as outlined above, when agreement could not be reached, further JNC meetings were held on 27 November 2022 and 17 February 2023.

On 9 February 2023, the Respondent had made its revised offer, described as a full and final offer and its Final Proposal, of a pay increase of 6% and a cost-of-living payment of £750 which was rejected and the Respondent was notified of this by email of 13 February 2023.

It was at a third meeting of the JNC on 17 February 2023, arranged at the instigation of the Respondent, that the Claimant put forward the revised counter proposal on behalf of the Union of a pay increase of 7.5% and a cost-of-living payment of £500. In turn, this was rejected by the Respondent.

It was following this meeting that the Respondent confirmed that the counterproposal of the Union was rejected and that the offer of 6% plus a cost-of-living payment of £750 was confirmed as the Respondent's full and final offer and was described as such in an email dated 21 February 2023.

- 122 Consequently, on 17 November 2022, 27 November 2022 and 17 February 2023, there were meetings of the JNC at which negotiations took place in an endeavour to achieve a pay settlement.
- 123 In the circumstances, the Tribunal was not satisfied that the Claimant had established that there had not been adherence to the process described by section 7.5 of the Recognition Agreement.
- 124 Furthermore, based on the email correspondence set out by the Tribunal in its factual findings, the Tribunal was satisfied that, prior to the offer being made directly to union members on 2 March 2023, the Respondent genuinely believed that the collective bargaining process had been exhausted in respect of terms relating to pay.
- 125 When reaching its conclusion that the Respondent genuinely believed that the collective bargaining process had been exhausted with regard to pay, the Tribunal also took into consideration developments which took place before and after March 2023.
- 126 The Tribunal had accepted Mr Bullough's evidence and found that, in his experience, the nature of the negotiation that was taking place was unique and unlike any previous negotiation in which he had an involvement in his time as a Finance Director. The reason for the negotiation being unique was as a consequence of the cost-of-living crisis and the high level of inflation. The Tribunal had found that members of staff had approached Mr Jones to indicate that they were anxious about their financial circumstances, and that they were finding it difficult to make ends meet. The Tribunal did not accept Mr Rushton's submission that the cost-of-living payment in the course of these particular negotiations was not unique and that the cost of living was an annual consideration when negotiations take place.
- 127 The Respondent's approach to offer a percentage pay increase together with a one-off cost-of-living payment was described by Mr Bullough as extraordinary.
- 128 The Respondent found itself in a situation where the Partnership Forum at the Holywell site had reached agreement with the Respondent in terms of the pay rise and the one-off cost-of-living payment. Furthermore, the pay rise, which was backdated to January 2023, together with the cost-of-living payment, was going to be paid to all those staff outside of Unite at Holywell in the March payroll. The members of Unite, numbering approximately 80, would be the only

members of staff who would not receive such a payment. The Respondent reached the decision in mid-February 2023 that this would be unduly harsh for the Unite members and decided that they should receive the same payment in the March payroll (page 147). Decisions had also been taken elsewhere for such payments to be made, for example in February 2023 at Sherburn (page 126).

- 129 Allied to this, the Tribunal concluded that there was no evidence to suggest that, in terms of the percentage pay increase and the cost-of-living payment, namely 6% and £750, the Respondent was going to offer at any stage a higher settlement.
- 130 The offer had been described as full and final, and expressed as the Final Proposal. Whilst Mr Davies said that this sort of language was often used by companies such as the Respondent, and suggested that it did not actually mean that it was full and final, the Tribunal considered that the evidence on which the Tribunal made its findings of fact meant that it was, indeed, a full and final offer.
- 131 In support of this conclusion, there had been no indication at all of a preparedness at any time on the part of the Respondent to increase its offer. This was the case from the date on which it was originally made on 9 February 2023 all the way through to the meetings that took place between the Respondent and the Claimant and Mr Davies on 27 March 2023, which was the date on which all staff would be paid, and even later, on 6 July 2023.
- 132 At the meeting on 27 March 2023, the Respondent confirmed that the offer remained at a 6% pay award and the £750 one off payment. It was noted that Mr Davies suggested that Unite was looking for *“a significant uplift to the offer”*.
- 133 Up until that point, the evidence was that the Union’s counterproposal was for a 7.5% pay increase plus £500 cost of living payment. Therefore, the difference between the Respondent’s proposal and the Union’s counteroffer could not be described as significant. It was this that provoked the email from Mr Bullough to Ms Mulliner (page 191) when Ms Mulliner reported on the outcome of the meeting.
- 134 Evidence to support the conclusion that the Respondent had at no stage intended to increase its offer from a pay increase of 6% and a cost of living payment of £750 can also be found in the update provided to staff on 6 July

2023 when it was confirmed by the Respondent that, *“there is no opportunity for the offer to be improved.”*

- 135 It was also noted that, even though the Respondent was not prepared to increase its offer in terms of pay of 6% and a one-off payment of £750, there was considerable correspondence to suggest that they were prepared to continue to meet and discuss matters with the union.
- 136 For example, in the email from Mr Jones to Mr Davies on 10 March 2023, so clearly following the pay offer which was made on 2 March 2023, he referred to the fact that he was waiting to hear from Mr Davies regarding dates to meet with the JNC and he says the same in the letter of 10 March 2023 attached to his email.
- 137 As far as the Respondent was concerned, it was stated by both Mr Jones and Mr Bullough that there were other areas that could be discussed and negotiated which may resolve the matter, such as working practices, holiday entitlement or long service awards. Indeed, Mr Bullough was surprised that this had not formed part of the ongoing negotiation. This was consistent with what is said to Mr Davies in the email from Ms Mulliner of 3 July 2023 and also in an email from Ms Mulliner to the board and Mr Jones on 6 July 2023 following a meeting between Ms Mulliner, Mike Jones and the Union (page 196).
- 138 Consequently, the Tribunal took account of what was said at paragraphs 71 and 72 of the Judgment of Lord Leggatt in *Kostal*. The Tribunal was satisfied that, if the offer to the Union members on 2 March 2023 had not been made, the Respondent genuinely believed, and the Tribunal therefore finds, that there was no real possibility that the terms in question would have been determined by collective agreement. Whilst it is stated in *Kostal* that a real possibility that terms may be determined by collective agreement must ordinarily be assumed to be the case where there is an agreed procedure for collective bargaining in place which had not been complied with, this suggests that there will be exceptions to such an assumption. However, in any event, for the reasons outlined, the Tribunal considers that the level of communication and the number of meetings between the Union and the Respondent supported a conclusion that the process had been followed.
- 139 Furthermore, in *Kostal*, the collective bargaining process outlined in the Recognition Agreement was still continuing when the first and second offers were made by the company directly to the Claimants. In this case, the offer of a pay increase of 6% and a cost-of-living payment of £750, which the Tribunal

has found to be a genuine full and final offer, had been made to the Union well before it was made directly to all staff at Holywell to include the Union members.

- 140 There was, the Tribunal concludes, a genuine belief on the part of the Respondent that the collective bargaining process had been exhausted in terms of pay. Therefore, the purpose of making direct offers to the Union members was not designed to procure the result that terms would not be determined by collective agreement when otherwise that might have been the case. The offer made directly to staff was not causative of, and did not lead to, a prohibited result. The offer made directly to the Union members on 2 March 2023 did not amount to an unlawful inducement under section 145B of the Act.
- 141 The Tribunal also determined that, whilst the Claimant had expressed concern at the timing of the offer during the time at which the indicative ballot was taking place with regard to industrial action, the offer made directly to the Claimants on 2 March 2023 was identical to the terms of the offer made on 9 February 2023 which, following a ballot, had been rejected by the Claimant on behalf of the members.
- 142 The Tribunal also noted that, whilst s.145D was concerned with the purpose of the offer being made, which the Tribunal has considered above, the timing of the payment being made, based on the offer, was of relevance. The Tribunal has found that, having reached the genuine belief that the collective bargaining process had been exhausted in terms of pay, the Respondent's purpose in making the payment on 27 March 2023 was to ensure that, at a time of a cost-of-living crisis, the members of the union did not suffer financially when compared with the non-union members of staff.
- 143 For these reasons, the Tribunal concluded that the claims of the Claimants listed in Schedule 1 are not well-founded and are dismissed.

Employment Judge R Havard

Dated: 23 December 2025

JUDGMENT SENT TO THE PARTIES ON

7 January 2026

Miriam Drake

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

Schedule 1

Number	Case number	Claimants
1.	1601314/2023	Alun Williams
2.	1601315/2023	Michael Alder
3.	1601316/2023	David Almond
4.	1601318/2023	Michael Arrowsmith
5.	1601320/2023	Darrell Bennett
6.	1601321/2023	Adam Bonos
7.	1601322/2023	Philip Burton
8.	1601323/2023	Robert Clegg
9.	1601324/2023	Jack Collins
10.	1601325/2023	Paul Conway
11.	1601326/2023	Darren Conway
12.	1601327/2023	Thomas Conway
13.	1601328/2023	Donald Crombie
14.	1601332/2023	Thomas Duffy
15.	1601333/2023	Neil Edge
16.	1601334/2023	Richard Fenwick
17.	1601335/2023	Andrew Gibbons
18.	1601336/2023	John Gilbert
19.	1601338/2023	John Hansom

Number	Case number	Claimants
20.	1601339/2023	Kevin Hewitt
21.	1601340/2023	Chris Hicks
22.	1601341/2023	Sean Horsfield
23.	1601342/2023	Paul Houldin
24.	1601343/2023	Lee Howarth
25.	1601344/2023	Paul Hudson
26.	1601346/2023	Darren Hughes
27.	1601347/2023	Timothy Hughes
28.	1601348/2023	Sam Illman
29.	1601349/2023	Michael Jones
30.	1601350/2023	David Jones
31.	1601351/2023	Peter Jones
32.	1601352/2023	Alun Jones
33.	1601353/2023	Wayne Jones
34.	1601354/2023	Stephen Jones
35.	1601355/2023	Robert Jones
36.	1601357/2023	Brett Jones
37.	1601358/2023	Christopher Joynson
38.	1601361/2023	Christopher Levitt
39.	1601362/2023	Joshua Luke
40.	1601363/2023	Timothy McCone
41.	1601364/2023	Alan Moore
42.	1601365/2023	Stephen Morris
43.	1601367/2023	Lewys Oldfield
44.	1601369/2023	David Owen
45.	1601370/2023	Mark Owen
46.	1601371/2023	Tony Owen

Number	Case number	Claimants
47.	1601372/2023	David Pae
48.	1601373/2023	Graham Parry
49.	1601374/2023	Paul Ratcliffe
50.	1601375/2023	Antony Roberts
51.	1601376/2023	Lee Roberts
52.	1601377/2023	Niall Roberts
53.	1601378/2023	Philip Roberts
54.	1601379/2023	David Rogers
55.	1601380/2023	Michael Russell
56.	1601381/2023	Kurt Scarlett
57.	1601382/2023	Mattius Scott
58.	1601383/2023	Matthew Scott
59.	1601384/2023	Lee Seabrook
60.	1601386/2023	Stephen Stoneley
61.	1601387/2023	Ian Stooke
62.	1601388/2023	Ross Sumner
63.	1601389/2023	Ian Taylor
64.	1601390/2023	Frank Thompson
65.	1601391/2023	Alan Threadgold
66.	1601392/2023	Jason Toulalan
67.	1601393/2023	Dylan Tyrrell
68.	1601394/2023	Peter Unwin
69.	1601395/2023	Rasa Urbute
70.	1601398/2023	Josh Williams
71.	1601399/2023	Robert Williams
72.	1601402/2023	Geoffery Williams
73.	1601404/2023	Neil Williams

Number	Case number	Claimants
74.	1601405/2023	Jonathan Wilson