



HR Bulletin

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Unlawful Inducements

Tucked away in the Trade Union and Labour Relations (Consolidation) Act 1992 is a little known provision that can be a major hazard for any employer seeking to change its relationship with a trade union or move away from formal collective bargaining.

Union recognition can't really function without the agreement of both the employer and the relevant trade unions. That's why – despite the statutory recognition procedure – most collective bargaining arrangements are entirely voluntary. They continue because they suit both sides of the negotiation. If they break down, the employer is free to derecognise, and although the union could, if supported by the workforce, seek an order for recognition from the Central Arbitration Committee a more immediate – and more likely – outcome is an industrial dispute. There is a strong tradition in the UK that issues of recognition and derecognition belong primarily in the field of industrial relations and employment law has a relatively limited role to play.

That may, perhaps, be why both employers and trade unions have paid little attention to s.145B of the 1992 Act. This gives individual workers the right not have their employer make them any sort of 'offer' – described as an 'unlawful inducement' - with the purpose of persuading them to agree that the terms of their employment will not, or will no longer, be determined through a collective agreement. The provision was inserted into the 1992 Act in 2004 as part of the Government's response to the ruling of the European Court of Human Rights in the case of *Wilson & Palmer v United Kingdom*.

That case involved employers offering increased pay awards to employees who opted out of collective bargaining and chose to negotiate their terms directly with the employer. The Court held that it was a breach of Article 11 of the Convention (the right to freedom of association) for UK law to allow the purpose of trade unions to be undermined in this way.

So S.145B was passed without much fanfare, and it has not been much used in the decade since. This is perhaps because the rather ironic central message behind the provision is that an employer who wants to derecognise a union is better off simply imposing the new regime rather than trying to persuade employees to accept it. Back in 2014 Bromley Council was ordered to pay compensation to 18 employees after it withdrew from national collective bargaining and moved to localised pay and conditions determined each year by the Council. To sweeten the deal, employees who signed up to the new arrangements were offered a one-off payment of £200. Oddly, both the employer and the union seem to have gone through the whole process without either side realising that that this would be held to amount to an unlawful inducement.

Frankly, Bromley should be relieved that so few employees had the presence of mind to bring a claim. It is, after all, the mere making of the 'offer' that is unlawful – a claim can be brought irrespective of whether the employee accepts or declines that offer. There is no need to show that the employee was upset, or suffered any kind of detriment. And although Bromley had initially offered a £200 payment, there is also no requirement in the legislation for a financial inducement. Any offer will do.

If you think about it, any change in terms and conditions involves some sort of offer being made by the employer – that is how contracts are formed. This means that any council that wants to move away from national bargaining should move to a comprehensive local bargaining framework. Replacing a collective agreement that has been incorporated into the contract with a consultative arrangement may simply be impossible.

But in any event, it now seems that s.145B is not even confined to cases where the employer is seeking to get out of collective bargaining altogether. In **Kostal UK Ltd v Dunkley and others** (EAT, December 2017) the employer had only recently recognised a trade union and their first round of negotiations ended in stalemate. Frustrated at the lack of progress the employer went over the union's head and made a direct offer to employees – arguing that an early resolution was needed to ensure that Christmas bonuses were paid. Eventually the union accepted the proposed terms and a collective agreement was reached. The company was perfectly happy to bargain with the union – it just wanted to be able to talk to employees directly if negotiations failed.

In the meantime, however, 57 employees (backed by the union) brought claims alleging that they had been subjected to unlawful inducements when the employer made its direct pay offer. And they won. The EAT agreed that the purpose of the offer made by the employer was that –for one pay round at least – the pay of employees would not be determined by collective bargaining but by individual negotiation.

There was no requirement, said the EAT, that an individual offer would only amount to an unlawful inducement if it sought to permanently remove the employee from the scope of collective bargaining.

That is quite a draconian conclusion – even more so when you consider the compensation that is awarded in cases of unlawful inducement. There is a fixed penalty that a Tribunal must impose on employers of just over £3,900 for each employee to whom an unlawful offer is made. Unfortunately for the employer in the Kostal case they actually made the same offer twice – once before Christmas and once after. That means that their attempt to break an impasse with a trade union by talking to the employees directly is going to cost them almost £400,000 in compensation. That seems like a lot of money for conduct which, while a breach of the etiquette of collective bargaining, is hardly sinister.

I would expect an appeal in this case. But it is clear that any local authority employer that is thinking of changing the way in which it deals with trade unions or collective agreements needs to tread very carefully indeed. The cost of getting it wrong can be eye-watering.

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WME and NHS working together to support your leadership journey

As the public sector landscape evolves, so do the expectations and opportunities available to our emerging leaders. Here at WME we have a long history of supporting emerging leadership and we are now widening our scope to include cross sector partners to take this important agenda forward.

Building on the reinvestment of the 2016/17 WME 'shareholder reward', we are excited to announce that we have been able to not only engage NHS colleagues in our first cross public-sector initiative but also, that we have successfully secured matched investment in our project from the NHS Leadership Academy 'In Place Leadership Innovation Fund'.

The aim of the fund is to support local systems and organisations to develop innovative, inclusive and collaborative leadership and Health Education West Midlands Leadership Academy are keen to explore with us, what it means to lead 'in place' in the West Midlands.

We know this will not be achieved through further top-down reorganisation but from leaders at all levels in the system being supported to innovate and test new approaches. Whether it is at organisation, neighbourhood or system level, we want to encourage collaborative learning, using different ways to develop leadership across local health and social care systems. Our aim is to equip colleagues to lead, to have the confidence when needed to relinquish power and unlock it in others, to have the knowledge to help shape new ways of working and to have behaviours that engage, empower and excite staff.

More and more public sector organisations are being asked to work in a way that is potentially unfamiliar, surrendering organisational boundaries by sharing knowledge and resource and becoming local systems of health and social care. This has many implications for leaders within these systems and brings the challenge of defining, developing and deploying the best talent to deliver the vision for their local populations. We also know that there is a need for new and more dynamic and inclusive ways of working and in working across difference.

Denise Bolger, WME's Head of Leadership and OD is spearheading this new initiative and will be working closely with Health Education West Midlands Leadership Academy and the Birmingham & Solihull Mental Health Trust to ensure an exciting programme that meets the needs of the wider public sector community.

Next Steps include reconvening the Cross Public Sector Steering Group and we are also delighted to invite you to take part in an open space event at Birmingham Conference and Events Centre on Friday 2 February 2018 when we will be looking to broaden engagement in the shaping and designing of the framework prototype.

[Click here to book your place](#)