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# COLLECTIVE BARGAINING AND INDIVIDUAL CONTRACTS IN *KOSTAL UK Ltd v DUNKLEY*: A *WILSON AND PALMER* FOR THE TWENTY FIRST CENTURY?

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## I Introduction

*Wilson v Associated Newspapers Ltd* and *Palmer v Associated British Ports* were the landmark labour cases of the 1990s.<sup>1</sup> In *Wilson*, the employer withdrew recognition from the union and terminated the house agreement. To facilitate this process of de-recognition, it offered a 4.5% pay increase to employees who signed new contracts that excluded collective negotiation with the trade union. This pay rise was withheld from employees who refused to sign the new 'personal' contracts, including Mr. Wilson. In *Palmer*, a significant pay rise was offered to employees who signed personal contracts which did not provide for union representation. Those employees who preferred to continue with union representation did not receive the same pay rise. The personal contracts provided for individualized merit-based payment mechanisms. For those employees who refused the personal contracts there was a subsequent collective bargaining round with the union, but recognition was eventually withdrawn by the employer.

These practices were challenged under domestic law on the basis that the withholding of the financial benefit constituted 'action short of dismissal' attributable to their trade union membership. The House of Lords rejected this on the basis that the measure was an omission, not an act, and so not included within the scope of 'action short of dismissal'. Nor did it constitute discrimination on the ground of 'trade union membership' since the individuals were free to retain their union membership in a very narrow reading of the legislation.<sup>2</sup> Having exhausted their domestic legal remedies, the unions and workers made the momentous decision to fight on to Strasbourg. The European Court of Human Rights (ECtHR) held that UK law at this time, which permitted the conduct of the employers in these cases, violated the Convention rights both of the union members and the trade union itself.<sup>3</sup> It was a decision that began a process of what has been the expansion of the European Convention on Human Rights (ECHR), Art 11 to include the core labour rights: the right to organize, bargain, and strike.<sup>4</sup>

*Wilson and Palmer* also led to a number of significant changes to domestic law in the Employment Relations Act 2004 (ERA), to eclipse modest changes that had been made in 1999 by the newly elected Labour Government. *Kostal UK Ltd v Dunkley (Kostal)* is the first appellate consideration of those important legislative changes prompted by *Wilson and Palmer*

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<sup>1</sup> *Wilson and Palmer v United Kingdom* [2002] ECHR 552 (*Wilson and Palmer*), where the domestic litigation is discussed by the Court.

<sup>2</sup> *Associated Newspapers plc v Wilson* [1995] 2 AC 454.

<sup>3</sup> *Wilson and Palmer v United Kingdom*, above n 1.

<sup>4</sup> See especially *Demir and Baycara v Turkey* [2008] ECHR 1345.

in 2004.<sup>5</sup> As in the *Wilson and Palmer* cases themselves, there have been many twists and turns in the *Kostal* litigation to date. This article will provide a critical assessment of the Court of Appeal judgment in *Kostal*. We argue that the Court of Appeal committed a series of legal errors in departing from the Employment Tribunal's (ET) and the Employment Appeal Tribunal's (EAT) approach. *Kostal* is now on appeal to the United Kingdom Supreme Court (UKSC), which provides an important opportunity to get the law back on the right track.

## II The *Kostal* Dispute

*Kostal* is a reminder that the saga of *Wilson and Palmer* is far from over, and that it may yet require another trip to Strasbourg to resolve. As referred to above, *Wilson and Palmer* raised two issues: the right of workers to use the services of their union to represent them in dealing with employers; and the right not to be subjected to financial inducements to persuade them to give up trade union representation. *Kostal* case was concerned exclusively with the second of these issues,<sup>6</sup> in relation to which the amending legislation to give effect to the Strasbourg decision is to be found in TULRCA, s 145B. Thus:

- Section 145B posits a right not to have an offer made where acceptance of the offer (along with acceptance of offers made by the employer to other workers) would lead to a 'prohibited result'; and it was the employer's 'sole or main purpose' to achieve this 'prohibited result'.
- The 'prohibited result' is further defined in s 145B (2) as a situation where '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'.
- Employer liability under s 145B therefore hinges upon the concept of 'prohibited result'. This is because
  - (i) this result must occur if the offers are accepted (the factual condition); *and*
  - (ii) it is the employer's intention ('sole or main purpose') that this result is brought about through its offers (the mental state condition).
- Both factual and mental state conditions must be satisfied before there is liability under s. 145B, and the legislation envisages that the 'prohibited result' bears an identical meaning under both (i) and (ii).

### Complaint Upheld in the Employment Tribunal (ET)

In relation to the foregoing, it was the interpretation of 'prohibited result' that was central to the legal arguments in *Kostal*. And it was on this point that there was a stark divergence between the ET/EAT and the CA on its meaning. The dispute in question arose out of the difficult negotiations for a first collective agreement following a voluntary recognition and procedure agreement signed in February 2015. This gave UNITE 'sole recognition and bargaining rights' at the company. The procedure set out a general framework for the timing and conduct of collective negotiations, and Appendix 1 provided for a four stage procedure for the resolution of 'collective grievances', notably which culminated in a reference to ACAS for

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<sup>5</sup> *Kostal UK Ltd v Dunkley* [2019] EWCA Civ 1009; [2020] ICR 217.

<sup>6</sup> For earlier cases in employment tribunals, see H Collins, K D Ewing and A McColgan, *Labour Law* (2<sup>nd</sup> ed, Cambridge University Press, 2019), p 499.

conciliation. The Appendix also provided that there would be no sanctions or changes implemented until the agreed dispute resolution procedures had been exhausted, and hence where an 'impasse' was reached in the negotiations.

The union commenced formal pay negotiations in October 2015. The employer's pay offer included an extra 2% payable as a Christmas bonus to all workers. It was a condition of the bonus offer that it would be paid in December 2015 from the year's profits, otherwise it would lapse (although the ET took the view that this strict inflexibility was not necessary but represented a bargaining position which increased the pressure on the union to agree to its proposal). The employer's offer was rejected in a ballot of the union membership. Following the union's rejection of the pay offer, the employer wrote to employees personally on 10<sup>th</sup> December making the pay offer directly and indicating that the 2% Christmas bonus would no longer be available if it was not accepted by 18<sup>th</sup> December. Further letters were sent out to employees who had not accepted the original direct 'offers' in December, and the company indicated that there would be dismissal and re-engagement on the new terms of employment set out in the employer's original proposal to UNITE. As a result of this employer conduct, the union organised industrial action in the form of an overtime ban.

In addition, 57 workers brought proceedings for breach of s 145B in relation to the two separate incidents of direct 'offers' in December and January. The ET found that the employer had breached s 145B in relation to both communications, and it awarded compensation in relation to each event as separate statutory breaches. Put simply, when presented with a ballot outcome that it did not like, the employer went over the head of the union during a collective negotiation. In so doing, it had circumvented the agreed procedure before the parties had exhausted the dispute resolution mechanism provided for in their agreement. This had led to the 'prohibited result' in that those terms that constituted the 'offer' would 'no longer be determined by collective agreement' once they were accepted by the workers. Since it was the employer's intention to bypass the collective procedure and make offers directly to individual workers, the employer's 'sole or main purpose' was to achieve the 'prohibited result'.

Before considering the appellate decisions, it is worth pausing to reflect on these facts. First, this was a newly recognised union, with recognition having only recently been established following a ballot of the workforce, in its first bargaining round with the employer. Secondly, the employer had presented its opening pay offer to the union on a 'take it or leave it' basis. Consequently, since this was its first and final offer, there was nothing left for the union to negotiate about in collective bargaining. Thirdly, having had its offer rejected in a democratic ballot, the employer then breached its own procedure agreement with the union and made financial offers directly to individual workers. Short of formal de-recognition, it is difficult to see how the employer's behaviour in *Kostal* could have been any more destructive of the union's credibility as a bargaining representative for the workforce.

## ET Upheld by EAT

The EAT upheld the ET and decided in favour of the union by a majority, whose judgment was delivered by the then President of the EAT, Simler P.<sup>7</sup> The employer's central argument was that 'prohibited result' in s 145B incorporated a temporal distinction. The statutory provision is that 'the worker's terms of employment...will not (or will no longer) be determined by collective agreement'. According to Mr Andrew Burns QC for the employer, this linguistic formula was future-oriented, specifically that the term or terms 'will not' be collectively determined. It was contended that this wording envisaged a situation where the relevant terms were excluded permanently from collective bargaining: not just in the current bargaining round but also in future bargaining rounds. In effect, this criterion would be satisfied only where there was a *permanent exclusion* of the terms from collective negotiation (or, at least according to Mr Burns QC, where the collective determination of terms was excluded 'at least at the next bargaining round') from the scope of collective bargaining.<sup>8</sup> The 'prohibited result' would not be satisfied where the exclusion of the terms had occurred on an episodic basis in a single bargaining round.

That was argued to be the case in *Kostal* itself, where there had been found to be no hostility to the union and a willingness to bargain about pay in the next collective bargaining round. It was also argued that this temporal reading of s 145B, limiting it to permanent rather than episodic exclusions of collective bargaining, was supported by the background to s 145B's enactment. Since *Wilson* itself involved a permanent exclusion of recognition, facilitated by direct contractual offers, s 145B should be construed narrowly by reference to that specific factual situation. Quickly disposing of this argument, Simler P. said that the use of the future tense in the statutory definition was a reflection of the fact that 'an offer once made can only be accepted subsequently so that any acceptance viewed at the point of offer is in the future'.<sup>9</sup> In support of that observation, we would add that the two statutory possibilities – 'will not' and 'or will no longer' – also correspond with s 145B's application to situations where the independent union is either 'seeking to be recognised' or 'is recognised'. Where a union is 'seeking to be recognised', it does not make sense to describe the terms as 'no longer' determined by collective agreement since the union is not yet recognised. It can only be described by reference to some future state, and this is reflected in 'will not' as an alternative to 'or will no longer'.

The interpretation of the ordinary and natural meaning of the words in s 145B was fortified by a range of supporting arguments. The first was the unworkability of requiring a permanent exclusion of collectively agreed terms as the basis for the 'prohibited result'. The practical difficulties in establishing whether offers today 'would have' this permanent effect are formidable. It cannot mean that workers must wait for years to find this out, not least because this would be incompatible with the three-month time limit for claims from the date when the

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<sup>7</sup> *Kostal UK Ltd v Dunkley*, UKEAT/0108/17/RN.

<sup>8</sup> *Ibid*, at [52].

<sup>9</sup> *Ibid*, at [50].

last offer was made, as provided in s 145C (1). The only possible way in which this ‘factual condition’ (would acceptance of the offers have this effect?) could be identified is indirectly through establishing the ‘mental state condition’ (was it the employer’s ‘sole or main purpose’ that it should have this effect?). The effect of this would be to render the factual state condition superfluous, which invites the question why the legislator bothered to set it out as a separate element in the statutory test. Furthermore, if the employer had ‘an expressed intention to bargain with the union about some or all of these matters in the next bargaining round’ then, without evidence that this was dishonest or a sham, this would ‘reduce the scope of section 145B almost to vanishing point.’<sup>10</sup>

The employer also introduced a further consideration that would prove pivotal in the Court of Appeal. This was based upon the ‘veto’ concern. According to this argument, the purpose of s 145B was ‘to stop employers preventing or ending collective bargaining and not to afford unions a veto on any further changes to employment terms’.<sup>11</sup> The effect of the wider interpretation of s 145B, encompassing episodic departures from collective bargaining, would give the union an effective veto over any changes to individual terms and conditions of employment. By contrast, however, the narrower reading restricted to permanent exclusion would preserve the managerial prerogative to effect changes in terms and conditions. But this too was rejected by the EAT, which explained convincingly that

If collective bargaining breaks down, to the extent that the employer has a proper purpose for making offers directly to workers, there is nothing to prevent such offers being made. What the legislation seeks to prevent is an employer going over the heads of the union with direct offers to workers, in order to achieve the result that one or more terms will not be determined by collective agreement with the union if offers are accepted. Mr Burns complains about the risk an employer must take on this approach, in making direct offers to workers in circumstances where these arguments are open to the union. He submits that even if there is no veto as a matter of law, in effect the trade union has a practical veto. We disagree. Although inevitably in cases that depend on questions of fact and degree there is less certainty as to the outcome and more risk, we consider that employers who act reasonably and rationally for proper purposes and are able to demonstrate that their primary purpose in making individual offers is a genuine business purpose, retain the ability to make offers directly to their workforce without fear of contravening s.145B.<sup>12</sup>

### **EAT Reversed by the Court of Appeal**

In a unanimous judgment, the Court of Appeal upheld the employer’s appeal. The single judgment delivered by Bean LJ restricts s 145B to situations where there is a permanent surrender of collective bargaining in relation to the term or terms of employment. While the EAT’s broader interpretation was ‘possible as a matter of literal interpretation of the words used’, the narrower interpretation was to be preferred. Bean LJ noted the wording of s 145B supported his narrower approach: ‘“No longer” clearly indicates a change taking the term or

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<sup>10</sup> Ibid, at [55].

<sup>11</sup> Ibid, at [44].

<sup>12</sup> Ibid, at [62].

terms concerned outside the scope of collective bargaining on a permanent basis'.<sup>13</sup> This did not include situations where the term or terms were taken outside the collective agreement on a single occasion, what we describe as the 'episodic' position, as had happened in *Kostal* itself. The effect of this construction is to make the 'mental state condition' determinative of 'prohibited result', for – as we have explained - it is difficult to see how else to determine whether the acceptance of offers will have the effect of permanent exclusion without knowing the employer's intention in making them. Employers are unlikely to be explicit about this in the give-and-take of bargaining, which makes the avoidance of liability under s 145B relatively easy for the well-advised employer.

Of course, the dispute in *Kostal* is not really a dispute about the meaning of words at all. It is a dispute about the underlying values that the law should seek to respect and promote. Though the operative part of the CA judgment is concise, it sets out the justifications for preferring the narrower reading with clarity, with the 'veto' objection given particularly strong emphasis. According to Bean LJ, the effect of the EAT's broad reading of s 145B was to give the union an 'effective veto' over proposed changes to terms and conditions of employment.<sup>14</sup> There was no Article 11 right for workers and trade unions 'to impose their will on the employer'.<sup>15</sup> To reinforce the point, Bean LJ gave the following example:

Suppose an employer wishes to introduce bank holiday working for the first time. The trade union says that it will only agree if such days are paid at triple the usual rate: £300 for a worker ordinarily paid £100 per day. An impasse is reached. The employer, anxious to have work done on the forthcoming August bank holiday, makes a direct offer to workers inviting them to volunteer for work on bank holidays at double time, that is to say for £200 per day. On the claimants' construction of section 145B the employers would be liable to pay each workers to whom the offer was made (whether or not he or she accepted) an award, at 2015/16 rates, of £3,800. The trade union would thus have an effective veto over the proposed change.<sup>16</sup>

More interesting perhaps is the CA's purposive approach to statutory construction, the purpose being the maximal preservation of managerial prerogative rather than supporting Art. 11 rights, an interpretive approach which is offered without any supporting argument. It is simply presented as axiomatic that s 145B should be interpreted to impair the employer's freedom to contract with individual workers as minimally as possible.<sup>17</sup> This interpretive orientation has no basis either in the Article 11 jurisprudence, the legislative history to s 145B, or the obligations of collective bargaining which in this case the employer had voluntarily undertaken in the shadow of a statutory procedure for trade union recognition.

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<sup>13</sup> *Ibid*, at [51].

<sup>14</sup> *Kostal UK Ltd v Dunkley* [2019] EWCA Civ 1009, at [41]. This effective veto was attributed to the 'penal' nature of s 145B, given the heavy financial penalty for breach of the statutory provision. We return to Bean LJ's example in a later section, for it is not at all clear on these facts that an employer would breach s 145B.

<sup>15</sup> *Ibid*, at [42].

<sup>16</sup> *Ibid*, at [41].

<sup>17</sup> There is a shift here from the formulation of the managerial prerogative argument in the EAT, which was based upon ensuring consistency across different statutory provisions by reference to SI 2000/1300. In the CA, the 'veto objection' is freestanding and presented as so obvious as to not need legal support.

Apart from the veto argument, the CA relied also on a narrow reading of the mischief in *Wilson v UK*, which s 145B was introduced to address. Bean LJ stressed the extreme facts in the *Wilson and Palmer* cases, which involved permanent de-recognition of the unions motivated by a total repudiation of collective bargaining.<sup>18</sup> The enhanced pay offers in those cases were a *quid pro quo* for ‘personal contracts’ detached from future collective bargaining on a permanent basis. As such, the CA took the view that the provision in s 145B should also be interpreted narrowly by reference to the extreme facts in *Wilson v UK*. While the Government did propose to deal with ‘comparable circumstances’ in its freedom of association reforms in the 2004 Act, the CA considered that these were very likely addressed through other statutory reforms enacted at that time rather than s145B itself.<sup>19</sup> This would include s 145A (which prohibited inducements in relation to union membership, use of union services other than collective bargaining, and participation in the activities of an independent trade union); the insertion of ‘union services’ in the ‘detriment’ and ‘dismissal’ provisions in TULRCA 1992, ss 146 and 152 respectively; and the extension of the personal scope of s 146 to include ‘workers’.

Since *Wilson v UK* involved the permanent exclusion of collective bargaining, brought about through a deliberate strategy of targeted financial inducements, the CA took the view that s 145B should be interpreted accordingly. The making of episodic ‘offers’, as in *Kostal*, was not ‘remotely comparable to what took place in the *Wilson* cases’.<sup>20</sup> Hence, it was not proscribed by s 145B. This, however, ‘does not render the union powerless. It remains open to them (for example) to ballot their members for industrial action, as UNITE did in the present case in order to implement an overtime ban.’<sup>21</sup> Of course, in *Wilson* itself the union could have balloted its members for industrial action in response to the derecognition, and indeed the Strasbourg court openly observed that ‘there were other measures available to the applicant trade unions by which they could further their members’ interests. In particular, domestic law conferred protection on a trade union which called for or supported strike action ‘in contemplation or furtherance of a trade dispute’.<sup>22</sup> Nevertheless, the possibility of recourse to strike action did not prevent the ECtHR from finding a violation of Article 11 in the circumstances of that case. Indeed, it is difficult to see when the logical end point would be reached by this line of thought. Trade unions could no doubt organize strike action to challenge the victimisation of trade union members or pregnancy discrimination, but that is no argument against effective legal protection. The possibility of self-help through strike action should be irrelevant to the judicial interpretation of statutory protections.<sup>23</sup>

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<sup>18</sup> *Kostal UK Ltd v Dunkley* [2019] EWCA Civ 1009, at [44].

<sup>19</sup> *Ibid*, at [47].

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid*, at [54]

<sup>22</sup> *Wilson and Palmer v United Kingdom*, above n 1, at [45] Also, ‘The Court agrees with the Government that the essence of a voluntary system of collective bargaining is that it must be possible for a trade union which is not recognised by an employer to take steps including, if necessary, organising industrial action’ (at [46]).

<sup>23</sup> Not least because of tight legal controls that militate against its spontaneous and effective use.



### III Collective Bargaining, Convention Rights and De-unionisation

We propose to respond to the Court of Appeal decision in two stages. The first is to examine some of the broader contextual issues which it raises, which will be undertaken in this section. These relate to the nature and significance of collective bargaining, the impact and scope of Convention rights and related international treaty obligations, and the social reality of de-unionisation practices to which the wider-ranging 2004 reforms (including those introduced in the context of trade union recognition campaigns under the statutory recognition procedure) were addressed. This context challenges some of the assumptions laid bare in the CA judgment. The second is to assess the intention of Parliament, the interpretation of the language used, and the role of s. 145B in its wider statutory context. This will be addressed in section IV below.

#### The Nature of Collective Bargaining

The first concern relates to the view of the CA that it was axiomatic that an employer should be free as a matter of course to override the collective agreement and deal directly with workers covered by the agreement. This seems to misunderstand the nature of collective bargaining and the changing relationships between employers and workers that collective bargaining implies. The point is made famously and vividly by the Supreme Court of Canada in *McGavin Toastmaster Ltd v Ainscough*,<sup>24</sup> where it was said by the Chief Justice that where collective bargaining operates, it is not possible ‘to treat the collective agreement as a mere appendage of individual relationships’.<sup>25</sup> Collective bargaining introduces a third party into the employment relationship, a third party who enters into a relationship with the employer independently of the relationship between employers and employees individually. It is true that unlike collective agreements in other countries, British trade unions do not acquire legally enforceable rights by virtue of a collective agreement, unless the agreement states expressly that it is intended to be legally binding.<sup>26</sup> But that does not alter the fact that even here the employer has voluntarily assumed ‘social’ obligations to the union under the collective agreement,<sup>27</sup> independently of any legal obligations owed to its members. Nor does it alter the fact that while a collective agreement may not usually be legally enforceable as a contract, its breach may have other legal effects. Most labour law systems provide a range legal mechanisms to support the role of the collective agreement as a ‘code’ in regulating individual employment contracts, and s. 145B can be understood as an instance of this regulatory type.<sup>28</sup>

It is true that the British system of industrial relations (such as it is) does not embrace the uniform formality of the Canadian systems which are governed almost exclusively by statutory procedures. It is thus not possible in this country as it is in Canada to speak of collective

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<sup>24</sup> [1976] 1 SCR 718.

<sup>25</sup> Ibid, p 719.

<sup>26</sup> TULRCA, s 179. But see TULRCA, Sch A1, para 31.

<sup>27</sup> As Kahn-Freund observed in the classic 1950s account of the ‘legal framework’ of industrial relations, collective agreements ‘are intended to yield “rights” and “duties”, but not in the legal sense’: these are social or moral rights and duties. See O. Kahn-Freund, ‘Legal Framework’, in A. Flanders and H.A. Clegg (eds), *The System of Industrial Relations in Great Britain* (Blackwell, Oxford, 1954) 42, 57.

<sup>28</sup> O. Kahn-Freund (eds P.L. Davies and M. R. Freedland), *Labour and the Law* (Stevens, 3<sup>rd</sup> ed, 1983) 166-199.

bargaining creating an autonomous legal framework, divorced from the common law and traditional common law principles applicable to the contract of employment.<sup>29</sup> But it is possible nevertheless to point to the sense that collective bargaining necessarily changes the dynamic relationship between the employer and the individual employee, even within the United Kingdom's more flexible and fluid system. This is brought home by the statutory recognition procedure introduced in 2000,<sup>30</sup> and designed to encourage employers and trade unions to enter into voluntary collective bargaining arrangements in 'the shadow of the law' (whether or not the procedure is formally invoked).<sup>31</sup> The last stage in the statutory procedure is set out in the Trade Union Recognition (Method of Collective Bargaining) Order 2000,<sup>32</sup> which was referred to by Mr Burns in *Kostal* to support his argument that individual negotiation was compatible with a collective bargaining regime.<sup>33</sup> A close reading of the procedure in the Method of Collective Bargaining Order suggests, however, that the situation may be more subtle, and much less helpful to the employer's freedom to go over the head of the union as Mr Burns appeared to suggest..

Thus the Method of Collective Bargaining Order reveals that even in the UK system there is an acceptance that while the employer may not surrender the right of individual negotiation, by entering into a collective agreement with a union the employer nevertheless significantly qualifies that right. Paragraph 17 of the procedure set out in the Method of Collective Bargaining Order needs to be read carefully:

The employer shall not vary the contractual terms affecting the pay, hours or holidays of workers in the bargaining unit, unless he has first discussed his proposals with the union. Such proposals shall normally be made by the employer in the context of his consideration of the union's claim at Steps 3 or 4. If, however, the employer has not tabled his proposals during that process and he wishes to make proposals before the next bargaining round commences, he must write to the union setting out his proposals and the reasons for making them, together with the supporting evidence. The letter shall provide information estimating the costs and staffing consequences of implementing each element of the proposals, unless the employer is not required to disclose such information for any of the reasons specified in section 182(1) of the 1992 Act. A quorate meeting of the JNB shall be held within five working days of the Union Side's receipt of the letter. If there is a failure to resolve the issue at that meeting, then meetings shall be arranged, and steps shall be taken, in accordance with Steps 5 and 6 of the above procedure.

What this seems to mean is that there should be *no* individual negotiation, until the procedure has been exhausted. The only narrow exception is that provided in paragraph 18, which applies in the limited circumstances of 'an individual worker where that worker has agreed that the terms may be altered only by direct negotiation between the worker and the employer', in other words excluded from the process.

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<sup>29</sup> Cf *McGavin Toastmaster Ltd v Ainscough*, above n 24.

<sup>30</sup> TULRCA, Sch A1.

<sup>31</sup> A term memorably used by the late Brian Bercusson, albeit in the different context of working time regulation.

<sup>32</sup> SI 2000/1300.

<sup>33</sup> *Kostal UK Ltd v Dunkley*, UKEAT/0108/17/RN, at [47].

Although there was no statutory bargaining method of this kind operating in *Kostal*, this is nevertheless emblematic of what collective bargaining means for the personal relationship between the employer and its employees. The template procedure has six steps, and it is only when these steps are completed that it would be appropriate for personal contacts to be made with employees affected. Notably, the final step in the statutory procedure is to call on the services of ACAS, which operates for these purposes under statutory authority.<sup>34</sup> But while there was no statutory order agreed or imposed in *Kostal*, there was nevertheless a detailed procedure agreement similar in nature, the steps in which the employer pre-empted by going over the head of the union. It is true that the agreement does not appear to be legally binding, but it is also true that collective agreements were ‘juridified’ by the New Labour government’s legislation to reinforce compliance indirectly. One example is TULRCA, s 145D(4)(a) which increases the risk of liability under s 145B if there is evidence that the employer ‘did not wish to use, arrangements agreed with the union for collective bargaining’. Another example is TULRCA, s 238A (5) - (6) which may extend the protection from unfair dismissal in a strike where the employer has failed to comply with the terms of a procedure agreement for the purpose of resolving the dispute.

### **The Nature of Convention Rights**

The second concern identified above relates to the CA’s under-estimation in *Kostal* of the nature of Convention rights. As was pointed out by the CA, s 145B was part of a package of measures introduced to give effect to the *Wilson and Palmer* decision, which was narrowly read by the CA as being concerned with ‘the offering of inducements to employees to opt out of collective bargaining altogether’.<sup>35</sup> This, however, seems a very narrow reading of the decision, which is not consistent with the facts in *Palmer* (as explained below), or indeed with the wider observations of the Strasbourg Court to the effect that ‘domestic law did not prohibit the employer from offering an inducement to employees who relinquished the right to union representation, even if the aim and outcome of the exercise was to bring an end to collective bargaining and thus substantially to reduce the authority of the union, as long as the employer did not act with the purpose of preventing or deterring the individual employee simply from being a member of a trade union’.<sup>36</sup> And again, we find the Court censuring ‘United Kingdom law at the relevant time’, whereby ‘it was, therefore, possible for an employer effectively to *undermine* or frustrate a trade union's ability to strive for the protection of its members' interests’.<sup>37</sup>

These remarks were addressed in part at some of the aspects of the *Wilson* saga that are now long forgotten. Thus, as may yet be the fate of what will be known as the *Kostal* case, the *Wilson* case had a long history of success and failure in the courts. Mr. Wilson succeeded in his claim that the conduct of the employer violated what is now TULRCA, s 146 in the

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<sup>34</sup> TULRCA, ss 209, 210.

<sup>35</sup> *Kostal UK Ltd v Dunkley* [2019] EWCA Civ 1009, at [28].

<sup>36</sup> *Wilson and Palmer v United Kingdom*, above n 1, at [47].

<sup>37</sup> *Ibid*, at [48] (emphasis added). To undermine, as an alternative to frustrate, seems to connote a more incremental and gradual erosion of the trade union’s ability to protect its members’ interests.

Industrial Tribunal, only to lose in the EAT, and then to succeed in the CA, before going down in the House of Lords. Following the CA decision, the government intervened at a late stage in the parliamentary process with an amendment to the Trade Union Reform and Employment Rights Act 1993 (infamously known as the ‘Ullswater’ amendment).<sup>38</sup> This denied s 146 protection where ‘the employer's purpose was to further a change in his relationship with all or any class of his employees’, unless the employer's action was action that no reasonable employer could take. This was designed to facilitate termination or dilution of collective bargaining arrangements even if the consequence was to discriminate against trade union members who resisted the changes and were penalized as a result. The Ullswater amendment was, however, largely rendered functionally redundant by the HL decision in *Wilson and Palmer* that paying inducements in these circumstances did not constitute discrimination on trade union grounds against the workers who refused the inducements.<sup>39</sup>

These restrictions on freedom of association led to international scrutiny of the United Kingdom under a number of ratified treaties. These were the European Social Charter, and ILO Convention 98, both of which deal with collective bargaining. Some of the jurisprudence of the supervisory bodies is considered by the ECtHR in *Wilson and Palmer*,<sup>40</sup> though not all of it is discussed. Thus, in addition to the latter, the ILO Committee of Experts observed on several occasions that

The Committee notes the indication in the Government's report that section 13 was not introduced as an attack on trade union membership rights, but rather was intended to ensure that there was no obstacle to the ability of employers to change their negotiating arrangements and to make clear that the right not to be discriminated against on trade union membership grounds did not include or imply a right to have one's terms and conditions negotiated by collective bargaining. The Committee recalls that, when ratifying Convention No. 98, the Government undertook to take appropriate measures to encourage and promote the full development and utilization of machinery for the voluntary negotiation between employers and workers' organizations with a view to the regulation of terms and conditions of employment by means of collective agreements. The Committee considers that section 13 of the said legislation is likely to result in a situation wherein collective bargaining is easily and effectively discouraged instead of being encouraged. It therefore requests the Government to indicate in its next report any steps taken to review section 13 of the TURER and to amend it so that it will not result in the effective discouragement of collective bargaining in contravention with Article 4 of the Convention (Committee of Experts, 1995).<sup>41</sup>

With respect to TURER section 13 the Committee notes that this provision provides for protection against action short of dismissal on grounds related to union membership or activities. However, the Committee notes that the **provision allows an employer wilfully to discriminate on anti-union grounds as long as another purpose is to further a change in the relationship with all or any class of employees**. The Committee notes the Government's statement that the wording of the section helps make clear the important distinction between rights to trade union membership and the rights to collective bargaining, and thus serves a useful purpose and ought to be retained. The Government adds that the Employment Relations Act deals with the abuse arising where employers coerce workers to opt out of agreements. While noting the information and explanations provided by the Government, in the

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<sup>38</sup> Trade Union Reform and Employment Rights Act 1993, s 13.

<sup>39</sup> It was, however, retained until repealed by the Employment Relations Act 2004.

<sup>40</sup> *Wilson and Palmer v United Kingdom*, above n 1, at [30]-[37].

<sup>41</sup> ILO Committee of Experts, Report of Observation Adopted in 1995 at 83<sup>rd</sup> ILC Session (Geneva, 1996).

Committee's view, such a provision could be considered as tantamount to condoning anti-union discrimination, and the provisions of the Employment Relations Act do not redress this situation. The Committee, like the Committee on Freedom of Association, therefore, calls again on the Government to take steps to review and amend TURER section 13 (Committee of Experts, 1999).<sup>42</sup>

This is significant for two reasons. The first is the importance which the Strasbourg court attaches to other international human rights treaties in the interpretation of the ECHR, and to the jurisprudence of the bodies which supervise the operation of these treaties. While this was implicit in *Wilson and Palmer*, it was made much more explicit in the decision of the Grand Chamber in *Demir and Baycara v Turkey*.<sup>43</sup> That case – to which no reference was made by the CA in *Kostal* – was also notable for upgrading the standard of protection developed in *Wilson and Palmer*. Although a major breakthrough, the decision in *Wilson and Palmer* was based on existing jurisprudence in which ‘the Court has consistently held that although collective bargaining may be one of the ways by which trade unions may be enabled to protect their members' interests, it is not indispensable for the effective enjoyment of trade union freedom’.<sup>44</sup>

That is no longer the position, and this goes to the second reason, with the Grand Chamber in *Demir and Baycara* making clear that ‘having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the “right to form and to join trade unions for the protection of [one's] interests” set forth in Article 11 of the Convention’.<sup>45</sup> It is the duty of domestic courts to keep pace with this evolution. But even without the dramatic implications of *Demir and Baycara*, it is not clear how the CA could read s 145B as narrowly as it did. To do so would be to leave space in which it would be possible for an employer – by superficial or surface bargaining, and by failing to bargain in good faith – ‘wilfully to discriminate on anti-union grounds’,<sup>46</sup> and/or ‘effectively to undermine or frustrate a trade union's ability to strive for the protection of its members' interests’,<sup>47</sup> in breach of the obligations referred to above.

### **The Nature of the Mischief**

The third concern is that the narrow approach to Convention rights means in turn a very limited conceptualization of the mischief which *Wilson and Palmer* represented and with which s 145B is concerned. The problem of ‘union exclusion’ was more complex than the simplicity of the CA’s analysis permitted, the complexity revealed by the different facts in the conjoined *Wilson and Palmer* cases themselves. In *Wilson*, the withdrawal of union recognition for collective bargaining purposes was implemented across all newspapers under the Associated Newspapers umbrella, and for all purposes. The termination of recognition occurred contemporaneously

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<sup>42</sup> ILO Committee of Experts, Report of Observation Adopted in 1999 at 88<sup>th</sup> ILC Session (ILO, Geneva, 2000).

<sup>43</sup> [2008] ECHR 1345.

<sup>44</sup> *Wilson and Palmer v United Kingdom*, above n 1, at [44].

<sup>45</sup> *Demir and Baycara v Turkey*, above n 4, at [154].

<sup>46</sup> As condemned by the ILO Committee of Experts in 1999, above.

<sup>47</sup> To use the language of the Strasbourg court in *Wilson and Palmer v United Kingdom*, above n 1, at [48].

with the issuing of personal contracts and financial inducements. In *Palmer*, by contrast, the process of de-recognition was more gradual. Personal contracts were issued before recognition was eventually withdrawn in a later bargaining round. Hence, there is a need for great caution in talking of the ‘*Wilson* mischief’. The social phenomenon that the *Wilson and Palmer* litigation revealed was complex and variegated, and these features were elucidated in the academic literature on ‘union exclusion’ and ‘de-recognition’ practices that occurred in the 1990s.

This literature repudiates the idea that recognition/non-recognition is a simple binary matter. In fact, *Wilson* itself was an atypical case of the general phenomenon of de-recognition. The gradualist and cumulative erosion of union power in *Palmer* was more typical of de-recognition and union exclusion practices occurring during this period. De-recognition often took the form of a gradual attrition than a one-shot withdrawal of all recognition on a permanent basis. This might include the withdrawal of recognition on specific issues such as pay, while continuing to negotiate on more peripheral matters such as trade union facilities.<sup>48</sup> Or shifting away from serious negotiation in good faith to looser and more consultative practices. Furthermore, the attitudes of employers were often as complex as the practices of exclusion themselves. It was far too simplistic to equate union exclusion with overt employer hostility to unionization, or to equate hostility with a particular form of exclusion.<sup>49</sup>

Smith and Morton’s study of ‘union exclusion’ practices, including derecognition, highlighted the cumulative character of many of these practices. Derecognition would often be implemented partially rather than fully in a company, focused on specific geographical sites or specific grades and occupations. Smith and Morton described a ‘partial exclusion’ strategy,<sup>50</sup> whereby some form of recognition was accorded to the union but its scope and depth were reduced. This might be reflected in more consultative forms of engagement with union negotiators, or the withdrawal of some issues from the scope of joint regulation. Often, this ‘partial exclusion’ related to pay-setting. Many employers preferred to deal with pay on a more individualized basis through forms of performance-related pay. They might do so while retaining collective bargaining on other topics. The use of ‘personal contracts’ was an important mechanism for implementing this ‘procedural individualization’,<sup>51</sup> and this could still operate alongside collective bargaining on non-pay issues in circumstances of partial derecognition.

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<sup>48</sup> Indeed, in *Wilson* it appears that although the union lost all negotiating rights, it retained a health and safety role: *Associated Newspapers plc v Wilson*, above n 2, Lord Slynn referring to para 61 of the industrial tribunal’s decision.

<sup>49</sup> See for example, the study of derecognition in W. Brown, S. Deakin, M. Hudson and C. Pratten, ‘The limits of statutory trade union recognition’ (2001) 32 IRJ 180, 186: ‘Derecognition encompassed employer attitudes towards unions which ranged from outright hostility to tacit warmth. Within some companies this range of attitude was still evident among the managers themselves.’ Cf the evidence in *Kostal* where the absence of hostility tended to negate a finding of liability under s. 145B.

<sup>50</sup> G. Morton and P. Smith, ‘Union Exclusion and the Decollectivisation of Industrial Relations’ (1993) 31 BJIR 97, 101.

<sup>51</sup> Brown et al, above n 49, 184.

These modes of individualized engagement ‘aim to provide an institutional relationship between management and individual employees without the mediation of unions. On occasion, such procedures have been utilized to circumvent unions entirely — a form of temporary derecognition’.<sup>52</sup> Other studies of de-recognition during this period support the view that the phenomenon was not monotypic. In their important study of union de-recognition 1988-1994, Gall and McKay traced the how the erosion of union influence often occurred in partial ways.<sup>53</sup> And in 2001, in a study of union recognition in light of the recently introduced statutory recognition procedure, Brown, Deakin, Hudson and Pratten observed that

‘the status granted to a union by an employer is not a black-and-white issue. It is...a matter of degree. The depth of trade union recognition granted by an employer depends, in part, upon the scope of bargaining, which is another way of describing the range of issues on which bargaining is permitted.’<sup>54</sup>

In our view it is quite clear that s 145B is addressed to the mischief in the round and not to the narrow characterization of the CA that it was concerned only with ‘the offering of inducements to employees to opt out of collective bargaining altogether’.<sup>55</sup> To confine s 145B to only some forms of union exclusion would not make much sense, particularly in view of the different forms of exclusion presented even in the Strasbourg court’s seminal decision.

#### **IV Legislative History, Legislative Structure and Legislative Effects**

With a clearer understanding of the context, we now move to consider the language used by Parliament in s 145B and s 145D respectively, the provisions of which must be read together. We begin with the immediate legislative history of these provisions to show how the movement was away from a regime over-indulgent to the possibility of individual negotiations, to a situation that was more compatible with a collective bargaining regime. We also consider how, when read fully and carefully, the sections do not lend themselves to the narrow interpretation of the CA. Finally, we point out that the interpretation favoured by the EAT does not create a union veto, but on contrary encourages employers to follow agreed procedures, while preserving to the employer the ultimate power to dismiss and rehire with little legal risk to itself.

#### **Relevant Legislative History**

The legislative response to *Wilson v UK* was taken forward through the more general review of the Employment Relations Act 1999, which was being led by the Department of Trade and

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<sup>52</sup> Morton and Smith, above n 50, 102.

<sup>53</sup> G. Gall and S. McKay, ‘Developments in Union Recognition and Derecognition in Britain, 1988-1994’ (1994) 32 BJIR 437.

<sup>54</sup> Brown et al, above n 49, 181-182.

<sup>55</sup> *Kostal UK Ltd v Dunkley* [2019] EWCA Civ 1009, at [28].

Industry (DTI).<sup>56</sup> The initial framing of the regulatory problem in the ‘DTI Review of the Employment Relations Act 1999’ suggested narrow statutory parameters for a ‘Wilson’ provision. The Review was anxious to maintain space for ‘individualised’ contracts and flexibility, particularly on issues of pay, while respecting the judgment in *Wilson v UK*. To this end, it proposed that ‘the entering of individualised contracts would not constitute unlawful union discrimination against those union members not offered them, as long as there was no inducement to relinquish union representation and no pre-condition in the contracts to relinquish it.’<sup>57</sup>

Hence, this envisaged a very wide latitude for individual freedom of contract, provided that there was no explicit ‘pre-condition’ in the contract to relinquish trade union representation. By the time of the ‘Government Response’ to the DTI Review, the position had shifted very significantly. In particular, the Response paper envisaged the need for broader statutory regulation *beyond the specific facts* in *Wilson* to include the following (the substance of which is very close to the eventual s 145B):

‘offers should be made unlawful whose *main purpose* is to induce a group of workers, who belong to a recognised union, to accept that their terms of employment should *be determined outside collectively agreed procedures*. The result is that it would be unlawful for an employer to offer an inducement to the union members in such a group to have their terms of employment determined *outside the framework set by any existing collective bargaining arrangements*. This limits the scope of employers to offer individualised contracts.’<sup>58</sup>

This situation, which is treated as an extension beyond the specific facts in *Wilson* but nevertheless encompassed by its broad mischief, is concerned with the bypassing of collective procedures provided for in ‘existing collective bargaining arrangements’. There is nothing here about permanent exclusion of collective bargaining. It is entirely consistent with the broader episodic view of union exclusion whereby the union’s position is undermined cumulatively by ignoring the collectively agreed procedures from time to time. This cumulative view of the mischief is further supported by the DTI’s concern to target the purpose of ‘undermining or narrowing the collective bargaining arrangements.’<sup>59</sup>

The concern to preserve some contractual flexibility did not disappear, but it was formulated more narrowly in terms of ‘a freedom to enter individualised contracts designed to reward or retain key workers.’<sup>60</sup> This is far less solicitous of contractual flexibility than the wider position in the DTI Review. It limits the exception to situations where specific individuals need to be rewarded or retained. This is accordingly less permissive of other types of pay flexibility, such as ‘across the board’ merit or company performance payments as a component of pay settlements, particularly in circumstances where the ‘main purpose’ was to avoid the agreed

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<sup>56</sup> DTI, *Review of the Employment Relations Act 1999* (February 2003).

<sup>57</sup> *ibid* 3.13.

<sup>58</sup> DTI, *Review of the Employment Relations Act 1999: Government Response to the Consultation* (December 2003) 3.12 (*emphasis added*).

<sup>59</sup> *ibid*.

<sup>60</sup> *Ibid*.



bargaining procedures. Indeed, this type of ‘non-individualised’ merit pay was precisely at issue in *Kostal* itself. There is nothing in this history to s. 145B to support the CA’s concern to provide carte blanche to the managerial prerogative and the employer’s freedom to contract individually.

During the legislative progress of the Employment Relations Bill, this provision attracted sustained attention from the Joint Committee on Human Rights (JCHR). In the thirteenth report, the JCHR noted the absence of a freestanding trade union right in the Bill and it regarded this as a violation of the Article 11 right.<sup>61</sup> This was a significant omission, given the ECtHR’s recognition in *Wilson v UK* that the union’s rights had also been violated in that case. There was also a discussion of the ‘sole or main purpose’ liability test, and whether this was sufficiently robust to address violations of Article 11.<sup>62</sup> The JCHR was evidently persuaded by the DTI’s Memorandum to the JCHR, which was set out in Appendix 2 to the thirteenth report. The reasoning in paragraphs 30 to 35 of the DTI Memorandum makes it very clear that the point of the ‘sole or main purpose’ was to give some flexibility to retain or reward individual staff who were particularly valuable to the business. There was absolutely no suggestion that ‘sole or main purpose’ was designed to provide a gateway out of collective bargaining for general pay settlements not targeted at key individuals in the organisation, as was the situation in *Kostal* itself.

### **Structure of Section 145B**

After a long process of deliberation and adjustment, the legislative response to *Wilson and Palmer v United Kingdom* culminated in s. 145B, inserted into TULRCA 1992 by the ERA 2004. As we have seen, the CA adopted a narrow reading of s 145B, so as to confine it to the specific facts in *Wilson*. To the extent that the ERA 2004 reforms extended beyond the narrow construction of *Wilson’s* mischief, the CA argued that this extension was reflected in other statutory reforms such as s. 145A or the inclusion of ‘union services’ in sections 146 and 152.<sup>63</sup> This restricted view of s. 145B is unsupportable on its face, not least because s. 145B explicitly includes situations where only certain terms (rather than all terms) are taken out of collective bargaining, a form of ‘partial’ rather than ‘full’ derecognition that is obviously wider than the specific factual scenario in *Wilson and Palmer*.

For context, however, we would draw attention to the fact that there is no suggestion that the issuing of offers or the imposition of a ‘detriment’ for use of union services in sections 145A and 146 is restricted to situations where there is a ‘sole or main purpose’ to prevent or deter the use of those services on a permanent basis. It is sufficient for liability that there be a ‘sole or main purpose’ that use of services be prevented or deterred in a specific instance. It would be illogical to read a permanence restriction into ss. 145A and 146. It would be equally illogical

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<sup>61</sup> Parliamentary Joint Committee on Human Rights, Thirteenth Report of Session 2003-04, HL 102/HC 640 (2003-4), paras 2.18-2.19.

<sup>62</sup> *Ibid* 2.20-2.21.

<sup>63</sup> *Kostal UK Ltd v Dunkley* [2019] EWCA Civ 1009, at [47]

and indefensible to treat the service of collective bargaining differently to other union services by restricting s. 145B to permanent exclusions, particularly so given its status as a fundamental right now under Article 11. As a matter of interpretation, the CA's restrictive reading is unjustified in the case of s 145B for the following reasons.

The first relates to an elaboration of purpose in s 145D, which in turn elucidates the mischief that is being targeted in s 145B. There are two features of particular importance:

- TULRCA, s 145D supports an inference of a prohibited 'sole or main' purpose 'that when the offers were made the employer had recently changed or sought to change, *or did not wish to use, arrangements agreed with the union for collective bargaining.*'<sup>64</sup> The italicized portion identifies bargaining behaviour where the employer bypasses agreed procedures for collective bargaining. This formulation in s. 145D (4) (a) would be elaborate and abstruse if s 145B were simply focused on the extreme situations of permanent exclusion, reflected in hostility to the union, envisaged by *Bean LJ*.
- TULRCA, s145D undermines an inference of prohibited purpose where 'the offers were made only to particular workers, and were made with the sole or main purpose of rewarding those particular workers for their high level of performance or of retaining them because of their special value to the employer'. This reflects the more stringent approach to pay flexibility in the Government Response to the DTI Review and the DTI's Memorandum to the JCHR, permitting individualised rewards for 'particular workers' on the basis of performance and retention. It does not include other varieties of performance-related pay within its ambit, such as the generalized 'merit' component of the pay offer in *Kostal*.

The second reason why a restrictive reading is unjustified is that to construe s 145B in the manner of the CA would be to leave a notable gap in the legislative protection which would be hard to reconcile with the *Wilson and Palmer* decision. This is very unlikely to have been intended by the government. Suppose an employer decided as a matter of spite to postpone pay negotiations for a year because the union had organized industrial action on another matter earlier. In the year in question the employer decides to negotiate annual salary increases on an individual basis, but commits to return to the bargaining table the following year. A shop steward refuses to take the money and suffers a detriment as a result. There is clear anti-union animus, with a purpose or effect that will 'undermine or frustrate [the] trade union's ability to strive for the protection of its members' interests'.<sup>65</sup> This is not far removed from the *Wilson* case, yet there would be no remedy under either s 145B or s 146, in view of (i) the narrow reading of trade union membership by the HL in *Wilson*, and (ii) the provision of s 145B(4) that collective bargaining is not a union service. Such a state of affairs appears to fall four square within *Wilson* para 47 (quoted in full by the CA), if the word **termination** in italics were replaced by the word **suspension**:

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<sup>64</sup> Section 145D (4) (a) (emphasis added).

<sup>65</sup> *Wilson and Palmer v United Kingdom*, above n 1, at [48].

In the present case, it was open to the employers to seek to pre-empt any protest on the part of the unions or their members against the imposition of limits on voluntary collective bargaining, by offering those employees who acquiesced in the *termination* of collective bargaining substantial pay rises, which were not provided to those who refused to sign contracts accepting the end of union representation. The corollary of this was that United Kingdom law permitted employers to treat less favourably employees who were not prepared to renounce a freedom that was an essential feature of union membership. Such conduct constituted a disincentive or restraint on the use by employees of union membership to protect their interests.

For both of these reasons, we believe that the statutory formulation contemplates ongoing collective bargaining arrangements, and gradualist strategies that undermine those arrangements through attrition rather than through the nuclear option of full derecognition. Otherwise the protection would be anomalous and incomplete: in terms of de-unionisation strategies referred to above, it would apply to total de-recognition and the withdrawal of recognition on specific topics (such as wages, hours and holidays), but not strategies of suspension which by a process of attrition seek deliberately to weaken the position of the union, and the confidence of members in the ability of the union to represent them. Given the context and the nature of the drafting, it is a strain to interpret s 145B to exclude such activity. We would also note that apart from undermining the right of workers not to suffer anti-union inducements, the situation we have described also violates the right of the union, which the Strasbourg court held existed in addition to and independently of the rights of workers. While some may question whether a human rights convention should confer rights on legal as well as natural persons, it is nevertheless a controversial feature of the 2004 Act that it did not respond to this feature of the decision (even though other aspects of the Act on unfair practices empowered the union exclusively to deal with anti-union conduct targeted at individuals).<sup>66</sup> The Art. 11 right of the union invites a purposive approach to construction of a measure nevertheless effectively enforceable only derivatively by its individual members.

### **The Trade Union Veto**

The prospect of a ‘union veto’ exercised the CA greatly. Bean LJ reasoned that the EAT’s broad interpretation of s 145B, to include episodic as well as permanent exclusion, was tantamount to giving the union a veto over any contractual changes in the employment relationship. This was anathema to the CA. It is worthwhile pausing to reflect upon what this reveals about the values and assumptions of the English judicial mindset. In the German codetermination model, for example, a wide range of social matters are subject to ‘codetermination’ by the works council. Codetermination means that ‘management cannot take any decisions without the consent of the works council.’<sup>67</sup> The veto is enshrined in the institutional structure of the enterprise. It contrasts with the jealous protection of the managerial prerogative in English law, a legal value that suffuses the common law and which in *Kostal*

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<sup>66</sup> TULRCA 1992 Schedule A1, para 27A

<sup>67</sup> M. Weiss and M. Schmidt, *Labour Law and Industrial Relations in Germany* (Kluwer, Netherlands, 2008) 236.

shaped the entire process of statutory interpretation. But it did so incorrectly: there is no veto in s 145B.

What a purposive interpretation of s 145B does is to acknowledge that recognition of a trade union is a serious and solemn commitment to *joint regulation*,<sup>68</sup> which alters the nature of the employment relationship in the enterprise for reasons explained above. It is true that we do not *prohibit* individual bargaining under our collective bargaining regime in this country. Such conduct is often deemed in the United States and Canada to be an unfair labour practice, given its tendency to undermine the exclusivity of the collective bargaining representative.<sup>69</sup> But although it does not prohibit individual bargaining in a collective bargaining environment, s 145B nevertheless appears to *permit* it only in exceptional circumstances such as individualised merit pay or where the bargaining procedures have been exhausted. This, however, still does not give the union a veto, as the curious provision in s. 145B (4) preserves the ultimate employer counter-measure where there is a bargaining impasse. This provision – encountered above – provides that collective bargaining is not included within ‘union services’ in the detriment and dismissal provisions in s. 146 and s. 152. On its face, this is very odd as it appears to leave collective bargaining excluded from the scope of ‘automatically unfair’ trade union dismissals in s. 152. The only way to make sense of this exclusion is as a measure designed to ensure that the dismissal and re-engagement of employees on revised terms in a bargaining impasse does not constitute an ‘automatically unfair’ reason under s. 152. This – the nuclear option frequently used to deal with resistance to change – allows the employer to argue that the dismissals are fair on the basis of the statutory test,<sup>70</sup> thereby potentially requiring some obligation to justify the unilateral variation of contractual terms.

So while we agree with Bean LJ that Parliament was unlikely to be seeking to *promote* such an outcome,<sup>71</sup> s 145B (4) means that it is undeniable that Parliament was seeking to permit such an outcome. Otherwise, the inclusion of s 145B (4) would make no sense at all. The other side of the coin is that if the employer is free to pre-empt the union by going over its head at the first sign of resistance, there would be no incentive on the part of the employer to comply with procedures voluntarily entered into – as also happened in the *Kostal* case. The structure of s 145B and s 145D is such that an employer is expected to use ‘arrangements agreed with

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<sup>68</sup> For the classic paper on collective bargaining as joint regulation, see Allan Flanders, ‘Collective Bargaining: A Theoretical Analysis’ (1968) 6 BJIR 1.

<sup>69</sup> On the USA, see the seminal US Supreme Court decision in *J.I. Case Co v NLRB*, 321 US 332, at 337-339. Note that we also prohibit such conduct as an unfair practice (and give the union the exclusive power to enforce it) but only during a recognition campaign under the statutory ballot procedure in Schedule A1 (TULRCA, Sch A1, para 27A). See A. Bogg, ‘The Mouse that Never Roared: Unfair Practices and Union Recognition’ (2009) 38 ILJ 390 for more detailed consideration of our relatively undeveloped unfair labour practice system.

<sup>70</sup> *Catamaran Cruisers Ltd v Williams* [1994] IRLR 384. A dismissal in these circumstances would constitute a ‘redundancy’ within the scope of the redundancy consultation procedures under s. 188 TULRCA 1992, as s. 195 provides that ‘references to dismissal as redundant are references to dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related.’ Where the numerical thresholds of 20 or more employees at a single establishment are reached, this will trigger consultative obligations under s. 188. Under this provision, the union has no ‘veto’ either, but the employer is under a duty to consult with a view to reaching an agreement with the affected employees’ representatives. There is a risk that this right is also undermined by the impact of the CA decision in *Dunkley*.

<sup>71</sup> *Kostal UK Ltd v Dunkley* [2019] EWCA Civ 1009, at [43].

the union for collective bargaining’,<sup>72</sup> before any steps are taken directly to speak to employees individually. As we have seen, this also reflects the position in the statutory bargaining model under Schedule A1. The purpose here presumably is that exhaustion of the procedures may help to resolve the dispute between the parties, failing which the offices of ACAS may be called upon for the purposes of collective conciliation. The employer in *Kostal* had not bargained to an impasse in accordance with its own agreed dispute resolution procedure in the recognition agreement with UNITE. It went directly to the workforce once its opening offer had been rejected in a membership ballot. While we hesitate to engage in counterfactual speculation, we anticipate that the ET might have taken a very different view of s 145B liability had the employer complied with its own dispute resolution procedure before going directly to the workforce. In this situation, where an employer complies with its own bargaining procedure, s 145D (4) (a) could support a finding that it was not the employer’s ‘sole or main purpose’ that the terms would no longer be determined by collective agreement.

In this way, s. 145B provided the only meaningful statutory constraint on managerial prerogative in the circumstances of *Kostal*. Its meagre interpretation by the CA has left it shorn of protective rigour. The limitations of the CA interpretation are acute, and this is reflected in the following two examples:

**The bank holiday bonanza:** The CA provided the example of a situation where an employer proposed bank holiday working to the trade union, and it refuses the trade union’s proposal of triple rate for pay on a forthcoming bank holiday. In order to get the work done, it makes a direct offer to workers inviting them to work at double time. According to Bean LJ, this would involve a breach of s. 145B if the EAT’s interpretation was accepted. The penal nature of the remedy gives the union an effective veto over the proposed change to working practices.

In our view, it is not at all clear that this example constitutes a breach of s. 145B on the EAT’s broader interpretation. We do not know enough about the facts Bean LJ had in mind to make that determination. In a situation where the employer had exhausted the negotiation procedures provided for in the recognition agreement, hence this was a genuine impasse at the end of the agreed process, s. 145D might suggest that this was not a prohibited purpose. Moreover, the enhanced pay is being offered to specific individuals on the basis of their performance (i.e. working on the bank holiday). Again, s. 145D indicates that this is less likely to be treated as a prohibited purpose under s. 145B.

- **Covid19 caution:** The employer negotiates on pay and other conditions of employment with the trade union. In response to the economic situation caused by Covid19, it writes to the trade union saying that it will not negotiate on pay and working time until the economic situation has improved. The employer has a sincere willingness to resume collective negotiations at some unspecified future point if there is a sufficient

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<sup>72</sup> TULRCA, s 145D(4)(a).

improvement in the economic situation. It will continue to engage in collective negotiations about facilities time with the trade union in the meantime. The employer then proceeds to make pay offers to the workforce directly, which involve a substantial deterioration of pay and conditions.

This represents a scenario that is unaccounted for in the CA's elaboration of different possible facts arising under s. 145B.<sup>73</sup> It is neither a permanent exclusion of collective bargaining on pay, nor is it a temporary exclusion of collective bargaining on pay in the specific bargaining round. It involves the suspension of collective bargaining, for an unspecified and indefinite duration, with the possibility of resumption where an external condition is satisfied (i.e. the economic situation improves). On the CA's narrow interpretation, this falls outside of s. 145B because it is not a permanent exclusion. The effect of this is to leave the union and the workers without any redress under the statute where collective bargaining is suspended for an undefined period.

## V Conclusion

In our view, the CA's interpretation of s 145B is seriously flawed, having regard to broad contextual questions, as well as more narrowly focussed questions of statutory interpretation. Before concluding, we draw attention to an observation of the CA in support of its narrow interpretation. This – like observations made by other members of the CA in other recent labour cases<sup>74</sup> - appears to rest upon an appeal to a distorted account of 'collective laissez-faire' to justify judicial abstention in labour law cases. Collective laissez-faire was the dominant (though contested) ideology of mid-twentieth century UK labour law, and it proposed a limited view of the judicial role.<sup>75</sup> The employment contract was to be regulated through autonomous collective bargaining between trade unions and employers, supported by positive auxiliary 'props' to collective bargaining and a statutory 'floor of rights'.<sup>76</sup> The circumscription of the judicial role in collective laissez-faire was based on the legitimate concern that the common law was liable to disrupt the worker-protective framework created through administrative intervention, statute, and voluntary collective bargaining. But what we see in *Kostal* is a misuse of ideas loosely associated with 'collective laissez-faire' to justify judicial abstention in circumstances where such abstention is unwarranted.<sup>77</sup> The irony of this is particularly withering where fragments of collective laissez-faire, gleaned perhaps from an old Industrial Law syllabus, are being harnessed to undermine UK law's already fragile legal support for collective bargaining.

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<sup>73</sup> *Kostal UK Ltd v Dunkley* [2019] EWCA Civ 1009, at [50]-[52] where Bean LJ sets out three types of s. 145B case. Our example represents a fourth type of case.

<sup>74</sup> For another example of this general set of reflections on the limited nature of the judicial role in labour law, see the dissenting judgment of Underhill LJ in *Uber v Aslam* [2018] EWCA Civ 2748.

<sup>75</sup> *Ford Motor Co Ltd v AUEFW* [1969] 2 QB 303.

<sup>76</sup> K. W. Wedderburn, *The Worker and the Law* (Penguin, Harmondsworth, 1965).

<sup>77</sup> For a general assessment of 'collective laissez-faire', see Lord Wedderburn, 'Change, Struggle and Ideology in British Labour Law', in Lord Wedderburn, *Labour Law and Freedom* (London, Lawrence & Wishart, 1995) 1

This is notable in Bean LJ's response to the EAT's statement that an employer acting rationally and reasonably is less likely to be found to have acted with a prohibited purpose under s145B. Bean LJ observed that 'it has surely been settled law, at any rate since the 1980s, that courts and tribunals should not try to decide which side in a trade dispute is behaving reasonably and rationally'.<sup>78</sup> This is undoubtedly true. The value of judicial neutrality in industrial disputes has been an enduring legacy of collective laissez-faire,<sup>79</sup> punctuated only by embarrassing episodes such as Lord Donaldson's ill-fated tenure at the National Industrial Relations Court during the Industrial Relations Act 1971 period.<sup>80</sup> But all of this is beside the point in *Kostal*, where the court is simply required to make inferences from the facts to determine whether the employer has made offers with the prohibited 'sole or main purpose'. In other words, the task of the court is to apply the protective statute to the facts, where liability is dependent upon a specified mental state, using the rules of evidence provided for in s145D. It must do so in accordance with the fundamental human rights of the trade union and its members under Art. 11. This has nothing whatsoever to do with judges taking sides in industrial disputes or trespassing beyond their legitimate remit into voluntary collective bargaining. It has everything to do with their basic constitutional duty to interpret and apply the statute in a much more complex and challenging legal environment for trade unions than the one we inhabited in the past.

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<sup>78</sup> *Kostal UK Ltd v Dunkley* [2019] EWCA Civ 1009, at [43].

<sup>79</sup> See O. Kahn-Freund, 'Labour Law', in O Kahn-Freund, *Selected Writings* (London, Stevens & Sons, 1978) 21-24.

<sup>80</sup> Lord Donaldson, 'Lessons from the Industrial Relations Court' (1975) 91 LQR 63, 68.