Please find enclosed a briefing note from the Thompsons Trade Union Law Group about a judgment handed down relating to s 145B of the Trade Union and Labour Relations (Consolidation) Act 1992.

The Employment Appeals Tribunal (EAT) has handed down its judgment in Nimu Jiwanji & Others v London Northeastern Railway Limited & Others in which Thompsons Trade Union Law Group were acting for approximately 1,235 RMT members, finding in favour of the Claimants. The case builds on the team's previous successes in the Supreme Court in *Kostal UK Ltd v Dunkley and others* [2021] UKSC 47; [2022] ICR 434 and in the EAT in *Ineos Infrastructure Grangemouth v Jones* [2022] IRLR 768.

This case (like the two referenced above) was brought under section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 and concerned the conduct of pay negotiations between Virgin Trains East Coast (VTEC) and three trade unions, TSSA, Unite and the RMT, beginning in March 2017. Negotiations were conducted under the terms of a collective bargaining agreement called the "Great Northeastern Railway Limited Procedure Agreement 1".

In the course of the collective bargaining negotiations, VTEC was unable to secure the agreement of RMT (in contrast to the other unions) in respect of its proposal, following a ballot of its members. As a result, VTEC determined it would impose the proposed pay increases, giving RMT members an option to 'opt-out' of receiving the award if they so wished.

The RMT claimed that the offers made directly to its members amounted to unlawful inducements to give up collectively bargained terms. The claims were initially stayed pending the outcome in *Kostal* and were then heard by the Leeds Employment Tribunal in 2022. By the time these proceedings came before the Employment Tribunal, VTEC lost the franchise to operate on East Coast Main Line, and the affected employees had transferred to other operators who were joined as second and third respondents, namely London Northeastern and Hitachi Rail.

The Law

Section 145B provides, so far as material, the following:

*"**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."

It is established law that in a case where the union is already recognised, s 145B is breached if at the time the offers were made there was a real possibility that, but for those offers, the workers' terms would have been determined by collective agreement. Furthermore, where there is an agreed bargaining procedure in place, it must ordinarily be assumed that there was a possibility of reaching agreement if the agreed procedure had not been exhausted.

In regard to purpose, if the employer genuinely believes (subjectively) that the procedure has been exhausted, even if objectively that is not the case, it has an absolute defence, as its sole or main purpose in making direct offers to workers will not have been to procure the prohibited result.

Employment Tribunal Judgment

The Leeds Employment Tribunal (the ET) ruled that the communication to members with the 'opt-out' was an offer to give up collectively bargained terms. It also concluded that there had been "a unilateral business decision by VTEC's management to treat collective bargaining as at an end to implement the pay award". It was not, in the Tribunal's view, a business decision that collective bargaining was already at an end or put another way, exhausted; rather, it was a business decision to conclude collective bargaining unilaterally because it no longer wished to participate in it. The Tribunal also made a finding of fact that "when the offer was made to the workforce, there remained a realistic chance that the relevant terms would have been collectively bargained", as, objectively viewed, the parties were close to agreement, and no impasse had been reached. On that basis, the offer made by the employer did have the prohibited result.

The ET also found that VTEC had the sole or main purpose of achieving the prohibited result and this was not a case where VTEC genuinely believed collective bargaining was exhausted. VTEC had decided that it did not wish to use the agreed arrangements provided for under the bargaining agreement, a relevant factor under s 145D (4) (a), and did not wish to continue bargaining through the agreed process. VTEC's offer was therefore an unlawful attempt to achieve the result that terms would no longer be determined by collective bargaining.

The Employment Tribunal therefore ordered payment of £3,907 to each Claimant.

The Appeal

The appeal by the employer challenged both the fact that the offers made in 2017 had the prohibited result and that VTEC's sole or main purpose was to achieve the prohibited result.

In particular, they argued that the ET should have held that the agreed collective bargaining process had been exhausted by the time that the offer was made, and therefore that there could not have been a real possibility of the relevant terms being agreed through collective bargaining.

However, the EAT concluded the ET had made a finding of fact that there was a realistic chance that the relevant terms could have been collectively agreed at the time that the offer was made, which could not be overturned.

The EAT also considered the ET had been entitled to hold that the employer did have the prohibited purpose required by s 145B, having taken a business decision that it did not wish to carry on using the agreed collective bargaining procedures.

The following findings by the EAT are of particular relevance to how the claim was determined:

Prohibited Result

1. In determining whether offers have the prohibited result, the central question is whether there was a real possibility at the time the offer was made that the terms in question would have been determined by collective agreement. This is a question of fact for the ET.
2. In answering that question, one consideration to be taken into account was whether collective bargaining had been exhausted. The EAT observed that where collective agreements are less structured and more flexible, the less that factor may assist in answering the central question (because it is difficult to determine at what point the procedure has been exhausted).
3. In this case, the bargaining arrangements were less structured and provided for substantial flexibility. It was determined by the ET that bargaining could take place within and outside of the joint committee process.
4. The ET was entitled to find on the facts that bargaining had not been exhausted and that was one factor (amongst others) taken into account in reaching a conclusion that there was a real possibility at the time the offer was made that the terms in question would have ultimately been determined by collective agreement.
5. The fact that two unions (excluding the RMT) had agreed a deal at Joint Committee did not mean negotiations were exhausted, and nothing was said in the collective bargaining agreement that was consistent with that submission.

Purpose

6. The ET was entitled to reach the conclusion that the VTEC Executive Directors did not subjectively believe the collective bargaining process was exhausted. The ET had not misdirected itself on the purpose issue, and it had made a factual finding that could not be displaced on appeal that VTEC had taken a business decision that it did not want to continue collective bargaining, and therefore its purpose had been to achieve

the prohibited result. It was also correct to focus on the subjective genuine belief of the directors rather than the HR manager.

7. VTEC could not successfully contend the purpose "not to continue with collective bargaining" was a separate purpose made for business reasons rather than a purpose not to achieve the prohibited result. If that was the case, then it would render s145B devoid of any real application, as an employer would always argue it had decided not to use existing collective bargaining arrangements because of some alternative business purpose. Furthermore, where an employer does not use existing arrangements, it tends to show the employer did have the prohibited purpose, as consistent with s 145D (4) (a).

The decision by the EAT to uphold the original ET decision means VTEC is liable for a sum in excess of £6 million when interest is taken into account. This judgement is another important landmark in developing caselaw around s 145B TULRA and underlines the perils facing employers who "sidestep" bargaining arrangements and prematurely seek to impose unagreed terms.

THOMPSONS TRADE UNION LAW GROUP

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