Employment Law Brief

with

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The Supreme Court in Kostal v Dunkley (Supreme Court, October 2021) has ruled that an employer must pay 57 of its employees in excess of £400,000 in compensation. What did the company do wrong? It sought to bypass a collective bargaining process that had failed to reach an agreement. By making individual offers to union members the Supreme Court held that the employer had unlawfully induced them to give up collective bargaining - albeit for just a single pay round.

The concept of an unlawful inducement was introduced in 2004 following the decision of the European Court of human rights in Wilson v The United Kingdom (European Court of Human Rights, 2002). That case concerned employers who offered financial incentives to those employees who agreed that they would no longer be covered by collective bargaining. The Court found that those incentives were a breach of Article 11 of the European Convention on Human Rights which protects the right to freedom of association and trade union membership.

As a result, S.145B of the Trade Union and Labour Relations (Consolidation) Act 1992 now provides that trade union members have the right not to have offers made to them by the employer if acceptance of the offer would have what is called the 'prohibited result' that the workers terms of employment, will not (or will no longer) be determined by collective agreement. Unusually in UK employment law subjecting a worker to unlawful inducement carries with it a fixed penalty of £4341 per worker per offer. This is irrespective of any loss that the workers actually suffered.

The central thrust of the Supreme Court decision in Kostal is that an employer can make an offer directly to its workers only if it has first followed and exhausted the collective bargaining procedure. What the employer cannot do is make individual offers before the collective bargaining process has been exhausted. The key point is that the inducement can only have the result that the workers' pay is not determined by collective bargaining if there is a real possibility of an agreement being reached. Once that possibility has been exhausted then the individual offer is not what prevents pay being determined by collective bargaining.

This does not necessarily mean that the employer is legally bound to follow the dispute resolution mechanism set out in the recognition agreement. Collective agreements are not legally binding in the UK and so an employer that declares the firm intention of not following the process cannot be forced to do so in law. This suggests that the employer frustrated with the progress of collective bargaining could simply make the firm announcement that it was abandoning the process for this year so that there was no realistic possibility of a collective agreement being reached. It would then be free to make individual offers to employees as the employer did in the Kostal case.

Of course the fact that such a course is legally possible does not make it a good idea. Abandoning the collective bargaining process and making an offer directly to employees is very much a nuclear option and likely to lead to industrial action. In this area too we have seen recent cases push the boundaries of the law to accommodate the requirements of Article 11.

Closely related to the right not to be subjected to unlawful inducement is the right not to be subjected to a detriment for taking part in the activities of a trade union. This is set out in section 146 of the 1992 Act. This protects workers who are taking part in trade union activities "at an appropriate time". An appropriate time is then set out in the legislation as meaning either a time that is outside working hours or a time that has been agreed with the employer. Given that, it is not surprising that industrial action has previously

been held not to fall within the protection of section 146. After all, if you're taking part in strike action outside of your working hours that is not likely to be very effective. But in the case of Mercer v The Alternative Future Group Ltd (EAT, June 2021) the Employment Appeal Tribunal held that this limitation is a breach of article 11. The right to take part in industrial action is regarded as an inherent part of the right to join a trade union for the protection of your interests. Penalising someone for taking part in industrial action is therefore a breach of that right. In Mercer, the EAT interpreted section 146 to cover industrial action even though it was taking place during normal working hours.

That meant that a worker who was given a written warning for abandoning her shift on two separate occasions to take part in industrial action had been subjected to an unlawful detriment. Importantly the EAT accepted that the employer is entitled to withhold pay from a striking employee. That is not a detriment, but merely a recognition that there is no contractual obligation to pay an employee in respect of time when they have been withholding their labour. There will also be circumstances where the employee's conduct is such that it goes well beyond mere participation in union activities. Causing damage to the employer's property for example will be misconduct even if the damage is inflicted in the course of a dispute

The EAT's decision in Mercer is on its way to the Court of Appeal and will be heard in January next year. Meanwhile, however, another EAT judge has reached the same conclusion in a different case. In Ryanair DAC v Morais and others (EAT, November 2021) the employees were pilots whose concessionary travel benefits were withdrawn for a whole year after they participated in the strike called by their trade union. The employer had argued that the industrial action was unlawful but the EAT held this did not prevent it from being a union activity. In any event, the employer had tried to obtain an injunction preventing the strike but had failed. That effectively prevented it from arguing in a different context that the strike was unlawful.

The extent to which employment law in the UK is affected by the European Convention on Human Rights is sometimes overstated. But in the context of trade union law it is clear that Article 11 is genuinely important. This means that employers need to act very carefully when seeking to hold individual employees accountable for conduct that takes place in the context of a trade dispute. Except in extreme cases it is important not to let issues that are essentially matters between the employer and the union influence the individual relationship between the employer and employee.

Don't forget to check more about Darren Newman on his blog at A Range of Reasonable Responses or on twitter at @DazNewman