

The Supreme Court has today upheld Unite's appeal in the *Kostal* case. It is the first case on trade union collective bargaining rights to be decided by the UK's highest court.

The Supreme Court ruled that the right of unions to collective bargaining must be meaningful and bargaining procedures cannot be by-passed even on a single occasion.

## Facts

*Kostal* recognised Unite for collective bargaining. *Kostal*'s November 2015 pay offer, made to Unite through the agreed collective bargaining procedure, covered basic pay, a Christmas bonus and other terms and conditions. The offer was rejected by over 80% of the membership in a ballot.

In December, the company wrote to individual employees to make the same offer to them directly, giving a deadline for acceptance of 18 December, after which, employees were told, the Christmas bonus would not be paid. Further pay negotiations continued (inconclusively) under the collective bargaining procedures. The overwhelming majority of the employees accepted the offers.

In January 2016, the company wrote to the small minority of employees who had not accepted the offers, making essentially similar offers, and including backdated Christmas bonuses. Eventually, in November 2016, a collective agreement was concluded for the 2015/2016 pay round.

Backed by Unite, members brought claims for unlawful inducements in relation to collectively bargained terms and conditions under s145B TULRCA.

## S145B TULRCA

S145B TULRCA provides that it is unlawful for an employer to make an offer to a member of a recognised trade union if:

- (i) acceptance of the offer (together with other workers' acceptance of similar offers) would have the 'prohibited result'; and
- (ii) the employer's sole or main purpose in making the offers is to achieve the prohibited result.

The 'prohibited result' is that the workers' terms and conditions (or any of them) 'will not' or 'will no longer' be determined by collective bargaining.

If the Employment Tribunal upholds the claim, it must make an award of (currently) £4,341 for each offer made to an individual member of a trade union.

### Proceedings before the Supreme Court

The Employment Tribunal upheld the Unite members' claims in relation to each series of offers made, awarding total compensation of more than £420,000. It found that the company, after its offer had been rejected in the ballot, had taken the conscious decision to by-pass further meaningful negotiations in favour of making direct offers to employees.

Kostal appealed against the Tribunal's finding that the offers, if accepted, would have the 'prohibited result'. It did not appeal against the Tribunal's finding that its purpose in making the offers was to achieve the 'prohibited result'. The Employment Appeal Tribunal upheld the Employment Tribunal's decision.

The Court of Appeal overturned the decisions of the Employment Tribunal and the Employment Appeal Tribunal. It ruled that the words 'will not...be determined by collective bargaining' only applied where the union was not yet recognised and that the words 'will no longer' applied where the union was already recognised. Applying this reasoning, s145B did not apply where the offer only involved giving up the right to collectively bargained terms on one occasion.

Unite appealed on behalf of its members to the Supreme Court as to whether the offers made to its members, if accepted, would have the 'prohibited result'.

### Supreme Court judgments

There were two judgments: Lord Leggatt's, (agreed with by two other Justices, and therefore the majority judgment); and the minority judgment of Lady Arden and Lord Burrows.

All five of the Justices upheld Unite's appeal. They ruled that the words 'will not' and 'will no longer' both applied to situations where the union was already recognised, and to situations where it was seeking to be recognised. The 'prohibited result' can therefore occur when a term is not collectively bargained on a single occasion.

The minority judgment essentially upheld the EAT's interpretation that the 'prohibited result' occurs on any occasion when an employer which recognises a union makes an offer, which if accepted, would result in the term not being collectively bargained (even on a single occasion only).

For the majority, the 'prohibited result' occurs where, if accepted, the offers would cause arrangements for collective bargaining which have been agreed with the union to be by-passed. There had to be the possibility that, if the offers had not been made, the terms would be

collectively bargained in the future. That was ordinarily to be assumed if the collective bargaining procedure had not been complied with and exhausted.

If the 'prohibited result' occurs, the next step is to consider the employer's purpose in making the offers (which had already been determined by the Tribunal in favour of the Claimants).

The appeal was therefore upheld, and the Unite members will be entitled to the compensation awarded to them by the Tribunal.

### Commentary

This is undoubtedly a major victory for trade union rights, and the protection of the right to meaningful collective bargaining in particular.

All five Justices agreed that an offer can give rise to the 'prohibited result' where acceptance of it would only give rise to a term not being collectively bargained on a single occasion. That is alone is a very significant ruling.

Equally significantly, it appears that all five Justices are in agreement that the employer must comply with and exhaust the collective bargaining process before making offers direct to workers if it is to avoid liability under s145B.

The minority expressly said that, just because the collective bargaining process is exhausted, it does not follow that the employer has a genuine business purpose for making the offers. However, it is implicit in the majority judgment that compliance with (and completion of) the collective bargaining procedure means that the collective bargaining process must be conducted in good faith.

All five judgments refer to, and uphold, trade union rights recognised by the European Convention on Human Rights. To our knowledge, this is also the first time the Supreme Court has expressly relied on a ruling of the International Labour Organisation's Committee on Freedom of Association.

Unite and its members were represented throughout by Thompsons Solicitors LLP, and by Oliver Segal QC and Stuart Brittenden of Old Square Chambers.