



Case Law Overview 2019

Stuart Brittenden
Madeline Stanley

Old Square Chambers

Collective Labour Law - 2019

Collective Bargaining Inducements: s. 145B TULR(C)A 1992

- *Wilson/Palmer v UK*
- Right not to have direct offer which *if* accepted would have the “prohibited result”
- 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.”
- ER’s sole or main purpose must be to achieve result
- Does this apply to one-off direct offers? *OR* is a permanent surrender of rights required?

Kostal UK Ltd v Dunkley & Ors

[2019] IRLR 817

- Recognition agreement – *status quo* pending dispute resolution/ACAS
- ER offer *quid pro quo*
- Staff Notices published – 97% accepted. TU mandate?
- 2 inducements
 - (1) direct offer to employees + Christmas bonus;
 - (2) threat of dismissal
- ET found that ER
 - “took the conscious decision to by-pass further meaningful negotiations and contact with the union in favour of a direct and conditional offer to individual employees who were members of that union... it was exceptionally improbable that the [ER] did not intend to circumvent the collective bargaining process when it made the offers”
- 2 x awards (currently £4,193)

Kostal EAT and CofA

- EAT – majority decision (Simler P)
 - No requirement for permanent cessation of bargaining [para 52]
 - Guidance as to determining ER’s “sole or main purpose” [para 61]
 - “... legislation seeks to prevent ... an ER going over the heads of the union with direct offers to workers...”
- Court of Appeal – found for ER
 - S. 145B requires term to be taken out of bargaining sphere on a “permanent basis”
 - Does not apply where direct offers are made “on ... one occasion”
 - Parliament did not intend to give veto to TU
- Implications?
- Supreme Court?

Industrial Action

❑ *British Airways v BALPA* [2019] EWCA Civ 1663

(1) Categorisation challenge: s. 226A ballot notice

- categorisation by rank or rank plus fleet?
- HCt and CofA reject challenge
- “Unions are not... required to determine what information has to be given by reference to what would help the ER to make plans... by determining the relative importance to the ER’s business and substitutability of the skills, roles, functions and qualifications...”
[65]

(2) Period(s) of expected IA in ballot paper: s. 229(D)

- 6m period specified in paper
- Voters “would know that it might go on for 6m so they knew what they were signing up to”

❑ Ryanair DAC v BALPA

Denial of entitlement to vote: s. 227

- 7 day cut-off date for new joiners to vote in ballot
- HCt not reasonably practicable to send papers after cut-off period
- Code of Practice rec 7 day min period

Summary of dispute in ballot paper: s. 229(2B)

- List containing slight discrepancies BUT other comms

Strike notice: s. 234A

- Explanation for increase in numbers?
- Short/formulaic explanation of how figures calculated not why increase

De minimis

❑ **Ognevenko v Russia [2019] IRLR 195**

- Prohibition vs strikes in rail sector
- Dismissal of rail worker
- ECtHR refers to “right to strike”
- Reliance upon ILO CFA need for “compensatory guarantees” where strike ban

❑ **Royal Mail Group v CWU – s. 230**

- Interference with ballot/ballot to home address/voting in secret

❑ **Birmingham City Council v Unite & Unison [2019] IRLR 423**

- Bin dispute, payments made to 1 TU
- IA to secure payment for members of other TUs
- Was IA unlawful vs s. 222 in that ER failed to discriminate against members of another TU?
- HCt IA was to bring about parity, that is opposite reason vs ER discriminating against members of the other TU.
- Payments also sought for all (including non-members)

Disciplinary Procedures

Reason for dismissal

- Automatically unfair dismissal (e.g. section 152 of the TULR(C)A 1992, section 103A of the ERS 1996).
- What happens if:
 1. The dismissing officer is not motivated by a prohibited reason BUT
 2. Somebody else (whose actions contribute to the dismissal) is motivated by a prohibited reason?

Royal Mail Group Ltd v Jhuti

[2019] UKSC 55

- The Claimant made protected disclosures. Her line manager pretended there were performance concerns. A different manager eventually dismissed the Claimant for poor performance. The ET found that because of the line manager's actions it was "inevitable" that the dismissing officer would terminate the Claimant's employment.
- Detriment Claim (section 47B of the Employment Rights Act 1996). Automatic unfair dismissal (section 103A of the Employment Rights Act 1996).
- Paragraph 62:
...if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.

Cadent Gas Ltd v Pritpall Singh

UKEAT/0024/19/BA

- Court of Appeal Guidance *Jhuti v Royal Mail* [2018] ICR 982 (see paragraphs 57 to 66). (See also paragraph 53 of *Jhuti* in the Supreme Court).
- Claim for dismissal on grounds related to union membership and activities (section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992).
- The ET found there had been disputes relating to the Claimant's trade union activities between the Claimant and a manager involved in the investigation.
- In this case the EAT held that the motivation of a manager deputed to conduct the investigation could be attributed to the employer even if the manager who actually dismissed did not share this (prohibited) motivation.

Reason for dismissal: Practical Considerations

- In most cases ETs will not need to look beyond the decision maker (paragraph 60 of *Jhuti* in the Supreme Court).
- When do you look beyond the decision maker? Where do you draw the line?

Disciplinary Procedures

Other Cases

- ***London Borough of Lambeth v Agoreyo* [2019] IRLR 560**

When is a decision to suspend a breach of the implied term of trust and confidence?

- ***North West Anglia NHS Foundation Trust v Gregg* [2019] IRLR 570**

Suspending internal disciplinary proceedings pending a criminal investigation.

Thank you

Contact

London

10 - 11 Bedford Row
London WC1R 4BU
DX 1046 London / Chancery Lane
T 020 7269 0300

Bristol

9 Queen Square
Bristol BS1 4JE
DX 78229 Bristol 1
T 0117 930 5100

E clerks@oldsquare.co.uk

W oldsquare.co.uk

 [@OldSqChambers](https://twitter.com/OldSqChambers)