EMPLOYMENT TRIBUNALS

Claimants **Respondent**

1. Glenn Robert SMITH **v** London Ashford Airport Limited
2. Oliver DOWLE
3. Benjamin HART
4. Patrick HUGHES
5. Timothy Ian MASKENS
6. Nichola Jayne MERCHANT
7. Nathan MILLARD
8. Oliver SHEPPARD
9. Robin WILLIAMS

Heard at: Remote CVP **On:** 25 March 2024

Before: Employment Judge R Wood

Appearances
For the Claimants: Miss C Ibbotson (Counsel)
For the Respondent: Mr J-P Van Zyl (Solicitor)

JUDGMENT

1. The claim of the first Claimant is allowed under section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 in relation to the offer of 21 February 2023 and 1 April 2023.

2. The Respondent is thereby ordered to pay to the first Claimant the sum of **£9,108.**

3. The claim of the second Claimant is allowed under section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 in relation to the offer of 21 February 2023 and 1 April 2023.

4. The Respondent is thereby order to pay to the second Claimant the sum of **£9,108**.

5. The claim of the third Claimant is allowed under section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 in relation to the offer of 21 February 2023.

6. The Respondent is thereby order to pay to the third Claimant the sum of **£4,554**.

7. The claim of the fourth Claimant is allowed under section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 in relation to the offer of 1 April 2023.

8. The Respondent is thereby order to pay to the fourth Claimant the sum of **£4,554**.

9. The claim of the fifth Claimant is allowed under section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 in relation to the offer of 21 February 2023 and 1 April 2023.

10. The Respondent is thereby order to pay to the fifth Claimant the sum of **£9,108**.

11. The claim of the sixth Claimant is allowed under section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 in relation to the offer of 21 February 2023 and 1 April 2023.

12. The Respondent is thereby order to pay to the sixth Claimant the sum of **£9,108**.

13. The claim of the seventh Claimant is allowed under section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 in relation to the offer of 21 February 2023 and 1 April 2023.

14. The Respondent is thereby order to pay to the seventh Claimant the sum of **£9,108**.

15. The claim of the eighth Claimant is allowed under section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 in relation to the offer of 21 February 2023 and 1 April 2023.

16. The Respondent is thereby order to pay to the eighth Claimant the sum of **£9,108**.

17. The claim of the ninth Claimant is allowed under section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 in relation to the offer of 21 February 2023 and 1 April 2023.

18. The Respondent is thereby order to pay to the ninth Claimant the sum of **£9,108**.

REASONS

Claims and Issues

1. Page numbering referred to in square brackets in this decision are to pages in the bundle, unless otherwise stated.

2. The Claimants were employees of the Respondent, London Ashford Airport limited. More specifically, they were traffic controllers at the airport. The Claimant's were all members of the trade union, 'Prospect' ("the union"), which is a trade union within the meaning of section 5 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the Act"). The union was voluntarily recognised by the Respondent for collective bargaining purposes in relation to pay and holiday further to a written recognition agreement dated 31 May 2018 ("the agreement"). I will return to the precise terms of the agreement below.

3. In summary, during the course of late 2022 and early 2023, the union and the Respondent entered into discussion with a view to seeking agreement about pay related issues for the union's members. What discussions that did take place were unsuccessful. No agreement in relation to pay was reached. On 16 January 2023, the Respondent issued notice of its intention to terminate the agreement. On 21 February 2023 and/or 1 April 2023, the Respondent corresponded directly with it's staff, including the Claimants, allegedly making offers in respect of pay. The Claimants allege that each of these were offers for the purposes of section 145B of the Act.

4. The Respondent resists the claims. It asserts that the second of the alleged offers was not an offer at all, but simply the implementation of the offer of 21 February 2022. It was not an contractual offer in its own right. Moreover, it is denied any offers by the Respondent had the 'prohibited result' (see below) and/or that even if they did have that effect, that it was not the Respondent's sole or main purpose in making the offers that the workers' terms of employment, or any of those terms, would not (or would no longer) be determined by collective agreement negotiated by or on behalf of the union.

Procedure, Documents and Evidence Heard

5. The Hearing took place on 25 March 2024. The claims were heard via a remote CVP hearing. I first of all heard testimony from the Claimants' witnesses: Mr Steve Jary, the union's National Secretary with responsibility for Aviation; and from Mr Benjamin Hart, on of the Claimants himself. The parties agreed that it was not necessary that I hear oral testimony from all of the Claimants. I then heard evidence on behalf of the Respondent from Mr David Hainsworth (general manager). Each of the aforesaid witnesses adopted their witness statements and confirmed that the contents were true. We also had an agreed bundle of documents which comprises 160 pages. I also heard helpful submissions from Miss Ibbotson and Mr Van Zyl. Miss Ibottson had also provided a written skeleton argument.

6. In coming to my decision, I had regard to all of the written and oral evidence submitted, even if a particular aspect of it is not mentioned expressly within the decision itself.

Legal Framework

7. The relevant legislation reads as follows:

> "*145B*
> *(1) A worker who is a member of an independent trade union which is recognised, or seeking to be recognised, by his employer has the right not to have an offer made to him by his employer if–*
>
> *(a) acceptance of the offer, together with other workers' acceptance of offers which the employer also makes to them, would have the prohibited result, and*
>
> *(b) the employer's sole or main purpose in making the offers is to achieve that result.*
>
> *(2) The prohibited result is that the workers' terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union.*
>
> *…..*
>
> *(5) A worker or former worker may present a complaint to an employment Tribunal on the ground that his employer has made him an offer in contravention of this section.*
>
> *145D*
>
> *…..*
>
> *(2) On a complaint under section 145B it shall be for the employer to show what was his sole or main purpose in making the offers.*
>
> *….*
>
> *(4) In determining whether an employer's sole or main purpose in making offers was the purpose mentioned in section 145B(1), the matters taken into account must include any evidence–*
>
> *(a) 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,*

(b) that when the offers were made the employer did not wish to enter into arrangements proposed by the union for collective bargaining, or

(c) that 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."

8. In *Kostal UK Ltd v Dunkley and ors [2021] UKSC 47* the Supreme Court explained the proper interpretation of the "prohibited result" as defined in section 145B(2):

"65. I think it is possible to read section 145B in a way which gives meaning and effect to this significant feature of its language and does so in a way which is compatible with article 11. Once it is recognised that the question whether the acceptance of offers would have the prohibited "result" is a question of causation, it is evident that the state of affairs described in subsection (2) cannot be regarded as the "result" of acceptance of the offers if it would inevitably have occurred anyway, irrespective of whether the offers were made and accepted. In that case there would be no causal connection between the presumed acceptance of the offers and the state of affairs described in subsection (2). More specifically, in order for offers made by the employer to workers to be capable of having the prohibited result, there must be at least a real possibility that, if the offers were not made and accepted, the workers' relevant terms of employment would have been determined by a new collective agreement reached for the period in question. If there is no such possibility, then it cannot be said that making the individual offers has produced the result that the terms of employment have not been determined by collective agreement for that period. In other words, it is implicit in the definition of the prohibited result that the workers' terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union when they otherwise might well have been determined in that way. …

67. Likewise, where there is a recognised union, there is nothing to prevent an employer from making an offer directly to its workers in relation to a matter which falls within the scope of a collective bargaining agreement provided that the employer has first followed, and exhausted, the agreed collective bargaining procedure. If that has been done, it cannot be said that, when the offers were made, there was a real possibility that the matter would have been determined by collective agreement if the offers had not been made and accepted. What the employer cannot do with impunity is what the Company did here: that is, make an offer directly to its workers, including those who are union members, before the collective bargaining process has been exhausted.

> *68. It was argued on behalf of the Company that it may be difficult to say with certainty whether the collective bargaining process has been exhausted in any particular case and that this interpretation therefore exposes employers to risks which they cannot afford to take and hence would unreasonably restrict their freedom of negotiation. I do not accept this. In my view, employers have two means of protection against that risk. The first is to ensure that the agreement for collective bargaining made with the union clearly defines and delimits the procedure to be followed. The Recognition Agreement made in this case does this sufficiently. I have quoted Stage 4 of the agreed 6 procedure at para 5 above. If in the present case, following the meeting specified at Stage 3, the Company had written to the union representatives stating that the Company did not agree to refer the matter to ACAS, it is clear from the terms of Appendix 1 that the procedure would at that point have been exhausted. A second level of protection is provided by the requirement of section 145B(1)(b) that the section will not be contravened unless the employer's sole or main purpose in making the offers is to achieve the prohibited result. If the employer genuinely believes that the collective bargaining process has been exhausted, it cannot be said that the purpose of making direct offers was to procure the result that terms will not be determined by collective agreement when that otherwise might well have been the case.*
>
> *….*
>
> *71. I conclude that, on the proper interpretation of section 145B of the 1992 Act, an offer would have the prohibited result if its acceptance, together with other workers' acceptance of offers which the employer also makes to them, would have the result that the workers' terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union when, had such offers not been made, there was a real possibility that the terms in question would have been determined by collective agreement. That must ordinarily be assumed to be the case where there is an agreed procedure for collective bargaining in place which has not been complied with.*

9. *Kostal* was applied by the EAT in *Ineos Infrastructure Grangemouth Ltd v Jones & ors and Ineos Chemicals Grangemouth Ltd v Arnott & ors [2022] EAT 82*. Evidence of a "prohibited purpose" under s. 145D(4)(a) and (b) was the fact that *Ineos* had given notice to terminate the collective bargaining agreement when it made the offers directly to the Claimants and an email stating, "*we have to engineer a way to get rid of Unite*".

Findings

10. Based on the evidence that I heard and read, the Tribunal makes the following primary findings of fact relevant to the issues to be determined.

11. In terms of the factual events relevant to this case, there was little dispute. Of course, there were significant divergences as to the appropriate interpretation of these events in the context of the relevant statutory framework.

12. On 31 May 2018, the Respondent entered into the written recognition agreement with the union [48]. The Agreement had been negotiated with the Respondent's predecessor, SafeSkys Ltd, which the Respondent accepts they then inherited via a TUPE transfer in November 2020. Mr Hainsworth was questioned about this.

13. Section C of the Agreement sets out the collective bargaining machinery and says, insofar as is relevant [49]:

    'Pay and Holiday

    1. In September (or nearest working day thereafter) of each year, the Company and the Union of the Bargaining Unit will meet to discuss Pay and Holiday.

    2. The JNCC shall meet at least once a year and shall have responsibility for managing the formal negotiation of any changes to the employee's Pay and Holiday.

    3. In the event that the JNCC does not reach an agreement following any meeting relating to Pay and Holiday regarding the Bargaining Unit, the parties can agree to appoint and attend a further meeting with an ACAS conciliator within 21 working days.'

14. It was unchallenged that the Agreement therefore set out the Respondent's commitment to negotiate with the union on pay and holiday (not merely to consult with it), and to do so each year from September. If those negotiations were not successful, then there was the option of referring matters to ACAS conciliation.

15. I note in passing that when the relevant matters took place in 2022/23, it was in effect the first time that the Respondent had engaged with the union under the terms of the agreement. Save for three of the Claimants who had been the subject of pay increases to keep them in line with the national minimum wages increases, none of the Claimants had had a pay increase since 2018.

16. I accept Mr Jary's evidence on the question of those Claimant's identified by the Respondent as occupying a 'minimum wages role'. He explained that this usually implies that the rate for the job tracks the statutory national minimum wage, and is never expected to rise above it. I accept his testimony that none of the Claimant's were employed on this basis but had

been employed at salary levels above those rates. However, as a result of static wages since 2018, this group's pay had been caught up by national minimum wages increases.

17. In accordance with the agreement, Mr Jary approached the Respondent in September 2022 to begin pay negotiations. At a meeting on 22 September 2022, he was told that the Respondent would be in a position to discuss the September 2022 pay review in mid-November, following discussions with the owner.

18. On 14 November 2022, Mr Jary again requested a meeting. Mr Hainsworth replied on 21 November 2022 in an email confirming that the meeting with the owner had occurred but that, '*… before any pay award can be agreed, business performance for 2022 & projections for 2023, need to be assessed. This will take place in the first quarter of 2023. Accordingly, I would be prepared to discuss the matter further in the second quarter of next year.*' It was common ground that in this context, the second quarter was April-June 2023. Mr Jary rejected this proposed timetable but was 'rebuffed' by Mr Hainsworth.

19. On 13 January 2023, Mr Jary again attempted to initiate negotiations about pay under the agreement [58]. This included raising the possibility of seeking assistance from ACAS.

20. In an email dated 16 January 2023 [59], Mr Hainsworth reiterated his previously stated position, and also attached a letter [60] which gave the union 6 months' notice of termination of the agreement further to clause E3. The notice was said to expire on 18 July 2023. It further stated that '*… this letter has been sent directly to you and not the employee Air Traffic Controllers so as not to unlawful induce those employees that comprise the Bargaining Unit.*'

21. On 21 February 2023, the Respondent sent a memorandum to its staff, including some of the Claimants, directly on the issue of pay [70]. The communication is titled 'Subject: LAA & LGC- Review of Personnel Renumeration'. It reads: '*Following a review of business performance for 2022 and projections for 2023, today we announce details of a pay increase for qualifying LAA & LGC personnel.*' It goes on to detail pay increases which will be implemented in April and September 2023, and then also anticipated increases in April and September 2024.

22. The memorandum identified two categories of employee, subject to a common qualifying condition of 6 months' continuous employment. The first was those who would receive the National Living Wage increase (those aged 23 and over) and the National Minimum Wage increase in April 2023. This group were only to be included in the April 2024 review. Everyone else would receive the full increase in 2023. This was to be 2% in April and 3% in September.

23. On 3 March 2023 [79] Mr Jary sent a letter to the Respondent [79], again suggesting seeking assistance from ACAS, and specifically referencing section145B of the Act.

24. The Respondent replied via its solicitors in a letter dated 17 March 2023 [81] in which it set out why the Respondent had given notice of withdrawal from the agreement. It stated that the union had:

> '• *made inappropriate and unhelpful comparisons when engaging in informal pay discussions with my Client to non-equivalent airports which commercially bear no financial similarity to that of my Client in respect of its income generated generally;*
>
> • *not engaged in a discussion with my Client in relation to the business' ability to afford a pay increase at any point;*
>
> • *referred to the cost-of-living crisis, however, appear to make no allowance for the impact of COVID-19 and national lockdowns on my Client which has suffered from a significant downturn in income generated as a result of the same reasons for the aforementioned cost of living crisis;*
>
> • *previously ignored requests to meet with my Client on an informal basis to discuss my Client's reasonable proposed approach to a more inclusive pay review across the entire staff including that of the ATC staff; and*
>
> • *generally, taken an unreasonable position resulting in our Client's decision to terminate the recognition agreement.*'

25. On 28 March 2023, Mr Jary replied [84], highlighting inaccuracies in the previous letter, and expressing the union's willingness to hold pay negotiations pursuant to the Agreement. Since the Respondent had indicated a willingness to bring in ACAS, Mr Jary offered to get some suggested dates from them.

26. On 1 April 2023, the Respondent again directly corresponded with some of the Claimants in the following terms, 'I write to inform you that London Ashford Airport Limited is proposing a change to your contract of employment. With effect from 1st April 2023, your annual salary will increase from [details specific to the relevant person]. All other terms and conditions will remain the same. Please sign and return to me the enclosed copy of this letter to accept the change to your Statement of Main Terms of Employment.' [86-94]

27. There is no issue that the increases in salary proposed by the Respondent were applied to the Claimants' April pay slips. All of the Claimants continue to work.

28. Meetings were held on 23 May (ACAS attending virtually) and 16 June 23 (ACAS attending in-person). At both these meetings, discussions about pay took place. It was also agreed that there would be a review of the agreement and its scope. The parties also discussed a benchmarking exercise. Both Mr Jary and Mr Hainsworth suggested airports which they thought would be most appropriate sources of reference data for such an exercise. Mr Jary invited the Respondent to withdraw the notice of de-recognition.

29. On 17 June 2023, Mr Jary emailed the Respondent with a suggested approach to benchmarking [103] and offering dates for a further meeting. Mr Jary emailed again on 27 June 2023 [106], asking the Respondent about the withdrawal of the de-recognition notice. The Respondent's solicitor replied on 29 June 2023 [107] saying the notice of de-recognition would not be withdrawn.

30. On 19 July 2023, the Claimants lodged their claims to the Employment Tribunal.

31. On the same day, the union applied to the CAC for statutory recognition. On 21 September 2023 the CAC issued its declaration of recognition without ballot [111]. On 28 September 2023, the Claimants were each sent a letter from David Hainsworth [118] which stated, '*Dear ATC Personnel, I write further to the Airport's circulation titled "LAA & LGC - Review of Personnel Renumeration" dated 21st February 2023 to all staff outlining the Airport's considerations concerning its commercial ability to address future incremental pay increases subject to appropriate consultation where required. In light of the recent Employment Tribunal claim (case number: 2303729/2023) and despite the Airport taking a proactive stance to date in seeking to address pay increases across all staff at the Airport, we have taken the decision not to continue to consider pay increases to ATC personnel as per the circulation until the matter of the Employment Tribunal claim has been concluded. At that point, and not before, the Board will further consider its position'*.

32. Pursuant to this correspondence, the Claimants did not receive a 3% rise in September 2023 which had been promised in the Respondent's letter of 21 February 2023. This matter is the subject of further claims and is not relevant to the issues before me.

Reasons and Decision

Was there an offer capable of engaging s.145B

25. The first issue for me to decide is whether offers were made; when they were made; and to which (if any) of the Claimants. There is a helpful table as to how the Claimants put their case in this regard [43]. It is alleged that there were two offers: on 21 February 2023 and on 1 April 2023. It is accepted that in the case of some of the Claimants, that one or other of the offers were not made to them.

26. Mr Hart accepts that he did not receive the alleged offer of the 1 April 2023 on the basis that he did not have the necessary 6 months of service as of 21 February 2023, and therefore was deemed by the Respondent not qualify for the increase in salary in April. Accordingly, he did not receive the letter on 1 April 2023.

27. In Mr Hughes case, he accepts that he did not receive the alleged offer in February 2023 because he was perceived by the Respondent to be in the national minimum wage group and was therefore not sent the circular. He did however receive a letter dated 1 April 2023 [87].

28. All of the other Claimants assert that they received both alleged offers. This was not disputed by the Respondent and I accept that evidence.

29. Were the 21 February and 1 April communications offers for the purposes of the Act? In the case of 21 February circular, the Respondent agrees that it was an offer. I think this was an inevitable concession on the part of the Respondent. It is very similar to the offer made in the case of *Ineos*.

30. In relation to the 1 April 2023, the Respondent argues that the letters sent to the Claimants were not offers. So far as I can understand, it is asserted that the letters were simply a continuation of the contractual exchanges commenced in February. Put another way, the April letters were by way of implementation of the offer made in February.

31. I have carefully considered the question of how the term offer should be interpreted in the context of the Act. In so doing, I have had regard to the case of *Ineos*, which turned largely on this question. I have also considered the case of *Scottish Borders Housing Association Limited v Ms Jacqueline Caldwell & Others, UKEATS/0001/21/SH (*decided before *Ineos).*

32. The April letters in this case are similar to those sent in September in *Scottish Borders*. There was no suggestion in that case, from either the parties to the Tribunal, that they did not constitute offers pursuant to the Act.

33. There is no definition of the word “offer” in the Act. It should therefore be given its ordinary meaning. The key principles are that an offer is a proposal from one party which is sufficiently definite in its terms to form a contract and also manifests an intention to be legally binding on the offeror should it be accepted by the party to whom it is addressed. Furthermore, an offer may be made and accepted orally or by conduct. The use of the word ‘offer’ is neither necessary nor necessarily determinative.

34. In my judgment, each of the April letters was a statement of intent to vary the employees contracts as to pay. It was acceptable by the recipient of the letters by either signing and returning the letters to indicate positive acceptance; or by continuing to work and thereby impliedly accepting the variation.

35. I have given considerable thought to the Respondent's submissions as to the April letters. There is clearly some common content between the February circular and the later letters. The broad issue in both is pay. However, to the extent that it is relevant, the terms within the documents are different. The former deals with increases for April and September 2022. The April letters seek to implement only the April increase. It is therefore difficult to see the April letters as nothing more than an implementation of the February circular.

36. In any event, a plain reading of one of the April letters reveals an offer which is capable of acceptance. Indeed, in my view it is the clear purpose of the letters, including as they do instructions to sign and return '*to accept the change to your statement of main terms of employment*'. I am therefore satisfied that both the February and April communications were offers for the purposes of the Act, and that section 145B is engaged.

37. Save as set out for Mr Hart and Mr Hughes (see above), I am satisfied that the s.145B was engaged for each of the Claimants, in respect of each of the offers. I agree with Miss Ibbotson that the attempted separation by the employer of employees into a national minimum wage group is a 'red herring'. It was not suggested to me that any of the Claimants' statement of terms was to the effect that they were entitled only to the national minimum wage. I accept Mr Jary's evidence that by reason of an absence of pay increases for air traffic controllers since 2018, that some were thereby receiving the national minimum wage.

38. These employees were the subject of pay increases in April 2023 to bring them in line with national minimum wage legislation. They were not included in the group entitled to a 2% rise in April, and a 3% increase in September 2023. It was not explained to me what the % increase was for those receiving national minimum wage. Whatever it was, it was nonetheless a pay increase. This was the offer in so far as it applied to them. Save for Mr Hughes, I find that all of the Claimants received the February offer. To this extent, it applied to them and was an offer made to them.

39. As Mr Jary explained, those in receipt of a wage equivalent to the national minimum wage would still have been part of the collective bargaining process. I am satisfied that as part of that negotiation, the union would have hoped to have improved the wages all of it members, particular those in receipt of the lawful minimum wage for those carrying out this type of work.

40. I am therefore satisfied that save in the case of Mr Hughes and Mr Hart (to the extent set out) section 145B of the Act was engaged.

Did the offers achieve the prohibited result

41. The next issue for me decide is whether the acceptance of the offers had the "prohibited result", i.e., that the Claimants' contractual pay terms would not, or would no longer, be determined by collective bargaining negotiated by or on behalf of the union?

42. As stated the test, as set out by the Supreme Court in *Kostal,* is one of causation, namely whether there is a real possibility that the matter would have been determined by collective agreement if the offers had not been made and accepted. The court in *Kostal* observed that this would ordinarily be the case where the employer makes an offer directly to the workers before the agreed collective bargaining procedure has been exhausted.

43. The requires consideration of the agreement itself. In this case, even Mr Hainsworth conceded that there had been little progress in terms of the procedure set out for collective bargaining with the union. Prior to the offers being made, there had been only one face to face meeting, in September 2022. This was between Mr Hainsworth and Mr Jary (and others) largely be way of introduction, after which the Respondent had indicated that it would not be in a position to negotiate until November, and then, not until the second quarter of 2023. It was a meeting which lacked any meaningful discussions about pay. Neither side made proposals on the issue. There had been no reference to the Joint Negotiating and Consultative Committee (JNCC) and no substantive discussion as to whether it was appropriate to refer the dispute to ACAS. At various points, Mr Jary had suggested discussions about pay, which had ben rejected by the Respondent. As such, the collective bargaining process had barely commenced in my view.

44. It follows that offers were made before collective bargaining had been exhausted. Pursuant to *Kostal*, this will ordinary mean that the offer had the prohibitive result. I can see no reason to depart from this approach in this case. It is quite impossible to rule out at least the real possibility that matters would have bene determined by collective agreement if the offers had not been made and accepted. It was only after the offer had been made, that discussions about pay commenced in May 2023.

Was the Respondent's sole or main purpose in making the offers to achieve the prohibited result?

45. On a complaint under section 145B it is for the employer to show what the sole or main reason was for making the offers. This is to be viewed is by reference to the factors set out in section 145D(4) (see above).

46. In my judgment, the predominant purpose behind the Respondent's actions during the relevant matters was a negative attitude towards the likely impact of the union on pay negotiations. The immediate background to these claims is significant. The Respondent had inherited the obligation to negotiate with the union by reason of a TUPE transfer in 2020. There had been no pay increases since 2018. The agreement had not been implemented in 2020 or 2021. The meeting in September 2022 between Mr Jary and Mr Hainsworth appears to have been the first substantive contact between Respondent and union, and certainly in terms of pay related matters. It was my impression of Mr Hainsworth's testimony that there was no enthusiasm to engage with the union on these issues from the outset. It was my view that he did not regard it as the Respondent's agreement.

47. This is demonstrated by events in a broader sense. The Respondent prevaricated when invited to negotiate pursuant to the agreement by the union. It first put off discussions until November so that Mr Hainsworth could meet with the owner. Then matters answer were deferred until the second quarter of 2023 when critical “fiscal data” and “information from the shareholder and accountant” would be available. In particular, the latter delay is inordinate. It completely disregarded the timetable envisaged by the agreement namely to discuss pay each year commencing in September.

48. Further, it appears to have been a disingenuous reason to defer discussions. The Respondent was able to issue the circular of 21 February 2023 which contained a detailed proposal for pay. The question asked of Mr Hainsworth was why he had unable to enter into collective bargaining relating pay with the union due to lack of performance data, when the Respondent had been able to make a direct offer to staff. In my view, Mr Hainsworth failed to provide a convincing answer to this question. He repeatedly stated that he had not refused to meet Mr Jary. However, this was the effect of his stance until May 2023, after the offers were made.

49. When asked why the offers had been made prior to the commencement of pay negotiations with the union, he said there was a retention crisis and that he feared that if they had not indicated a willingness to make pay increases in February, that staff would have left and the operation would have been jeopardised. On its face, this seems to be a perfectly plausible reason for making pay offers, especially in light of the background stated above. Unfortunately it is an explanation which is difficult to reconcile with the Respondent’s refusal to engage at all with the union on pay issues. If they viewed the resolution of pay issues as urgent, then why not meet with the union. For this reason, I found Mr Hainsworth’s explanation for making the offers when he did to be unconvincing.

50. Perhaps the most significant feature of the evidence in this case was the Respondent’s decision to issue a notice of termination of the agreement in January 2023. It is significant in part because it came before negotiations had commenced, and just before the first offer. In particular it was sent three days after the union had sent a letter, with a copy of the agreement, to the Respondent proposing a meeting with ACAS [58]. In this sense, this case echoes the facts in *Ineos*.

51. Mr Hainsworth was asked why this decision had been taken. He explained that they had inherited the agreement from its predecessor, Safesky. He felt that the agreement was “not fit for purpose” because it didn’t allow for discussion about affordability. he said this was critical because the business was “debt ridden”. They wanted to make clear that any agreement addressed the affordability issue.

52. I found this a difficult answer to understand. Clearly the heads of discussion are separate to the procedure to be adopted under the agreement. One can imagine that most pay discussions are occupied to some extent by the employer setting out the financial restrictions of the business. Mr Hainsworth

went on to state that Mr Jary had refused to discuss affordability. Upon questioning, he accepted that he was referring to the meetings in May and June 2023. Of course, this process had not really commenced in January 2023, when the notice of termination was issued.

53. I then turn to the letter of 17 March 2023 from the Respondent's solicitors, which purports to set out the reasons for de-recognition of the union. Mr Hainsworth was questioned in some detail about the five reasons given. The first referred to inappropriate and unhelpful comparisons when engaging in informal pay discussions to non-equivalent airports. He said this had been a reference to face to face meetings involving ACAS. However, Mr Hainsworth conceded that there had not been any substantive discussions about pay, and none involving ACAS, prior to May 2023. So I reject this reason.

54. The second reason as a criticism of the union for failing to engage in a discussion in relation to the business' ability to afford a pay increase at any point. I have already found that the discussions as to pay had barely begun at the time when this letter was written. Mr Hainswoth suggested there had been some "loose discussions" prior to the letter, but he could not direct us to any evidence in support. I reject this reason.

55. Similar considerations apply to the third reason in the letter, namely referring to the cost-of-living crisis but making no allowance for the impact of COVID-19. Negotiations as to pay had been deferred by the Respondent until May 2023. Mr Hainsworth submitted that these issues had been ventilated in general communications. Again, he could not be more specific.

56. The fourth reason details an alleged refusal on the part of the union to meet with the Respondent on an informal basis to discuss a proposed approach to a more inclusive pay review across the entire staff including that of the ATC staff. When asked about this, Mr Hainsworth suggested that this related to the unions failure to respond to the suggestion of a meeting in the second quarter of 2023. He was taken through the correspondence by Miss Ibbotson and conceded that the response of the union had been to require earlier discussions. In this respect, I agree with Miss Ibbotson that there was a surprising disconnect between Mr Hainsworth's testimony and the contemporaneous documentary evidence. I am afraid that on this and many other issues, I found Mr Hainsworth to be an unconvincing and, at times, evasive witness. Where there was a conflict, I preferred Mr Jary's over Mr Hainsworth's evidence to the Tribunal.

57. The final point in the letter concerned the union taking an unreasonable position resulting in our Client's decision to terminate the recognition agreement. Setting aside for a moment that there had not been any discussions, it seems to me that this amounted to a criticism of the union for taking a contrary stance to the employer. This is surely the premise of all pay discussions. The challenge is to find some ground for compromise. This cannot be done until negotiations have begun.

58. In my view, the matters set out in the solicitor's letter of 17 March are a fiction, bearing little relationship to what was actually happening. In my judgment, the purpose of the Respondent was clearly demonstrated by its actions. It's main, probably its sole purpose, in making the offers, was to rid itself of the obligation to have the Claimants' contractual pay terms determined by collective bargaining. As it stated, it wanted to deal with pay across it entire staff. This was to be without reference to the union, which it made clear by giving notice of de-recognition prior to discussions even starting.

59. In summary, the preconditions of section 145B are made out.

Remedy

60. Each offer complained of attracts compensation in the sum of £4,554. Each Claimant will be entitled to two such payments save for Mr Hart and Mr Hughes as aforesaid, who will be entitled to one payment each.

Richard Wood

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Employment Judge R Wood
Date: 10 April 2024

Sent to the parties on
Date: 12 April 2024

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Michael Chandler
For the Tribunal Office