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NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

DIRECT OFFER BEFORE COLLECTIVE BARGAINING EXHAUSTED WAS UNLAWFUL INDUCEMENT

Summary: The Supreme Court, overturning the Court of Appeal's 2019 decision, found that an employer's direct pay offer to workers, at a time when collective bargaining with the recognised trade union had stalled, was an unlawful inducement under Section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992. If the employer had exhausted the collective bargaining process before making the offer, the position might have been different (*Kostal UK v Dunkley*).

Key practice point: The Court of Appeal's interpretation of Section 145B had limited its impact to two scenarios – where the employer's purpose is to prevent the trade union being recognised, or to stop collective bargaining on a permanent basis. The Supreme Court has now extended the scope of Section 145B but there will not be an unlawful inducement unless there is at least a possibility that, had the offer not been made and accepted, the employees' terms of employment would have been determined by a collective agreement. An employer can make an offer directly to its workers in relation to a matter which falls within the scope of a collective bargaining agreement, provided it has first followed and exhausted the agreed collective bargaining procedure.

Background: Section 145B Trade Union and Labour Relations (Consolidation) Act 1992 prohibits any offer being made to a member of a recognised union, which, if accepted, would mean that all or any of their terms of employment would not be, or would no longer be, determined by collective agreement, and the employer's sole or main purpose in making the offer is to achieve that result.

Facts: A trade union recognition agreement provided for any proposed changes to terms and conditions to be negotiated between the employer and the trade union. The employer made an offer of a 2% pay increase plus a 2% Christmas bonus, conditional on acceptance of a number of other changes to terms. The offer was rejected by union members in a ballot. The employer decided to make the pay offer to each employee individually and wrote to all its employees setting out the offer, stating that if it was not accepted no Christmas bonus would be payable. A month later, the employer wrote to the remaining employees who had not yet accepted the pay proposal, offering a 4% pay increase in consideration for the changes to terms, but also indicated that if no agreement was reached the employees' contracts might be terminated.

The Employment Tribunal and the Employment Appeal Tribunal upheld the union members' claim that both the first and second offers amounted to unlawful inducements under Section 145B. The Court of Appeal disagreed, finding that Section 145B did not cover the facts because the sole or main purpose of the offer was to achieve the result that one or more of the workers' terms of employment would not, on that one occasion, be determined by the collective agreement.

Decision: The Supreme Court allowed the union members' appeal: the employer's direct offers to workers who were union members breached Section 145B. Section 145B had to be interpreted so as to be consistent with Article 11 of the European Convention on Human

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Rights (the right to join a trade union) in prohibiting employers offering financial inducements to their employees in an attempt to persuade them to relinquish their right to union representation. The union's argument – that any offer made directly to workers to agree to changes that had not been collectively agreed – was incorrect, but so was the employer's interpretation - that the protection applies only where the offer requires the worker to opt out of collective bargaining rights. What Section 145B prohibits is an offer which, if accepted, would bypass agreed arrangements for collective bargaining, as this would be a restraint on the employees' use of union representation to protect their interests. The test will not be satisfied unless there is at least a "real possibility" that had the offer not been made and accepted, the terms in question would have been determined by a collective agreement. In this case, there was still that possibility when the offer was made because the collective bargaining procedure had not been exhausted; therefore, the Supreme Court decided, the employer was in breach of Section 145B.

COURIER WAS A WORKER DESPITE HAVING RIGHT TO SUBSTITUTE

Summary: A courier driver who could release his delivery slots to another driver nevertheless worked under a contract for the personal performance of services, satisfying the definition of "worker" under employment protection legislation. The Court of Appeal decided that the courier's limited right to notify other couriers who were already working for the organisation that he was prepared to release a slot was not a sufficient right of substitution to remove the obligation personally to perform work (*Stuart Delivery Ltd v Augustine*).

Key practice point: It continues to be essential for businesses engaging staff on a casual basis to analyse the terms of their engagement. As well as having consequences in terms of individual rights, the distinction is important for tax, national insurance and other matters such as pensions auto-enrolment. A right to substitute with restrictions is unlikely to prevent an individual having worker status.

Facts: Stuart Delivery (SD) connected couriers with clients via a mobile app. Couriers were able to undertake "slot" deliveries, for which they committed in advance to being available in a certain geographical zone for a certain period at a certain time. A courier who signed up for a slot would be guaranteed a minimum rate for the duration of the shift, provided that the courier remained in the zone for at least 90% of the time and refused no more than one delivery. A courier who signed up for a slot could subsequently release it to other couriers. If no one accepted the released slot, the original courier remained liable for completing it.

When one courier sought to bring claims for unauthorised deductions and holiday pay, the Employment Tribunal found that the ability to release a slot did not amount to an unfettered right of substitution such as to undermine the obligation of personal performance. The Employment Appeal Tribunal upheld the decision and SD appealed.

Decision: The Court of Appeal dismissed the appeal. The Tribunal was entitled on the facts to conclude that the courier was a worker within the meaning of Section 230(3)(b) of the Employment Rights Act 1996. The courier performed the services under a contract to do the work or provide the services personally and SD was not the client or customer of a business carried on by the courier (which would have meant that the courier was self-employed rather than a worker).

The ability to substitute was not inconsistent with an obligation of personal performance. The system set up by SD was intended to ensure that the courier carried out the work and, in particular, that he did turn up for the slots that he had signed up for and do the delivery work during those slots. That was necessary for SD's business model to work. The limited right to notify other couriers that he wished to release a slot for take up by other couriers was not, in reality, a sufficient right of substitution to remove the obligation to perform his work personally. The Court of Appeal referred to the Supreme Court's decision in *Pimlico Plumbers v Smith*, where a plumber working on behalf of a plumbing company was found to be a worker and not (as his contract suggested) a self-employed contractor. In that case, the facility to appoint a substitute was also subject to a significant limitation: that the substitute came from the ranks of Pimlico operatives.

The Court of Appeal added that it did not matter whether the substitution arrangements were contractual or merely a practice; they were not sufficient to displace the obligation on the courier to perform the work personally.

Analysis/commentary: The *Pimlico Plumbers* case had identified five categories of substitution arrangements and analysed whether they were consistent with personal service. These classifications have been referred to in subsequent worker status cases. Here, the Court has made it clear that they are no more than examples and it will usually be

unhelpful to try to shoehorn the particular facts of a case into one of the categories. The question in every case is whether the nature and degree of any fetter on the right or ability to appoint a substitute is inconsistent with an obligation of personal performance.

The Court did not mention the *Deliveroo* courier case, where a right of substitution was crucial to a finding that the riders were not workers, albeit in different context (for trade union recognition purposes). The substitution right in that case was unfettered - riders were able to send any other individuals to take their place on any job at any time and for any reason, even if the substitute was not a fellow Deliveroo rider, and they were under no obligation to notify Deliveroo that they had done so.

COMPULSORY LIQUIDATION WAS NOT A SPECIAL CIRCUMSTANCES DEFENCE TO COLLECTIVE CONSULTATION

Summary: The Employment Appeal Tribunal confirmed that an employer could not rely on the "special circumstances" defence when it entered compulsory liquidation without complying with its collective consultation obligations. "Special" means something uncommon or out of the ordinary. This was a question of fact for the Employment Tribunal and it had concluded there were no special circumstances (*Carillion Services Ltd v Benson*).

Key practice point: Despite dating from 1978 and being based on earlier legislation on collective consultation, *Clarks of Hove v Bakers' Union* is still the authority for the special circumstances test. It is not enough that the circumstances are unforeseen – the cause must be something that affects the employer in a sudden, immediate way.

Background: Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 requires employers to consult with representatives about proposals to dismiss as redundant 20 or more employees at an establishment within a period of 90 days or less. Under Section 188(7), if there are "special circumstances" which render it not reasonably practicable for the employer to comply, the employer must take all such steps towards compliance as are reasonably practical in those circumstances.

Facts: The company was facing serious financial difficulties from July 2017 and went into liquidation on 15 January 2018. A large number of employees were subsequently dismissed. B and other employees brought claims for protective awards in respect of failure to comply with the requirements to consult. The company relied on "special circumstances" within the meaning of Section 188(7): "sudden intervening events" over the weekend of 13/14 January 2018, when the company's key stakeholders decided not to approve proposed short-term lending arrangements, an outcome the Board had not expected. At the same time, the Government confirmed that guarantees would not be forthcoming.

The Employment Tribunal decided that the duty to consult was triggered on 14 January 2018 and that there were no special circumstances as at that date. The Tribunal found that there had been no prior history of the Government providing the company with the type of support requested, or of its having provided such support to other companies in similar circumstances, and that the banks had been indicating, prior to 13/14 January, that any further support from them was conditional on support from the Government. The company appealed.

Decision: The Employment Appeal Tribunal dismissed the appeal. The Court of Appeal decision in *Clarks of Hove v Bakers' Union* is still the authority on the special circumstances defence. Although *Clarks* concerned the previous legislation, the essential components of the defence are similar to those set out in Section 188(7). Based on *Clarks*, the event relied upon has to be something "out of the ordinary" or "uncommon" - "sudden disaster" befalling the company, for example. On the other hand, a gradual financial decline leading to insolvency could be regarded as not amounting to special circumstances. What constitutes special circumstances depends on the facts, with the burden of proof on the employer. As it was a question of fact, the EAT could only interfere with the Tribunal's conclusion where there was some material error of law or perverse conclusion.

Analysis/commentary: It was impossible for the company to consult about "ways of avoiding the dismissals", as required by Section 188. However, the EAT said that the fact that a circumstance has an effect on the employer's ability to comply does not make it "special". The matters about which the company must consult under Section 188 are not an exhaustive list. Even if dismissal cannot be avoided, there is value in consulting about mitigating the consequences.

HORIZON SCANNING

What key developments in employment should be on your radar?

2022	Legislation expected to provide for: • Entitlement to one week's unpaid leave for employees who are carers • Extension of redundancy protections for mothers • Neonatal leave and pay • Extension of permissible break in continuous service from one week to one month • Right to request a more predictable contract • Single enforcement body for employment rights • Tips for workers to be retained in full

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status:** *Stojsavljevic v DPD Group* (EAT: whether individuals working under franchise agreements were workers); *Angard Staffing Solutions Ltd v Kocur* (Court of Appeal: agency workers' rights); *Nursing and Midwifery Council v Somerville* (Court of Appeal: whether an irreducible minimum of obligation is a prerequisite for worker status); *HMRC v Atholl House* (Court of Appeal: whether the IR35 rules applied to a presenter providing services through a personal services company)
- **Discrimination / equal pay:** *Lee v Ashers Baking Co* (European Court of Human Rights: whether refusal to provide cake supporting gay marriage is discrimination in provision of goods and services); *Higgs v Farmor's School* (EAT: whether a Christian employee's gender critical beliefs were protected under Equality Act 2010)
- **Trade unions:** *Mercer v Alternative Future Group* (Court of Appeal) and *Morais v Ryanair DAC* (EAT): whether protection from detriment for trade union activities extends to participation in industrial action
- **Vicarious liability:** *Chell v Tarmac Cement and Lime* (Court of Appeal: whether employer vicariously liable for consequences of employee's practical joke in the workplace)
- **Whistleblowing/detriment:** *UCL v Brown* (Court of Appeal: whether disciplining a trade union rep employee for failure to comply with an instruction was a detriment).

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