Michaelmas Term
[2021] UKSC 47
On appeal from: [2019] EWCA Civ 1009

JUDGMENT

Kostal UK Ltd (Respondent) v Dunkley and others (Appellants)

before

Lord Briggs
Lady Arden
Lord Kitchin
Lord Leggatt
Lord Burrows

JUDGMENT GIVEN ON
27 October 2021

Heard on 18 May 2021

Appellants
Oliver Segal QC
Stuart Brittenden
(Instructed by Thompsons Solicitors (Leeds))

Respondent
Andrew Burns QC
Georgina Hirsch
(Instructed by Gunnercooke LLP (Manchester))

LORD LEGGATT: (with whom Lord Briggs and Lord Kitchin agree)

Introduction

1.
This case is the first occasion on which appeal courts have had to consider the proper interpretation of section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 (the "1992 Act"), one of a group of provisions added to the 1992 Act by amendment in 2004. Its object, broadly stated, is to penalise offers made by employers to workers who are trade union members which, if accepted, would have the result that one or more terms of their employment will not (or will no longer) be determined by collective bargaining.

2.
Pursuant to section 145B(5), a worker (or former worker) may present a complaint to an employment tribunal on the ground that their employer has made an offer in contravention of section 145B. The complaint must normally be presented within three months from when the offer was made or, where the offer is part of a series of similar offers to the complainant, the date when the last of them was made: see section 145C(1) of the 1992 Act. If the tribunal finds that the complaint is well-founded, the worker is entitled to be paid a lump sum award by the employer in respect of the offer complained of: see section 145E(1)-(3). At the time of the offers made in this case, the amount of the award was fixed at £3,800.

Relevant facts

3.
The 57 claimants (and appellants) are members of Unite the Union ("Unite") and are employed as shop floor or manual workers by the respondent, Kostal UK Ltd (which I will refer to as "the Company"). The Company manufactures electromechanical and electronic products for the automotive industry.

The Recognition Agreement

4.
Following a ballot of workers in November 2014 which showed significant support in favour of recognising Unite for the purpose of collective bargaining, the Company and Unite entered into a Recognition and Procedural Agreement on 16 February 2015. The stated purpose of this agreement was to establish trade union recognition and representation within the Company and establish a framework for consultation and collective bargaining (clause 1.2). The agreement gave Unite "sole recognition and bargaining rights" (clause 2.1). By clause 3.1, the Company and Unite accepted that "the terms of this agreement are binding in honour upon them but do not constitute a legally binding agreement".

5.
Clauses 7.1 and 7.2 of the Recognition Agreement stated that formal negotiations would take place between the parties on an annual basis and that negotiations would commence normally in October "with a normal effective date of 1st January". Clause 7.4 stated that "any matters related to proposed change of terms and conditions of employment will be negotiated between the Company and the Union". Appendix 1 outlined a procedure that "will be followed in order to deal with collective issues which if not resolved, could lead to a dispute between the parties" and stated that "[d]uring the procedural process, there will be no ... change imposed by either party". The procedure has four stages. The first three stages involve meetings between trade union representatives and management. Stage 4 is described as follows:

"Failing agreement at Stage 3 the matter, by joint agreement, may be referred to ACAS for conciliation. … If the parties do not agree to refer the matter to ACAS the procedure is exhausted."

6.
On a fair reading of the Recognition Agreement, the Company undertook - albeit not as a legally enforceable obligation - not to make any change to any of its workers' terms and conditions of employment before it had first engaged in collective bargaining about the matter with Unite and exhausted the process outlined in Appendix 1.

The 2015 pay negotiations

7.
The first pay negotiations after the Recognition Agreement was signed commenced in October 2015. Following two preliminary meetings with Unite representatives, the Company tabled a pay offer on 24 November 2015. The offer comprised: a 2% increase in basic pay; an additional 2% increase for those earning less than £20,000 payable from 1 April 2016; and a Christmas bonus to be paid in December equating to 2% of basic pay. As part of the same package, the Company sought a reduction in sick pay for new starters, a reduction in the Sunday overtime rate and consolidation of two separate 15 minute breaks into a single 30 minute break (which would comply with the Working Time Regulations 1998).

8.
The offer was put to a ballot of union members on 3 December 2015. Of the 80% of union members who took part in the ballot, 78.4% voted to reject the offer.

9.
On 10 December 2015, the Company wrote to its employees to make the same offer to them directly. The letter stated that, if they did not accept the offer by 18 December 2015, they would not receive the Christmas bonus for 2015. A further pay negotiation meeting took place on 14 December 2015 at which no agreement was reached. By the end of December, the Company and Unite had reached Stage 4 of the procedure set out in Appendix 1 to the Recognition Agreement and had agreed to refer the matter to ACAS.

10.
By January 2016, according to the Company, 91% of eligible workers had accepted the direct offer made on 10 December 2015. On 29 January 2016, the Company wrote to employees who had not accepted it, making a similar offer (including an amount equivalent to the Christmas bonus backdated to 1 January 2016). The letter stated that, if no agreement was reached, “this may lead to the company serving notice on your contract of employment”.

11.
On 3 November 2016, by which point over 97% of employees had accepted individual offers from the Company, a collective agreement between the Company and Unite was reached for 2015, substantially in accordance with the offer put forward by the Company in November 2015 (but without the 2015 Christmas bonus).

These proceedings

12.
On 11 May 2016 the claimants presented complaints to an employment tribunal that the offers made to them directly by the Company contravened section 145B. The tribunal upheld the complaints and made the statutory award of £3,800 to each claimant in respect of the first offer made on 10 December 2015 and an additional award of £3,800 to each claimant who also received the second offer made on 29 January 2016. The total award was £421,800. The tribunal found as a fact that, after its offer in the negotiations with Unite had been rejected in the ballot of union members, the Company had taken the conscious decision to by-pass further meaningful negotiations and contact with the union in favour of making direct offers to individual employees.

13.

The Company appealed to the Employment Appeal Tribunal (Simler J (President) sitting with two lay members). The appeal tribunal, by a majority, dismissed the appeal: see [2018] ICR 768. The Company then appealed to the Court of Appeal. For reasons given by Bean LJ (with whom Singh and King LJJ agreed), the Court of Appeal allowed the Company's appeal and set aside the decisions of the employment tribunal and Employment Appeal Tribunal: see [2019] EWCA Civ 1009; [2020] ICR 217. From that decision, the claimants now appeal to this court.

The issue in the appeal

14.
The issue in this appeal is whether the pay offers made by the Company on 10 December 2015 and 29 January 2016 directly to workers who were members of Unite were offers which, if accepted by all the workers who received them, would have the "prohibited result", as defined in section 145B(2) of the 1992 Act. It is not disputed that, if that condition was satisfied, the Company's sole or main purpose in making the offers was to achieve that result, with the consequence that the making of the offers contravened the right protected by section 145B(1).

15.
Although the meaning of the relevant statutory provisions must be discerned first and foremost from the language used, they need to be situated in their legal and historical context in order to understand the mischief which they were designed to address. I will therefore begin by outlining the legislative history. It is common ground between the parties that the elements of this history which I will mention are admissible as an aid to interpretation.

The legislative history

16.
Section 145B and related provisions were inserted in the 1992 Act by section 29 of the Employment Relations Act 2004. It is not in dispute that a principal purpose of their enactment was to bring UK law into line with article 11 of the European Convention on Human Rights ("the Convention") as interpreted by the European Court of Human Rights in Wilson and Palmer v United Kingdom (2002) 35 EHRR 20; [2002] IRLR 568.

Wilson and Palmer

17.
The claimants in Wilson and Palmer were members of trade unions recognised by their employers for collective bargaining purposes. In each case the claimants were offered a pay increase if they agreed to sign personal contracts under which they relinquished their rights to be represented by the union in negotiations over pay and other terms of employment and agreed that these matters would be determined individually rather than by collective bargaining. Those employees such as Wilson and Palmer who refused to sign such contracts did not receive the same benefits. In tribunal proceedings the claimants complained that their employers' conduct infringed their rights under what is now section 146(1)(a) of the 1992 Act not to have action (short of dismissal) taken against them as individuals for the purpose of preventing or deterring them from being members of a trade union. Their claims ultimately failed when the House of Lords held (by a majority): (i) that the withholding from the claimants of benefits conferred on other employees who agreed to sign personal contracts constituted an omission rather than an "action"; and (ii) that anyway the employers' purpose was not to prevent or deter the claimants from being members of a trade union as such, but only to prevent or

deter them from using the union for the particular purpose of collective bargaining. In these circumstances section 146(1)(a) did not apply: Associated Newspapers Ltd v Wilson [1995] 2 AC 454.

18.
Having exhausted their domestic remedies, the claimants applied to the European Court of Human Rights complaining that the law applicable in the United Kingdom failed to secure their rights under article 11 of the Convention to freedom of association, which include the right of every individual "to join trade unions for the protection of his interests". The Court upheld the complaints. It did not accept that the absence under UK law of an obligation on employers to enter into collective bargaining gave rise, in itself, to a violation of article 11: see para 45 of the judgment. However, the Court stated (in para 46) that:

"it is of the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf. If workers are prevented from so doing, their freedom to belong to a trade union, for the protection of their interests, becomes illusory. It is the role of the State to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers."

19.
The Court went on to find (at para 47) that, by leaving it open to employers to offer 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), UK 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." Thus:

"… 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 …

Under United Kingdom law at the relevant time 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."

20.
The Court concluded (at para 48) that "by permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State failed in its positive obligation to secure the enjoyment of the rights under article 11 of the Convention".

The 2003 review and response to consultation

21.
In February 2003, the Government published a Review of the Employment Relations Act 1999. The centrepiece of that Act was the establishment of a statutory regime for the recognition of trade unions for collective bargaining. This regime seeks to promote voluntary recognition wherever possible; but if an agreement for recognition is not reached voluntarily, or if such an agreement is reached but the parties fail to agree on a method for conducting collective bargaining, a trade union may apply to the Central Arbitration Committee for assistance. In the last resort, where a lengthy and complex procedure is complied with and the union satisfies the necessary conditions, the Committee has

powers to compel the employer to recognise a trade union and to impose a specified method of collective bargaining.

22.
Chapter 3 of the Review referred to the judgment of the European Court of Human Rights in Wilson and Palmer and expressed the view that, in the light of that judgment, certain changes in UK law were needed to ensure compliance with the Convention. One such change was to "establish a clear positive right for members of independent unions to use their union's services" (para 3.11). Another was to regulate the "freedom to agree individualised contracts". The Review noted that "[e]mployers often enter contractual arrangements with individual workers which contain different terms from the provisions of a collective agreement" and recorded the Government's view that it is "essential that employers and individuals should retain their freedom to agree individualised contracts" (paras 3.12 - 3.13). However, it was said (at para 3.13) that "there must be clear limits on the exercise of this freedom". In particular:

"the law should not allow employers to do what they did in the Wilson and Palmer cases, that is, offer inducements to workers on condition that they relinquish their rights to union representation and make it a condition of entering individualised contracts that workers must relinquish those rights."

The Government proposed that:

"the law should be amended to specify 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."

23.
The Review was the subject of public consultation. The Government Response to the Public Consultation, published in December 2003, noted that the proposal concerning individualised contracts was generally welcomed by employer groups but that unions were concerned about the proposal (para 3.8). In response to the consultation the Government reaffirmed its view that the judgment of the European Court in Wilson and Palmer "requires some important changes to trade union law …" (para 3.9). Relevantly for present purposes, it was proposed (at para 3.12) that:

"… 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. To avoid inflexibility however, the law should allow employers to make offers where the sole or main purpose of the inducement is unconnected with the aim of undermining or narrowing the collective bargaining arrangements. In particular, the law should give room for employers and individuals to enter individualised contracts designed to reward or retain key workers." (Emphasis in original)

The Bill

24.
These proposals were taken forward in the Employment Relations Bill presented to Parliament in December 2003. The Bill included proposed new sections 145A to 145F to be inserted in the 1992 Act.

The Explanatory Notes which accompanied the Bill, and were published (with no material change in this respect) as Explanatory Notes to the Act, expressed the Government's belief that "the principle underlying the decision of the [European] Court extends beyond the facts in Wilson and Palmer and is applicable to a number of other comparable circumstances". Hence the purpose of the new provisions was said to be to "deal not only with the facts in Wilson and Palmer but also with the other circumstances considered by the Government to be comparable."

25.
One material change was made to the wording of the proposed new sections during the passage of the Bill through Parliament. This arose from a recommendation made by the Joint Committee on Human Rights. In its Fourth Progress Report (at para 1.8) the Joint Committee recommended that the Bill should be amended "to make proposed new section 145B apply whether or not the union in question is recognised by the employer at the time when an inducement is offered to give up the right to be represented by the union in collective bargaining." The reason given was that the European Court, in para 46 of its judgment in Wilson and Palmer, "made it clear that the rights under article 11 apply whether or not a union is recognised". The Government put forward amendments to the Bill to give effect to this recommendation, which were approved by Parliament.

The relevant statutory provisions

26.
Section 145B, as enacted, is in the following terms:

"**Inducements relating to collective bargaining**

(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.

(3) It is immaterial for the purposes of subsection (1) whether the offers are made to the workers simultaneously.

…"

(The words underlined were added when the Bill was amended in response to the recommendation of the Joint Committee on Human Rights referred to above.)

27.
Also relevant is section 145D, which provides:

"…

(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."

28.
In these provisions the word "recognised", in relation to a trade union, means being recognised by an employer for the purpose of collective bargaining: see section 178(3) of the 1992 Act. The phrase "collective bargaining" means negotiations relating to or connected with one or more of the matters specified in section 178(2). Those matters include (among others) terms and conditions of employment. The phrase "collective agreement" means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers relating to one or more of the specified matters: see section 178(1).

Interpretation of section 145B

29.
Against that background, I turn to the interpretation of section 145B of the 1992 Act. Three preliminary points may be made.

30.
First, as with any question of statutory interpretation, the task of the court is to determine the meaning and legal effect of the words used by Parliament. The modern case law - including, in the field of employment law, the recent decision of this court in Uber BV v Aslam [2021] UKSC 5; [2021] ICR 657, para 70 - has emphasised the central importance of identifying the purpose of the legislation and interpreting the relevant language in the light of that purpose. Sometimes the context and background, or the statute viewed as a whole, provides clear pointers to the objectives which the relevant provisions were seeking to achieve. In other cases, however, the purpose needs to be identified at a level of particularity which requires it to be elicited mainly from the wording of the relevant provisions themselves. The present case is one in which, although the legal context and aim of seeking to secure article 11 rights is important, the somewhat complicated and elaborate wording of section 145B (and section 145D) calls, in my view, for a careful linguistic analysis on the assumption that the words used have been chosen with precision.

31.
Second, the critical provision in this case is section 145B(1)(a), read together with subsection (2) which defines the "prohibited result". It is that result which (as its appellation indicates) represents the mischief which the legislation aims to prevent or deter. The employer has a defence if it shows that its sole or main purpose in making the offers was not to achieve that result. For short, I will refer to the purpose of achieving the prohibited result as the "prohibited purpose". It is, however, important to note that what constitutes the prohibited purpose is defined by reference to what constitutes the

prohibited result. For that reason too, although the relevant provisions must be construed as a whole, the primary question must be to identify the nature and scope of the prohibited result.

32.
The third preliminary point is that, although (as noted above) the words “will not” were added to section 145B(2) during the Parliamentary process as part of an amendment to extend the scope of section 145B to cases where a trade union is “seeking to be recognised”, I do not accept the Company’s submission that those words are limited in their application to such cases. Certainly, the words “will no longer” can only apply in cases where the union is already recognised for the purpose of collective bargaining. But there is nothing in the language used which confines “will not” to cases where the union is seeking to be recognised or which ties each alternative in subsection (2) exclusively to one of the alternatives referred to in subsection (1). The alternatives do not even appear in the same order in the two subsections: in subsection (1) a trade union “seeking to be recognised” is mentioned after a trade union “which is recognised”, but in subsection (2) the words “will not” appear before the words “or will no longer”.

33.
Further, the words “will no longer” carry the implication that the workers’ terms of employment were previously determined by collective agreement negotiated by or on behalf of the union. That may not be true, however, not only where the union is seeking to be recognised but also where a trade union has only recently been recognised by the employer. In that situation the existing terms of employment might have been determined by collective agreement negotiated by or on behalf of another trade union, or they might not have been determined by collective agreement at all (if there was previously no recognised union). It would be irrational to interpret section 145B as inapplicable in such circumstances - all the more so when it is expressly applicable where a trade union is seeking to be recognised. The only reasonable interpretation, in my view, is that, where a trade union is recognised, the right not to have an offer made by the employer applies where the result of acceptance would be that one or more terms of employment either (i) will not or (ii) will no longer be determined by collective agreement negotiated by or on behalf of the union.

Offers agreed to be contrary to section 145B(1)(a)

34.
Before considering the competing arguments about the meaning of section 145B(1)(a) and (2), I think it useful to start by identifying the category of offers which both parties agree fall within these provisions. This category consists of offers which, if accepted, would require workers who are members of a trade union to agree to forego or relinquish collective bargaining rights. The difference between the parties’ positions is that, on the Company’s case, this is the only type of offer to which section 145B applies.

35.
Examples of this type of offer are the offers made by the employers to the claimants in the Wilson and Palmer cases of a pay rise in return for agreeing to give up (altogether and for the indefinite future) their rights to be represented by their union in collective bargaining. Offers of this kind, if accepted, would clearly have the prohibited result. So too would offers made to members of a union seeking to be recognised if acceptance would require the workers to agree not to be represented by the union in collective bargaining in the event that the union receives recognition.

36.

What if an employer offers a pay rise to workers who are union members conditional on those workers agreeing not to have any changes to their pay and conditions determined by collective bargaining in this particular pay round? Leading counsel for the Company, Andrew Burns QC, agreed that the acceptance of such an offer would have the prohibited result. He was plainly right to do so. There is no difference in principle between offering an inducement to trade union members to agree not to be represented by their union in collective bargaining indefinitely or for a long period or for a very short period of time. In so far as the judgment of the Court of Appeal can be read as suggesting (at para 51) that section 145B can be contravened only where union members are asked to surrender collective bargaining rights "on a permanent basis", such an interpretation of the section cannot in my view be justified. There would be some basis for it in the language used if, in relation to a recognised trade union, subsection (2) applied only where one or more terms of employment "will no longer" be determined by collective agreement. But, as discussed above, the definition of the prohibited result cannot reasonably be interpreted as limited in that way. It also includes cases where the result of accepting an offer would be that a term "will not" be determined by collective agreement. No minimum length of time is specified or can reasonably be read into subsection (2) for which that result would have to persist in order to constitute the "prohibited result".

The claimants' case

37.
The claimants' case is that the "prohibited result" is achieved if one or more of the workers' terms of employment will, at least on the material occasion, not be determined by collective agreement but by individual agreements between the employer and the workers. This submission is ambiguous. The reference to "the material occasion" could be understood as meaning merely that an offer which, if accepted, would require a union member to agree not to have any term or terms of their employment determined by collective agreement will fall within section 145B(1)(a) and (2) even if that agreement would be limited to the current pay round (or some other temporary period). As discussed above, this point is conceded by the Company. In the way their case has been argued, however, the claimants' interpretation of section 145B(1)(a) and (2) is much more far-reaching. The majority of the Employment Appeal Tribunal, who agreed with it, expressed this interpretation clearly at para 52 of their judgment:

"We consider that on a straightforward reading of the words of [subsection (2)], if as a matter of fact, acceptance of direct offers to workers means that at least one term of employment will or would as a consequence of acceptance be determined by direct agreement whenever that occurs, and not collectively (even if other terms continue to be determined collectively), that is sufficient. That term, if accepted, would no longer or would not be determined collectively, at least until a further change is negotiated, agreed or imposed. The fact that the result is temporary (in the sense of being a one-off direct agreement following acceptance of the offers) rather than permanent does not affect this question, as both sides agree." (Emphasis added)

38.
On this interpretation, the fact that an offer is made by the employer directly to workers who are trade union members to make changes which have not been collectively agreed to one or more terms of their employment is by itself enough to achieve the prohibited result. The reasoning is that acceptance of such an offer would automatically have the result that the term in question will have been determined by individual agreement at least for the time being, and therefore "will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union" - at least until such time as the term is subsequently varied or replaced by a term negotiated through collective

bargaining. This is said to be sufficient for the offer to fall within the scope of section 145B(1)(a) read with subsection (2).

Reasons for rejecting the claimants' interpretation

39.
In my view, the Court of Appeal was right to reject this interpretation of the provisions for at least four reasons.

40.
First of all, if the intention had been to prohibit (subject only to the employer showing that the result was not its sole or main purpose) any direct offer made to a worker who is a trade union member to vary a term of the worker's employment in a way that has not been agreed through collective bargaining, then this could - and I have no doubt would - have been said much more simply and straightforwardly in the statutory wording. There would have been no need to use and no point in using what, if the claimants' interpretation is correct, is circuitous and convoluted drafting which requires hypothesising what result acceptance of the offer, together with other workers' acceptance of offers made to them, would have.

41.
Second, I agree with the Company's submission that, as a matter of language, the claimants' interpretation also does not fit with the use of the future tense in section 145B(2). In order to determine whether an offer is lawful, section 145B(1)(a) directs consideration to the result which acceptance of the offer (and any other similar offers) would have. To determine whether that result is the prohibited result defined in subsection (2), it is therefore necessary to look forwards from the notional date of acceptance of the offers to what will or will not happen thereafter. The period during which one or more terms will not be determined by collective agreement may be time-limited or open-ended, but it starts to run when the offers are assumed to have been accepted. It follows logically that the prohibited result is not a result capable of being achieved by the very acceptance of the offers irrespective of what happens afterwards.

42.
It is not an answer to this point to say, as the Employment Appeal Tribunal said at para 50 of their judgment, that it "is self-evidently the case that an offer once made can only be accepted subsequently so that any acceptance viewed at the point of an offer being made is in the future". It is indeed self-evident that, when an offer is made, any acceptance of the offer must lie in the future. But it is not self-evident whether acceptance of the offer is itself the prohibited result or whether the prohibited result is conceived as something which, if achieved, would post-date - and result from - acceptance of the offer (together with other workers' acceptance of offers made to them). The wording of subsection (2) indicates that the latter is that case.

43.
Third, as discussed, section 145B applies both where the trade union of which the worker is a member is already recognised and where the union is "seeking to be recognised", and no distinction is drawn between those two situations. It would, however, make no sense to prohibit or deter employers from making offers regarding pay or other terms of employment directly to workers where the union has not yet been recognised and is therefore not in a position to represent its members in any collective bargaining.

44.

The response given by leading counsel for the claimants, Oliver Segal QC, when this point was raised by Lord Briggs during oral argument, was that the employer could say in such a situation that it was not its sole or main purpose in making the offers to achieve the prohibited result. I do not think this answer adequate for two reasons. First, this argument operates at too late a stage in the analysis. As discussed earlier, the mischief which section 145B is aiming in general to prevent or deter is the "prohibited result". Yet I can see no credible reason - and none has been suggested - for seeking to prevent or deter employers from making pay offers directly to their workers when there is no recognised union with whom a collective agreement can be negotiated. Accordingly, there is no reasonable basis for attributing to Parliament the intention that acceptance of such an offer would have the prohibited result. The legality of such an offer therefore cannot rationally depend on the employer having to show what its purpose was in making it. Second, on the claimants' interpretation of the "prohibited result", relying on the employer's purpose to avoid a contravention of section 145B where the union has not yet been recognised in any event does not work. That is because, as also noted earlier, what constitutes the prohibited purpose depends upon what constitutes the prohibited result. If agreeing terms directly with a worker who is a union member which are not the subject of a collective agreement is ipso facto the prohibited result, I cannot see how the employer could say (at least in general) that it was not its main purpose in making the offers to achieve that result.

45.
A fourth reason for rejecting the claimants' interpretation is that, if it were correct, section 145B would have a radical effect going far beyond the aims apparent from the legislative history, and indeed inconsistent with those aims. The consequence would be that, whenever a union refuses to agree to a proposed pay deal or other change to one or more terms of employment so that no collective agreement is reached, the employer could not make a direct offer to its workers without being at serious risk of incurring what may be (if there is a large number of workers) a heavy financial penalty. That is because the offer, if accepted, would automatically achieve the prohibited result. I do not think that the Court of Appeal exaggerated in saying that this would potentially give a recognised trade union an effective veto over any direct offer to any employee concerning any term of the contract, major or minor, on any occasion (see para 53 of the judgment). Whatever view is taken of the merits of such a regime, it would undoubtedly mark a major shift in industrial relations in this country. It would also, as the Court of Appeal observed, go far beyond curing the mischief identified by the European Court in Wilson and Palmer. It would be a change of acute political sensitivity which only Parliament could properly make and which would naturally be preceded by public consultation and debate. There is no hint of such a proposal in the pre-Parliamentary and Parliamentary materials leading up to the enactment in 2004 of section 145B of the 1992 Act.

46.
The answer to this objection put forward by the claimants is once again to argue that sufficient protection is provided to employers by the possibility of showing that achieving the prohibited result was not the employer's sole or main purpose in making the offers. Again, I do not consider this a sufficient answer. First of all, this argument again operates at too late a stage in the analysis. Where an employer has negotiated with the union and the parties have exhausted the procedure for collective bargaining without being able to reach agreement, there is no justification in terms of the policy of UK law for preventing or deterring the employer from at that point making an offer directly to workers. There is accordingly no reasonable basis for attributing to Parliament the intention that acceptance of such an offer would have the prohibited result. Again, therefore, the legality of such an offer cannot rationally depend on the employer having to show what its purpose was in making it. Second, if the acceptance of such an offer is treated as automatically having the prohibited result just

because the worker is being invited to accept terms which have not been collectively agreed, showing the purpose in making the offers cannot anyway provide a secure or stable defence to the employer. It could always be said that achieving a change in terms of employment which had not been collectively agreed was the employer's main purpose in making the offers. Nor does section 145D(4) provide any basis on which a contrary argument could be made. In particular, subsection (4)(c) could not apply to an offer made generally to the workforce after negotiations with the union had ended without a collective agreement.

47.
The Employment Appeal Tribunal thought it sufficient protection for employers against this consequence that "where an employer acts reasonably and rationally and has evidence of a genuine alternative purpose, tribunals are likely to be slower to infer an unlawful purpose than in cases where the employer acts unreasonably or irrationally or has no credible alternative purpose" (see para 61 of the judgment). Without any clear criteria, however, with which to assess the reasonableness of the employer's conduct and motives, this is not a workable test and is incapable of providing the legal certainty which Parliament would naturally expect, and be expected, to provide as to what offers are and are not lawful.

The Company's case

48.
I turn then to the Company's case that the only type of conduct outlawed by section 145B is the offering of inducements to workers who are trade union members to forego or relinquish collective bargaining rights. In the Company's submission (accepted by the Court of Appeal at para 42 of the judgment), the collective bargaining rights which section 145B is intended to secure are the article 11 rights recognised in Wilson and Palmer to be represented by a trade union and for that union's voice to be heard in negotiations with the employer. They do not include a right to have terms of employment determined through such negotiations.

49.
On behalf of the Company, Mr Burns QC further submitted that the collective bargaining rights protected by section 145B are only capable of being infringed by offering inducements to contract out of collective bargaining. Provided the employer does not seek to remove any terms from the scope of collective bargaining in this way, the employer is free to strive for its own interests, which may legitimately include acting in ways which are calculated to undermine the union's bargaining position in negotiations.

50.
On this interpretation it can still be said that section 145B covers cases which go beyond the facts in Wilson and Palmer and applies in other comparable circumstances. For example, section 145B applies, as discussed earlier, to offers which, if accepted, would involve agreeing to relinquish collective bargaining rights for a temporary period only. It also applies to offers which, if accepted, would involve agreeing to give up collective bargaining rights in relation to one particular matter - unlike the offers in Wilson and Palmer which proposed a complete surrender of the right to union representation in relation to all matters. In so far as the Explanatory Notes are admissible as an aid to interpretation, therefore, the Company's interpretation is consistent with the statements quoted at para 24 above.

51.
The Company's interpretation also leaves scope for a defence of the kind contemplated by section 145B(1)(b) and section 145D based on the employer's sole or main purpose. Thus, even if, for

example, acceptance of an offer made by the employer would involve the permanent surrender of all collective bargaining rights, there will still be no contravention of section 145B in the situation contemplated by section 145D(4)(c): that is, 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."

52.
Applying the Company's interpretation of section 145B to the facts of the present case, Mr Burns submits that the offers made directly to workers who were members of Unite did not require them, if the offers were accepted, to forego or relinquish any collective bargaining rights (either indefinitely or at all). By accepting the offers, workers simply secured a pay rise in return for changes to sick pay, overtime and breaks. Their rights to be represented by Unite in negotiations over pay and conditions and to receive the benefit of any collective agreement were unaffected. Negotiations with Unite in fact continued after the direct offers were made and eventually resulted in a collective agreement for the 2015 pay round reached in November 2016 (see para 11 above). Had that collective agreement been more favourable than the terms of the direct offer which a worker had already accepted, the worker would have received the more favourable terms negotiated with the union. Accordingly, Mr Burns submits, it could not be said when the direct offers were made that their acceptance would have the result that any of the workers' terms of employment would not be determined by collective agreement.

53.
I agree with the Company's analysis of the article 11 rights which section 145B is intended to secure. I do not, however, accept the further submission that those rights, and section 145B, are only capable of being infringed by an offer which, if accepted, would require the worker to contract out of collective bargaining (for any length of time and in relation to one or more terms of employment). For the reasons which follow, I think it sufficient to contravene section 145B(1)(a) and (2) that an offer is made which, if accepted, would in fact cause arrangements for collective bargaining which have been agreed with the union to be by-passed (in whole or in part).

The article 11 right to union representation

54.
As outlined at paras 18-20 above, the European Court of Human Rights in Wilson and Palmer held that the article 11 rights of individuals to join trade unions for the protection of their interests include the right to be represented by a trade union in negotiations with the employer over pay and other terms of employment and for the union's voice to be heard in such negotiations. As Mr Burns QC for the Company put it in oral argument, the right protected by article 11 is a right that the union, when recognised, should be afforded "a seat at the table" for the purpose of collective bargaining and permitted to enter into discussions and negotiations with the employer and to be heard by the employer. There is, however, no right to have any changes to terms of employment agreed through collective bargaining and no restriction on the employer offering workers such changes where no collective agreement has been reached.

55.
I agree that this is what was decided in Wilson and Palmer. The claimants place much emphasis on the passage in the Court's judgment (quoted at para 19 above) which stated that in UK law at the relevant time it was possible for an employer "effectively to undermine or frustrate a trade union's ability to strive for the protection of its members' interests". However, this statement needs to be read in

conjunction with the conclusion which immediately precedes and follows it. Read in context, it cannot reasonably be understood to mean that the state has a positive duty to make it unlawful for an employer to do anything which would undermine a trade union's bargaining ability; rather, it is explaining that permitting employers to offer financial incentives aimed at inducing employees to relinquish the right to union representation infringes their right protected by article 11 to join a trade union "for the protection of [their] interests".

56.
It does not seem to me that subsequent decisions of the European Court of Human Rights have changed the position materially for present purposes. In Demir v Turkey (2009) 48 EHRR 54, para 154, the Court stated that "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". The conduct held to constitute a breach of article 11 in Demir, however, was the annulment by the state of a collective agreement freely entered into with a trade union following collective bargaining. It was not suggested in Demir, and has not been suggested since, that the state has a positive obligation to make collective bargaining compulsory, at least generally speaking, nor that the right to bargain collectively is a right to have changes to terms of employment determined only by collective and not by individual agreement. In Unite the Union v United Kingdom (2016) 63 EHRR SE7; [2017] IRLR 438, para 53, the European Court reiterated the general principle as follows:

"In substance, [article 11] affords members of a trade union the right for their union to be heard with a view to protecting their interests and requires national law to enable trade unions, in conditions not at variance with article 11, to strive for the protection of their members' interests. However, it does not guarantee them any particular treatment by the state …"

57.
An important question raised by the present case is how far the right to be represented by the union and for the union to be heard in discussions or negotiations with the employer extends. It seems to me that it must on any view extend beyond a right not to receive inducements to contract out of union representation. Suppose that in the present case, before having any discussion with representatives of Unite, the Company's managers had simply made direct offers to its workers of the kind that were in fact made and had told the union that they wished to see how many workers accepted those offers before deciding whether to engage in collective bargaining. If the right to be represented by the union in negotiations and for the union's voice to be heard is to have any substance at all and is not to be entirely empty or illusory, permitting such conduct must be contrary to article 11. That must be so, in my view, even if the offers made to workers who are union members are simply offers of a pay rise along with other changes to their terms of employment and do not require or request the recipients to agree to give up any collective bargaining rights (either indefinitely or at all).

58.
It follows that whether the offer, if accepted, would require contracting out of collective bargaining (for at least some period) cannot be the sole test of compliance with article 11. At least where there is a recognised union, refusing or failing to engage in any discussions or negotiations with the union before making direct offers to workers who are union members is itself inconsistent with their right to be represented by the union in collective bargaining. Such conduct denies the union its seat at the table and does not allow the union's voice to be heard.

59.

I draw further support for this analysis from para 48 of the judgment in Wilson and Palmer where, in reaching its conclusion that there had been a violation of article 11, the Court noted that the UK law as it stood at that time had been criticised by (amongst others) the International Labour Organisation Committee on Freedom of Association. The extract from the report of that Committee quoted at para 37 of the judgment to which cross-reference was made included the Committee's conclusion that, in a case which it had considered:

"[the employer] has by-passed the representative organisation and entered into direct individual negotiation with its employees, in a manner contrary to the principle that collective negotiation between employers and organisations of workers should be encouraged and promoted."

60.
Once it is accepted that it is incompatible with article 11 to allow an employer simply to by-pass a trade union which has been recognised for the purpose of collective bargaining and enter into direct individual negotiation with its employees, the question becomes one of where the line is to be drawn. How much discussion or negotiation with the union does the employer need to engage in to satisfy the rights of union members to be represented in collective bargaining and for the union's voice to be heard? The case law of the European Court has not addressed this question and there is no doubt in principle room for differences of approach on the part of national authorities. I find it difficult to see, however, what criterion there could be which is not arbitrary, and which is capable of providing legal certainty, other than to define the extent of the collective bargaining required by reference to whatever bargaining procedure has been imposed by the state or agreed between the employer and the union. The fact - where it is the fact - that an agreement with the union was entered into voluntarily and is not legally binding does not alter this. That was the situation in Wilson and Palmer. But the absence of a legal obligation on the employers in those cases to enter into collective bargaining did not prevent the rights of trade union members to be represented by the union in the collective bargaining process (which had been voluntarily agreed) from being regarded as "important union rights" (see para 48 of the judgment) which were capable of being, and were found to have been, infringed.

61.
Accordingly, there seems to me a strong case for saying that the obligation of the state to secure the right under article 11 to be represented by a trade union and for that union's voice to be heard entails that an employer which has recognised a trade union for the purpose of collective bargaining and agreed to follow a specified bargaining procedure cannot be permitted with impunity to ignore or by-pass the agreed procedure, either by refusing to follow the agreed process at all or by being free to "drop in and out of the collective process as and when that suits its purpose" (as it was put by the employment tribunal in the present case).

62.
In accordance with the general approach to statutory interpretation mentioned at para 30 above, section 145B (and the related provisions of the 1992 Act) must be interpreted in the light of the aim apparent from the legislative history of ensuring that UK law is consistent with article 11 of the Convention and, in particular, secures the right to union representation recognised in Wilson and Palmer. In addition, section 3 of the Human Rights Act 1998 requires the legislation to be read and given effect in a way which is compatible with Convention rights, so far as it is possible to do so. In my view, it is unnecessary to strain the language of the provisions to achieve this. To the contrary, a close analysis of the statutory wording leads naturally to an interpretation which conforms with article 11.

Focusing on results

63.
There is an important feature of the wording of section 145B which both parties' interpretations of the section leave out of account. In this respect, although diametrically opposed, they seem to me to share a common flaw. In both cases they treat the question whether an offer falls within section 145B(1)(a) and (2) as depending entirely on the content of the offer. On the claimants' preferred interpretation, all that matters is whether the offer is to agree a change which has not been collectively agreed with the union to a term or terms of the individual worker's contract of employment. On the Company's interpretation, all that matters is whether the offer requires the worker to contract out of any collective bargaining rights.

64.
Both interpretations fail to reflect the structure of section 145B. What is prohibited by the section is not the making of an offer which, if accepted, would constitute an agreement with a particular content. Rather, what is prohibited is the making of an offer which, if accepted, would have a particular result. Furthermore, and importantly, that result is not defined as one which follows simply from acceptance of the offer by the worker who is the subject of section 145B: it takes account additionally of any offers which the employer also makes to other workers and requires consideration of what would happen if all the offers made were accepted. This indicates that section 145B is concerned not merely with the content of individual offers but with the potential practical consequences of the employer's conduct, considered in the round. The interpretations of section 145B for which the claimants and the Company contend both seem to me incapable of explaining why, in judging whether acceptance of an offer would have the prohibited result, it is necessary to assume, as required by subsection (1)(a), "other workers' acceptance of offers which the employer also makes to them".

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.

66.
On this interpretation, there is no difficulty in applying section 145B in cases where the union is not yet recognised but is seeking to be recognised. In that situation the employer is free to make individual offers to workers in relation to a particular pay round without any risk of contravening

section 145B because, at the time when the offers are made, there is no possibility of agreeing terms through collective bargaining.

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 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.

69.
This interpretation of section 145B is further supported by section 145D(4)(a) of the 1992 Act. That provision identifies, as a matter which must be taken into account in determining whether an employer's sole or main purpose in making offers was the prohibited purpose, any evidence:

"that when the offers were made the employer … did not wish to use, arrangements agreed with the union for collective bargaining."

As Professors Alan Bogg and Keith Ewing have pointed out in a commentary on this case, this supports the inference that, where the acceptance of individual offers would by-pass arrangements agreed with the union for collective bargaining, such acceptance would have the prohibited result: see Bogg and Ewing, "Collective Bargaining and Individual Contracts in Kostal UK Ltd v Dunkley: A Wilson and Palmer for the 21st century?" (2020) 49 ILJ 430, 451.

The present case

70.
In the present case the Company agreed when it entered into the Recognition Agreement to conduct annual pay negotiations with Unite and to follow the procedure outlined in Appendix 1 before making

or proposing any change to terms and conditions of employment outside that process. The offers made directly to employees dishonoured that agreement because they were made before the process had been exhausted. Furthermore, the Company's behaviour, potentially at least, treated less favourably employees who were not prepared to relinquish their right to have the agreed procedure for collective bargaining followed. In the case of each direct offer made during the collective bargaining process, the clear message was that, if the employee did not accept it, he would not receive the Christmas bonus (or an equivalent payment) calculated at 2% of basic salary. In the case of the second offer, there was also a threat to terminate the worker's contract of employment unless the offer was accepted. It is hard to imagine how, on the assumption required by section 145B(1)(a) that all the direct offers were accepted, the negotiations with Unite could as a matter of practical reality have resulted in a better deal than the one which all the workers would thereby already have accepted individually. On the other hand, there was a real likelihood that any worker who did not accept the direct offers would be left financially worse off. That is indeed what happened, as workers who declined both offers did not receive the Christmas bonus (or any equivalent payment) for 2015. In these circumstances the Company's conduct can fairly be characterised as a disincentive or restraint on the use by the claimants of union representation to protect their interests. The relevant use was the exercise of their right to be represented in collective bargaining conducted in accordance with the Recognition Agreement.

Conclusion

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.

72.
In the present case, on the facts found by the employment tribunal the collective bargaining process outlined in the Recognition Agreement was still continuing when the first and second offers were made by the Company directly to the claimants. In those circumstances the tribunal was entitled to find that the offers were made in contravention of section 145B. I would therefore allow the appeal.

LADY ARDEN AND LORD BURROWS:

1. **Introduction**

73.
This case turns on a correct interpretation of certain statutory provisions relating to collective bargaining between a trade union and an employer. The central statutory provisions in question are sections 145B and 145D of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"), which were inserted by the Employment Relations Act 2004. Those provisions were part of the Labour Government's response to the UK's defeat before the European Court of Human Rights ("ECtHR") in Wilson and Palmer v United Kingdom (2002) 35 EHRR 20; [2002] IRLR 568 ("Wilson and Palmer v UK"). In those cases, employers had offered incentives (by increased pay) to employees to relinquish their contractual rights to have their terms of employment determined by collective

bargaining carried out by recognised unions. In one of the cases, the employer had also given notice that it was derecognising the union. The House of Lords had held that the employers' conduct had not infringed domestic law. But the Strasbourg court decided that the domestic law contravened the employees' rights under article 11 of the European Convention on Human Rights ("ECHR").

74.
This is the first case to be decided by an appellate court on sections 145B and 145D of the 1992 Act. The Employment Tribunal ("ET") and the majority of the Employment Appeal Tribunal ("EAT") found in favour of the claimants who are all members of the trade union Unite ("Unite"). The Court of Appeal allowed the appeal of the employer, Kostal UK Ltd ("Kostal"). That split of view is reflected in helpful case notes, referred to further below, written by John Bowers QC (supporting the Court of Appeal's decision) and by Professors Alan Bogg and Keith Ewing (criticising the Court of Appeal's decision): see Bogg and Ewing, "Collective Bargaining and Individual Contracts in Kostal UK Ltd v Dunkley: A Wilson and Palmer for the 21st century?" (2020) 49 ILJ 430; Bowers, "Can a union veto changes to terms by failing to negotiate or agree?" (2020) 136 LQR 186; Bowers, "Response to Bogg and Ewing, 'Collective Bargaining and Individual Contracts in Kostal UK Ltd v Dunkley: A Wilson and Palmer for the 21st century'" (2021) 50 ILJ 118; and Bogg and Ewing, "Kostal UK Ltd v Dunkley: A Reply to John Bowers QC" (2021) 50 ILJ 125.

2. The facts

75.
Although the facts have also been set out by Lord Leggatt in his judgment, we think it helpful to set out our own summary so that our judgment can be read as a coherent whole. The respondent employer, Kostal, produces electromechanical and electronic products. The appellant members of Unite are employed as shop floor or manual workers. In November 2014, there was a ballot with significant support in favour of recognising Unite for the purposes of collective bargaining with Kostal. Subsequently, on 16 February 2015, a "recognition and procedural agreement" was signed between Kostal and Unite which gave Unite "sole recognition and bargaining rights" (clause 2.1). Clause 3 made clear that the agreement was binding in honour only, rather than legally binding, and that the common objective was to use the processes of negotiation and meaningful consultation to achieve beneficial results for both sides.

76.
Under clause 7, the following was provided:

"7.1 Formal negotiations will take place between the parties on an annual basis. …

7.2 Negotiations will commence normally in October and with a normal effective date of 1 January. …

7.4 Any matters related to proposed change of terms and conditions of employment will be negotiated between the company and the union."

77.
Appendix 1 contained a "disputes and resolution of collective grievances procedure" designed "to deal with collective issues which if not resolved, could lead to a dispute between the parties". It set out four procedural stages, the last of which provided that, in the event of a failure to agree at stage 3, "the matter, by joint agreement, may be referred to ACAS for conciliation". It was provided that, during the procedural process, "there will be no sanctions of any kind applied nor change imposed by either party".

78.
Having achieved recognition earlier in the year, in October 2015 Unite requested a meeting so that formal pay negotiations could commence. There were preliminary meetings on 29 October and 12 November, with a first proposed pay offer for 2016 tabled by Mr Johnson for Kostal at a meeting on 24 November. The offer was of a 2% increase in basic pay, a lump sum of 2% of basic pay to be paid in December as a Christmas bonus, and an additional 2% for those earning less than £20,000 payable with effect from 1 April 2016. In return, Kostal requested a reduction in sick pay for new starters, a reduction in the Sunday overtime rate, and consolidation of two individual 15-minute breaks into a single 30-minute break.

79.
The offer was considered and discussed in the meeting of 24 November. Mr Coop, on behalf of Unite, asked what would happen to the Christmas bonus if the deal was rejected. He was told by Mr Johnson that the Christmas bonus had to be paid in December from 2015 profits and:

“if this was not paid in December, it could not and would not be paid in 2016, therefore it would be lost to employees and they would be left with either the 2% on basic or 4% on basic depending on whether their basic salary was greater or less than £20K …”

Mr Coop then stated that he could not recommend the offer, and would give his members a “free vote”, neither recommending acceptance nor rejection, in a forthcoming ballot.

80.
The ballot of Unite’s members at Kostal took place on 3 December 2015 and had an 80% turnout; 78.4% voted to reject the proposal and just over 20% voted to accept. On 9 December 2015, Mr Johnson emailed Mr Coop, describing the ballot result as “disappointing if not unexpected”. Mr Johnson’s email continued as follows:

“I am writing to inform you that I now intend to write to each and every individual employee at Kostal UK in order to offer the company pay increase and term and condition changes. I am doing this because otherwise we will run out of time to pay a ‘Christmas bonus’ prior to Christmas in December’s pay. Please be aware that any employee who rejects the pay offer will not receive the Christmas bonus and it cannot be paid at a later date even if we subsequently achieve an agreement between us.”

81.
That same day, Mr Johnson issued a “General Notice” headed “Pay Negotiations 2015”, which was displayed on notice boards in the workplace, summarising Kostal’s pay offer and its proposed changes to terms and conditions. The notice set out the offer and continued:

“Unfortunately, the above offer was rejected by a ballot of trade union members. Therefore, the company has made the decision to write to every individual employee of Kostal UK in order to offer the above to each person directly. We are doing this due to the short time frame in order to pay a Christmas bonus, which can and will only be paid in December’s pay. Therefore … failure to sign and return [by no later than 18 December 2015] will lead to no Christmas bonus and no pay increase this year.”

82.
Letters in the same terms as the notice were sent out to employees by Kostal on 10 December 2015. These were the first offers relied on by the claimants as constituting a breach of their statutory rights

under the 1992 Act. The letters began by referring to the rejection of the pay offer in the trade union ballot and continued: “However, the company does wish to reward our employees for their efforts in 2015 and therefore wish to offer the pay increase to each individual employee.”

83.
There was a pay negotiation meeting on 14 December 2015. At the beginning of the meeting Mr Coop was noted as having said:

“You sent a letter out to all employees - you are bypassing the collective bargaining agreement.”

The note records Mr Johnson’s confirmation that:

“he had distributed a letter … to all our employees because the pay offer had been rejected by trade union members …”

Mr Coop made a proposal that, if Kostal took out the provision about changing breaks, he would guarantee to get the pay offer through. The employer did not accept this proposal.

84.
Later in December 2015 Kostal issued a further general notice to employees stating that the pay offer had been made to all individual employees directly because:

“we wanted to give the majority of employees the opportunity to be paid the Christmas bonus in their December pay. 77% of employees have already signed their acceptance including trade union representatives and members.”

The notice urged employees to agree to the changes by 18 December and reminded them that they would not receive their bonus if they failed to do so.

85.
As for the dispute resolution process under the recognition agreement, the ET found that by the end of December 2015 the parties were at stage 4 of the process, namely reference to ACAS for conciliation. In anticipation of that, both sides set out their cases in writing. Kostal’s document, written by Mr Johnson, described the decision to write to individual employees as being for two reasons. First, the employer had no idea how many employees were trade union members and was not therefore aware whether Unite was speaking on behalf of the majority. Secondly, the employer wanted its employees to have the opportunity to receive the Christmas bonus. Towards the end of this document Mr Johnson wrote:

“my final point is to quote the Unite letter - ‘Mr Johnson needs to listen to the voice of the workers’ - I believe that I have, and that 91% of them have spoken, perhaps the trade union should follow their own advice and listen to the majority and not the minority.”

86.
By letter dated 14 January 2016 Mr Coop put Mr Johnson on notice that he believed that letters had been sent directly to employees because, following collective consultation, Unite had rejected the employer’s proposal and that, in Unite’s view, this appeared to breach section 145B of the 1992 Act.

87.
Mr Johnson responded by letter dated 29 January 2016 rejecting that contention. He said:

“The relevant circumstances are, in summary, that negotiations forming part of collective bargaining, reached stage 3 in December last year with no agreement. We have made it clear that our parent

company in Germany insists that payment of any Christmas bonus happens in December, and cannot be carried over into the New Year. This has been the case for many years. Therefore, we decided to write to the employees directly, clarifying that if they did not sign to accept their new terms, they would not be able to take the benefit of a Christmas bonus …

In my letter dated 15 January 2015, I made it clear that it was never the company's intention to induce people to opt out of collective bargaining. The only reason for making the offer to members was so that the Christmas bonus would be payable before the end of the year. If it was not accepted, the bonus would not be payable at a later date. There was absolutely nothing in the offer to staff that stated, or even implied, that acceptance of the offer would involve an agreement that they would no longer be subject to collective bargaining."

88.
Also on 29 January 2016 Kostal wrote letters to those employees who had not accepted the pay proposal. The letter noted that "unfortunately you rejected our offer". Reference was made to the three proposed changes to terms and conditions and an explanation was given as to why those were considered to be necessary. The recipients were invited to a meeting on 2 February 2016 with a human resources officer or alternatively invited to return the then current letter accepting the offer no later than 4 February 2016. The letter went on to state:

"Please be aware that the proposed changes will not be implemented without your express agreement and the consultation process will be full and open. However you should be aware that in the event that no agreement can be reached between the parties, this may lead to the company serving notice on your contract of employment."

Nothing was said about that action being followed immediately by re-engagement on the new terms. The letter went on:

"In consideration for your agreement to the proposed changes, the company is willing to pay a 4% increase in your basic salary backdated to 1 January 2016."

89.
Following a ballot for industrial action, Unite called for an overtime ban. This took place. Many months later, on 3 November 2016, by which stage over 97% of employees had accepted individual offers, a collective agreement was reached as to pay and amended terms and conditions. The ET recorded:

"save for the by then irrelevant issue of the Christmas bonus, the collective agreement endorsed the pay proposals which [Kostal] had put forward in November 2015 together with the three changes to terms and conditions."

90.
The claimants alleged that their rights under section 145B of the 1992 Act had been infringed on two occasions, by the letters of 10 December 2015 and 29 January 2016. The ET found that the offers were similar but not identical in that the Christmas bonus did not feature in the second offer.

3. The legislative provisions

91.
Sections 29 to 32 of the Employment Relations Act 2004 inserted a group of new sections, numbered 145A-145F, into the 1992 Act. Section 145A is headed "Inducements relating to union membership or

activities" and is not directly relevant to the issues we have to decide. But sections 145B to 145D are of central importance, especially sections 145B and 145D.

"**145B Inducements relating to collective bargaining**

(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.

(3) It is immaterial for the purposes of subsection (1) whether the offers are made to the workers simultaneously.

…

(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.

145C Time limit for proceedings

(1) An employment tribunal shall not consider a complaint under section … 145B unless it is presented -

(a) before the end of the period of three months beginning with the date when the offer was made or, where the offer is part of a series of similar offers to the complainant, the date when the last of them was made, or

(b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.

145D Consideration of complaint

(1) …

(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.

(3) On a complaint under section … 145B, in determining any question whether the employer made the offer (or offers) or the purpose for which he did so, no account shall be taken of any pressure which was exercised on him by calling, organising, procuring or financing a strike or other industrial action, or by threatening to do so; and that question shall be determined as if no such pressure had been exercised.

(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."

92.
Although this appeal is not concerned with the remedy imposed for breach of section 145B, it is noteworthy that section 145E requires that when an employment tribunal finds that a complaint under section 145B is well founded (ie the employer has made an offer to one of its workers that is in breach of section 145B) it shall make a declaration to that effect and shall make an award to be paid by the employer of a fixed amount specified by section 145E(3). At the time relevant to this case, the specified amount (for each infringing offer) was £3,800. As the EAT observed in the present case, there is no statutory basis on which an employment tribunal can reduce the award whether on "just and equitable", or any other, grounds.

93.
Section 145F goes on to set out some general provisions on interpretation (none of which provides any assistance on the issues we have to decide) and also makes clear that an action for infringement of the right conferred under section 145B must be brought in an employment tribunal (rather than the courts).

4. The decision of the ET

94.
The ET (Employment Judge Little, Mr Harker, and Mr Priestley) found in favour of the claimants: [2017] 1 WLUK 54. Its interpretation of section 145B was that both the December 2015 and January 2016 offers were offers to workers that, on acceptance, "would have the prohibited result". In important passages dealing with "the prohibited result", the ET said the following (under point 8.2):

"Whilst there would ultimately be a collective pay agreement concluded in November 2016, in law that did not alter the fact that the individuals who had accepted one or other of the individual offers had already had their terms determined on the basis of the individual agreement rather than the considerably later collective agreement. That document was purporting to record a collective agreement in circumstances where the terms and conditions had for some time been governed by variations agreed individually.

Although we still need to deal with [the] question of what the employer's purpose was in making the offer, we take the view that it is not permissible for an employer to abandon collective negotiation when it does not like the result of a ballot, approach the employees individually with whom it strikes deals and then seek to show its commitment to collective bargaining by securing a collective agreement which is little more than window dressing - having destroyed the union's mandate on the point in question in the meantime. In other words, if there is a Recognition Agreement which includes collective bargaining, the employer cannot drop in and out of the collective process as and when that suits its purpose."

95.
The ET went on to examine whether, as required by the statutory words, the achievement of that prohibited result was Kostal's sole or main purpose in making the offers. It held that that was Kostal's

main purpose in respect of both offers. As regards the December offer, the ET did not accept that Kostal's main purpose was one of ensuring the payment of the Christmas bonus. It was "somewhat disingenuous" (point 8.3) for Kostal to say that it made an offer to avert the consequences of a threat which it had itself made; and there was other evidence (in a notice in relation to a subsequent collective bargaining round dated October 2016) that December was not a necessary deadline for the Christmas bonus. As regards the January offer, the ET pointed out that, by then, any Christmas bonus deadline could not possibly apply as a "benign reason" (point 8.3). While accepting that a case of union hostility had not been made out, the ET therefore decided that Kostal's main purpose was the achievement of the prohibited purpose. It said, at point 8.3:

"On the facts before us it is plain that having found the ballot result 'disappointing if not unexpected' (Mr Johnson's email to Mr Coop of 9 December 2015 …) the respondent took the conscious decision to by-pass further meaningful negotiations and contact with the union in favour of a direct and conditional offer to individual employees …" (Emphasis added)

96.
Although the remedy for an infringement of section 145B is not in issue before us, the ET, in a separate decision (dated 10 March 2017), awarded the 55 claimants who had received the two offers, two awards of the mandatory fixed sum of £3,800 ie £7,600 per person.

5. The decision of the EAT

97.
Kostal's appeal to the EAT (Simler J, Ms Bilgan, and Miss Wilson) was dismissed (by a majority, Miss Wilson dissenting): [2017] 12 WLUK 330; [2018] ICR 768. It was held that the ET had made no error of law either in interpreting "the prohibited result" or in determining Kostal's main purpose in making the offers. The central reasoning of Simler J, giving the majority's judgment, may be summarised in the following six points:

(i) Contrary to the submissions of Andrew Burns QC (who was counsel for Kostal before the EAT as well as before us) there was nothing to justify interpreting the 1992 Act as requiring that the offer constituted a removal of collective bargaining in the future (or that the terms offered would not be the subject of collective bargaining in, at least, the next collective bargaining round). Simler J said, at para 52:

"There is nothing in section 145B that deals with the duration of the effect, or requires a permanent surrender of collective bargaining for the future. We can see no warrant for reading into section 145B(2) a requirement that the terms if accepted will no longer in the future (or will not in the future) be determined collectively, still less a requirement that future here is to be understood as Mr Burns contends, as 'at least at the next collective bargaining round'."

(ii) The question as to the prohibited result "will usually be a straightforward question of fact about the effect acceptance of the offers would have and is to be judged at the date when relevant offers are made" (para 53). It is clear from the wording of section 145B(1)(a) that the offers need not be accepted at all. And judging the effect of the offers at the date they are made is consistent with the three month time limit for bringing claims laid down in section 145C(1).

(iii) One must look behind the expressed intention of Kostal to continue with collective bargaining because otherwise section 145B will, in substance, have almost no effect. If one were to accept that

each year the employer could make offers directly to employees to accept changed rates of pay or varied terms,

“whilst at the same time maintaining union recognition and an expressed intention to bargain with the union about some or all of these matters in the next bargaining round, or in subsequent years … [this would seem to] reduce the scope of section 145B almost to vanishing point.” (para 55)

And earlier Simler J said:

“Following the enactment of section 145B offers are less likely to state expressly what effect their acceptance would have on collective bargaining.” (para 54)

(iv) The crucial determination of the employer’s main or sole purpose is a fact-sensitive enquiry. As regards the burden of proof, section 145D(2) lays down that “it shall be for the employer to show what was his sole or main purpose in making the offers”. But Simler J held (and there has been no suggestion by either counsel that this was incorrect) that, by analogy to other cases on other provisions protecting employees, once the claimant has raised a prima facie case, the burden passes to the employer of proving on the balance of probabilities both what its sole or main purpose was and that that was a proper purpose. Simler J said, at para 59:

“The burden of showing what the sole or main purpose is, is on the employer: section 145D(1) and (2). By analogy with Yewdall v Secretary of State for Work and Pensions [2005] All ER (D) 149 (EAT) and Serco Ltd v Dahou [2017] IRLR 81, it is for the complainant to raise a prima facie case, and if that is made out, the employer must prove on balance of probabilities that it had an alternative, proper purpose which was either its only purpose, or at least an equally important purpose in making the offers.”

Turning to the enquiry being fact-specific, Simler J went on, at para 61:

“There is an infinite spectrum of facts that might have to be considered in a section 145B case: at one end of the spectrum there may be cases where the employer has sought to change collective bargaining arrangements and then, without entering into collective negotiations or acting precipitately in the midst of such negotiations, and absent some pressing business aim, makes offers that would have the effect that all employment terms will be agreed directly if accepted. At the other end of the spectrum will be employers who have engaged in lengthy and meaningful collective consultation and reached an impasse before considering making direct offers; or who can demonstrate a strong history of operating collective bargaining arrangements with the union and/or have no wish to avoid entering into such arrangements when the offers are made; and there will be cases where employers can show genuine business reasons (unconnected with collective bargaining) for approaching workers directly outside the collective bargaining process. There may also be difficult cases in the middle where the employer has mixed aims or objectives it seeks to achieve, or the evidence is unclear. The question in each case is a question of fact and degree. As with other detriment cases, where an employer acts reasonably and rationally and has evidence of a genuine alternative purpose, tribunals are likely to be slower to infer an unlawful purpose than in cases where the employer acts unreasonably or irrationally or has no credible alternative purpose.”

(v) This fact-sensitive approach, in which the employer must show that it has a proper purpose - “a genuine business purpose” (see para 62 set out below) - for making offers directly to workers, does not give trade unions a veto, whether legally or practically, over changes to terms. As Simler J expressed it at para 62:

“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 section 145B.”

(vi) The ET had been perfectly entitled to make the findings of fact it did in relation to Kostal’s main purpose. It was entitled to reject the Christmas bonus explanation and it was entitled to make three further positive findings of particular relevance. These were as follows. First, the making of the first offers on 10 December 2015 was an immediate reaction to the rejection at ballot of Kostal’s proposal. Secondly, Kostal’s true intentions could be gleaned from the general notices published which included the percentage of employees who had already signed acceptances, “including trade union representatives and members”, which must have been intended to weaken Unite’s negotiating position. Thirdly, Kostal took the conscious decision to bypass further meaningful negotiations or contact with the union in favour of a direct and conditional offer to individual employees. The EAT also drew attention to the contextual factors that this was the first collective negotiation process between this employer and this union and there was an ongoing collective negotiation process that was not proceeding in the way Kostal wished it to proceed. Simler J continued, at para 71:

“The dispute resolution provisions in the Recognition Agreement had not been exhausted as they could have been. Instead, the respondent adopted direct approaches to individual workers in a way that the Tribunal plainly considered to be unreasonable and designed to undermine Unite’s mandate.”

98.
The EAT also indicated that it did not derive any real help from the enacting history or Parliamentary materials. While it was not in dispute that section 145B was enacted in response to the decision of the ECtHR in Wilson and Palmer v UK, to the effect that UK law was infringing the right engaged by article 11 of the ECHR, those cases involved “extreme facts” (para 38); and the explanatory notes to the Employment Relations Act 2004, at para 193, made clear that the purpose of sections 29 to 32 was to ensure that the legislation dealt not only with the facts of those cases but also with other circumstances that the Government considered to be comparable. But the explanatory notes did not indicate what were considered comparable circumstances.

99.
The EAT did refer to the Government’s Response to the Public Consultation reviewing the Employment Relations Act 1999, published on 2 December 2003, which said the following, at para 3.12:

“The Government also confirms that the law should explicitly prohibit inducements or bribes being made to trade union members to forego union rights. These were the particular employer behaviours that gave rise to the Wilson and Palmer case, and they should be made unlawful. The Government intends to make it unlawful for an employer to make an offer to an individual with the main purpose of inducing that person to relinquish rights to belong (or not to belong) to a union, rights to engage in trade union activities or the proposed right to use union services. In addition, 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. To avoid inflexibility however, the law should allow employers to make offers where the sole or main purpose of the inducement is unconnected with the aim of undermining or narrowing the collective bargaining arrangements. In particular, the law should give room for employers and individuals to enter individualised contracts designed to reward or retain key workers."

Simler J indicated that, while this did not give much help, it was "consistent with the approach we have adopted and certainly not inconsistent with it." (para 56). Simler J also made clear that there was here no justification for having regard to Hansard (applying Pepper v Hart [1993] AC 593) because the conclusion of the EAT was that the legislation was not ambiguous.

100.
Therefore the conclusion of the EAT, by a majority, was that, given the findings of fact of the ET, the acceptance of the offers would have the prohibited result and that Kostal had failed to show that its main purpose was a genuine business purpose. The dissenting member of the EAT, Miss Wilson, accepted the submissions of Mr Burns referred to at para 97(i) above.

6. The decision of the Court of Appeal

101.
Kostal successfully appealed from the EAT to the Court of Appeal. The main judgment was given by Bean LJ, with whom King and Singh LJJ agreed: [2019] EWCA Civ 1009; [2020] ICR 217. Bean LJ's central reasoning was that, on its correct interpretation, the "prohibited result" in section 145B was referring to two types of case only. The first is where a trade union is seeking to be recognised and the employer makes an offer whose sole or main purpose is to achieve the result that the workers' terms of employment will not be determined by a collective agreement. The second is where a trade union is already recognised and the employer makes an offer whose sole or main purpose is to achieve the result that the workers' terms of employment (as a whole), or one or more of those terms, will no longer be determined by collective agreement. Bean LJ went on to say of this second type of case, at para 51:

"'No longer' clearly indicates a change taking the term or terms concerned outside the scope of collective bargaining on a permanent basis; and corresponds, in my view, to the ECtHR's use of the word 'surrender' in para 48 of Wilson."

102.
Bean LJ rejected the interpretation that the "prohibited result" covered a third type of case - as on the facts of this case - where there is a recognised trade union and the employer makes an offer whose sole or main purpose is to achieve the result that one or more of the workers' terms of employment will not, "on this one occasion" (para 52), be determined by the collective agreement. Bean LJ gave his reasons for rejecting the interpretation, that section 145B covered this third type of case, as follows:

"(1) because of the penal nature of section 145B, that construction gives a recognised trade union an effective veto over any direct offer to any employee concerning any term of the contract, major or minor, on any occasion; (2) such a veto would go far beyond curing the mischief identified by the ECtHR in Wilson; (3) in such a case the members of the union are not being asked to relinquish, even temporarily, their right to be represented by their union in the collective bargaining process. All that

has happened is that the employer has gone directly to the workforce and asked them whether they will agree a particular term on this occasion." (para 53)

Bean LJ continued, at para 54:

"Such an interpretation of the section 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."

103.
Bean LJ had earlier illustrated the first of those reasons (that the contrary interpretation would give a recognised trade union the power to veto even the most minor changes in the terms and conditions of employment with the employers incurring a severe penalty for overriding the veto) by referring to the following hypothetical 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 worker 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."

7. Wilson and Palmer v UK

104.
As we have already said, it is not in dispute that sections 145B and 145D were part of the Government's response to the decision of the ECtHR in Wilson and Palmer v UK. To appreciate the general purpose of those sections, it is therefore helpful to consider Wilson and Palmer v UK in a little more detail.

105.
That case was a challenge primarily against a decision of the House of Lords reported as Associated Newspapers Ltd v Wilson [1995] 2 AC 454. Mr Wilson was employed by Associated Newspapers Ltd as a news sub-editor on the "Daily Mail". Prior to 1989, the National Union of Journalists (the "NUJ") was recognised by Associated Newspapers Ltd for collective bargaining purposes and had collectively negotiated a "house agreement" for the journalists' terms of employment. In early 1989 Associated Newspapers Ltd gave notice that it was derecognising the NUJ, terminating the house agreement and introducing individual contracts for its journalists. These new individual contracts had substantially the same terms and conditions as the collectively bargained "house agreement" contracts save that the journalists who agreed to the individual contracts would receive a 4.5% pay rise. This pay rise was withheld from those who would not sign. However, agreeing to a new individual contract did not prevent a journalist from being a member of the NUJ. A journalist could (and many did) remain a member of the NUJ once they had moved to an individual contract. Mr Wilson refused to sign the new individual contract. He brought a claim alleging that Associated Newspapers Ltd had infringed his rights, under section 23(1)(a) of the Employment Protection (Consolidation) Act 1978, not to have action taken against him individually for the purpose of preventing or deterring him from being a member of an independent trade union. The facts of the linked appeal, in the Palmer case, were

significantly similar, with the exception that the union in question, the National Union of Rail, Maritime and Transport Workers, was not derecognised.

106.
The House of Lords heard both appeals together. Overturning the Court of Appeal, it held that neither employer had infringed section 23(1)(a). The court's reasoning addressed two main issues: first, whether an employer's omission to confer a benefit on an employee could constitute an action against an individual within the scope of section 23(1)(a); and second, and in the alternative, whether the employer's actions were taken for the purpose of preventing or deterring the employees from being members of a trade union. Lord Bridge of Harwich gave the leading judgment on the first issue, with which Lord Keith of Kinkel and Lord Browne-Wilkinson agreed. He held that the term "action" in section 23(1)(a) could not encompass an omission. Withholding from Mr Wilson and Mr Palmer a pay rise conferred on their respective colleagues, whatever the purpose of granting that pay rise may have been, could not amount to a contravention of section 23(1)(a). Lord Lloyd of Berwick gave the lead judgment on the second, alternative, issue, with which Lord Bridge, Lord Keith and Lord Slynn of Hadley agreed. He held that the employees did not have a right to be represented by a union in negotiations with their employer. Section 23(1)(a) protected only the right to associate as a member of a trade union ie the right to be a member of a union per se, and not any right to make use of any particular essential services of the union (such as collective representation in contract negotiations with an employer).

107.
Mr Wilson and Mr Palmer, and their respective unions, brought a challenge before the ECtHR. They argued that the law as determined by the House of Lords failed to secure their rights under article 11 of the ECHR which reads:

"Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."

In Wilson and Palmer v UK, the ECtHR agreed that UK law was in violation of article 11. The crux of the ECtHR's reasoning proceeded in five stages (paras 41 to 48):

(i) Article 11 could impose on a state a positive obligation to ensure the effective enjoyment of the rights protected by that article.

(ii) The words "for the protection of his interests" in article 11 meant that a trade union must be free to strive for the protection of its members' interests. However, this freedom of a trade union to make its voice heard did not extend to imposing on an employer an obligation to recognise a trade union. Trade unions had other ways to make their voices heard including, for instance, the right to strike.

(iii) However, it was of the essence of the right to join a trade union for the protection of their interests that employees should be free to permit the union to make representations to their employer. If they were prevented from doing so, their freedom to belong to a trade union for the protection of their interests became illusory.

(iv) As it was open to the employers to treat employees who signed individual contracts better than those who refused to sign such contracts, UK 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 was a disincentive or restraint on the use by employees of union membership to protect their interests.

(v) It was therefore possible under UK law for an employer effectively to undermine or frustrate a trade union's ability to strive for the protection of its members' interests.

It followed that UK law was in violation of article 11.

8. Our reasons for allowing the appeal

108.
With great respect, we prefer the conclusion, and most of the reasoning, of the ET and the majority of the EAT to that of the Court of Appeal. Our essential reasons for doing so, and for allowing the appeal, can be set out in the following ten points.

(1) The modern approach to statutory interpretation and relevant materials

109.
We are here faced with a question of statutory interpretation. It is therefore first crucial to clarify the approach we must take. The modern approach to statutory interpretation requires the courts to ascertain the meaning of the words in a statute in the light of their context and purpose (see, for example, Uber BV v Aslam [2021] UKSC 5; [2021] ICR 657, para 70; Rittson-Thomas v Oxfordshire County Council [2021] UKSC 13; [2021] 2 WLR 993, para 33). In carrying out their interpretative role, the courts can look not only at the statute but also, for example, at the explanatory notes to the statute, at relevant consultation papers, and, within the parameters set by Pepper v Hart [1993] AC 593, at ministerial statements reported in Hansard. We have seen that the EAT in this case took into account the explanatory notes and the Government's response to the Public Consultation reviewing the Employment Relations Act 1999, published on 2 December 2003; and, in the light of those materials, it is not in dispute that one of the purposes of sections 145A-145F of the 1992 Act was to ensure that domestic law complied with the ruling of the ECtHR in Wilson and Palmer v UK which was itself concerned to ensure compliance with article 11 of the ECHR.

110.
But it is also relevant that the explanatory notes to the Employment Relations Act 2004 made clear that the new statutory provisions were concerned to deal not only with the facts of Wilson and Palmer but also with circumstances considered by the Government to be comparable. This is set out in the explanatory notes at para 193:

"The Government believes that the principle underlying the decision of the [European Court of Human Rights in Wilson and Palmer] extends beyond the facts in Wilson and Palmer and is applicable to a number of other comparable circumstances. The purpose of sections 29-32 [of the Employment Relations Act 2004, inserting sections 145A to 145F into the Trade Union and Labour Relations (Consolidation) Act 1992 and making some other amendments to the 1992 Act] is therefore to secure that these provisions deal not only with the facts in Wilson and Palmer but also with the other circumstances considered by the Government to be comparable."

This left open what counts as comparable circumstances. But one obvious example, going beyond the facts of Wilson and Palmer and falling within section 145B, is that the provisions extend, as made clear by the wording of section 145B(2), to where any (even just one) of the workers' terms of employment will not, or will no longer, be determined by collective agreement.

111.
Andrew Burns QC, counsel for Kostal, pressed upon us that we should also take into account earlier versions of the Bill. He pointed out that the words "will not" in section 145B(2) were only inserted in

later versions of the Bill, once it had been decided to include not only recognised unions but also unions seeking recognition. This was to support his submission that, in the case of a recognised union, the relevant words were “will no longer” which supported the interpretation that one was concerned with workers relinquishing their rights in the future to have their terms of employment determined by collective bargaining (ie that the workers were “contracting out” of collective bargaining). We are not convinced that it is permissible to consider previous versions of the Bill that became law. But even if we were to take those earlier versions into account, we do not think that it takes matters much further. In particular, it would be very odd, if Mr Burns’ submission were correct, for the words applicable to the standard situation of a recognised union (“will no longer”) to be relegated to brackets.

(2) The “prohibited result” and the employer’s “main purpose in making the offers”

112.
In determining the correct interpretation of sections 145B and 145D, one can see that the crucial wording embodies the two linked concepts of the “prohibited result” and the employer’s “main purpose in making the offers”. Section 145D(4) provides some mandatory but limited guidance as to whether the employer’s main purpose was to achieve the prohibited result. One can see that sections 145D(4)(a) and (b) refer to situations which would tend to show that that was the employer’s main purpose: they are situations where the evidence is that the employer does not wish to use the collective bargaining arrangements agreed or proposed by the union. In contrast, section 145D(4)(c) refers to situations which would tend to show that the employer’s main purpose was not to achieve the prohibited result but was, rather, what Simler J helpfully referred to (see para 97(v) above) as a “genuine business purpose”: ie there is evidence that the employer is making the offers to particular workers to reward those workers for their high level of performance or to retain them because of their special value. It is mandatory for a court to take those matters into account if there is any evidence in relation to those matters: the relevant words of section 145D(4) are that “the matters taken into account must include any evidence [of the matters set out in (a), (b) and (c)]”.

113.
It is very important to stress - and it may be this that makes the interpretation of sections 145B and 145D particularly difficult - that the words in section 145B(1)(b), that “the employer’s sole or main purpose in making the offers is to achieve that result [ie the prohibited result]”, cannot be read literally. A literal interpretation - so that offers of individual agreements with workers (who are members of a recognised trade union or a trade union seeking recognition) on any terms of employment would automatically mean that the employer’s main purpose is to achieve the prohibited result - would leave no scope for the idea that the employer does not infringe section 145B if the employer has a genuine business purpose. Yet section 145D(4) makes clear that, through the concept of “the employer’s sole or main purpose”, offers to particular workers are sometimes acceptable and do not infringe section 145B. This is consistent with the Government’s explanation of the policy that we have set out in para 99 above. The words in section 145B(1)(b) must therefore be interpreted (see Simler J at para 97(v) above) as excusing the employer where, even though acceptance of the offer would have the prohibited result, the employer has a genuine business purpose. In other words, the employer does not have the main purpose of achieving the prohibited result where the employer has a genuine business purpose. Where this is in dispute, it will be for employment tribunals to make findings of fact as to the employer’s main purpose.

114.

In interpreting sections 145B(1)(b) and 145D(4), and while we recognise the caution that one needs to exercise in looking from one set of statutory provisions to another differently drafted set in an entirely different context, we consider that some assistance can be obtained from Brady v Brady [1989] AC 755. Here the House of Lords had to interpret the “proper purpose” defence to a statutory prohibition on a company giving financial assistance in connection with the purchase of its own shares. The company must show that its principal purpose was not to assist the acquisition or was an incidental part of some larger purpose of the company: see now section 679 of the Companies Act 2006. The issue was whether as a result of the share acquisition, which the company financially assisted, the company would cease to be subject to management deadlock and would therefore have the benefit of better management. The House acknowledged the difficulty of interpreting “purpose”. It held that the prohibition and the “proper purpose” defence had to be read together within the “fasciculus” or series of sections in which they appear and each had to have a “useful application”. Moreover, the proper purpose had to be independent of achieving the prohibited result and not merely a “by-product” of it: see pp 779-780, per Lord Oliver of Aylmerton, with whom the other members of the House agreed. So too here, the scope of section 145B(1)(b) has to be understood within the series of sections within which it appears. On this basis we consider that what it means is that, if the employer is to be excused, the employer must show that its sole or main purpose was to achieve something other than the prohibited result (ie that the employer has a genuine business purpose).

115.
There are two further points to make about the interpretation of the “prohibited result”. The first is that the words in section 145B(1)(a), “together with other workers’ acceptance of offers which the employer also makes to them”, seek to ensure that the offer by the employer has an impact on collective bargaining. If the law were concerned with an offer made to just one relevant worker, that worker’s hypothetical acceptance, viewed in isolation, would constitute a waiver of any wrong to that worker and would have no impact on collective bargaining. Put another way, there is a de minimis threshold that must be crossed.

116.
Secondly, “the workers’ terms of employment” in section 145B(2) must be referring to the category of terms that would be incorporated into the workers’ contracts of employment by reason of an existing or envisaged collective agreement negotiated by or on behalf of the union (whether that union is recognised or is seeking to be recognised). See, generally, on the incorporation of collective agreements into individual contracts of employment, Chitty on Contracts, 33rd ed (2018), paras 40-049 to 40-054. Oliver Segal QC, counsel for the appellants, referred us to National Coal Board v National Union of Mineworkers [1986] ICR 736, 772 in which Scott J approved the submission of counsel that there is:

“a distinction between terms of a collective agreement which are of their nature apt to become enforceable terms of an individual’s contract of employment and terms which are of their nature inapt to become enforceable by individuals. Terms of collective agreements fixing rates of pay, or hours of work, would obviously fall into the first category.”

Let us assume, therefore, that, immediately before an individual offer as to pay is accepted by a relevant worker, the worker’s contractual right was to the pay set by collective agreement. It would follow that, immediately after acceptance, that worker’s pay would no longer be determined by collective agreement but would be that set out in the employer’s offer. The “prohibited result” would thereby be brought about, albeit for a limited period, until the terms fixed by any subsequent collective agreement replaced those terms.

(3) Rejecting an extremely narrow interpretation and the important consequences of accepting "contracting out" on a one-off basis

117.
The approach taken by the Court of Appeal produces an extremely narrow interpretation of section 145B. Mr Burns' primary submission was that the prohibited result is one where the offer is for the workers to "contract out" of collective bargaining. That can apply equally to a union seeking recognition as to a union that is already recognised. But even Mr Burns conceded that there can be a contracting out of collective bargaining, with a recognised union, on a temporary one-off basis. So had Kostal here offered the workers the disputed package of terms in return for their expressly giving up their right to have their terms of employment determined by collective bargaining for the 2015 round, Mr Burns accepted that that would have been covered by section 145B. We consider that he was obviously correct to have made that concession. There would be no valid reason to distinguish a long-term (or permanent) contracting out of collective bargaining from a one-off contracting out of collective bargaining. The mischief of the Wilson and Palmer case would extend to both as would the protection offered by article 11 of the ECHR.

118.
Once one accepts that express contracting out of collective bargaining on a temporary one-off basis must be covered, three important consequences follow. First, the main reasoning of the Court of Appeal cannot be sustained. That reasoning explicitly rejected a third type of case where, "on this one occasion", the workers' terms will not be determined by collective agreement. Secondly, the words "will not" in section 145B(2) are being applied to a recognised trade union ie "the prohibited result is that the workers' terms of employment, or any of those terms, will not [on this occasion] be determined by collective agreement negotiated by or on behalf of the union." (bracketed emphasised words inserted). This contradicts the view, otherwise submitted by Mr Burns, that the words "will not" apply only to unions seeking recognition and "will no longer" applies only to recognised unions. Thirdly, and most importantly, one inevitably must consider whether the facts of this case constitute, in substance if not in form, the contracting out of collective bargaining on this occasion. It cannot be correct - and would amount to an unacceptable triumph of form over substance - if only offers expressly referring to contracting out of collective bargaining on this occasion were covered.

(4) These facts did constitute contracting out on this occasion

119.
The facts of this case did constitute the contracting out of collective bargaining on this occasion so that the acceptance of the offers would achieve the prohibited result. Although Kostal did not make any express reference to collective bargaining in its offers, acceptance of the offers being made would mean that, on this occasion, as found by the ET, the relevant workers' terms of employment would not be determined by collective agreement. The important passages from the ET's judgment set out at para 94 above, make clear that, even though collective bargaining continued until it was concluded on 3 November 2016 (see para 89 above), the individuals who had accepted one or other of the individual offers had already had their terms determined on the basis of the individual agreement rather than that considerably later collective agreement. That document was purporting to record a collective agreement in circumstances where the terms and conditions had for some time been governed by variations agreed individually. This is consistent with the interpretation of the "prohibited result" that we have put forward in para 116 above. Furthermore, as the ET put it, Kostal's commitment to collective bargaining was "little more than window dressing" as it had already "destroyed the union's

mandate". This was because the relevant terms of employment had already been offered (and accepted) individually irrespective of the collective bargaining.

(5) Kostal's main purpose was to achieve the prohibited result (ie the employer did not have a genuine business purpose)

120.
We have explained in para 113 above that the words in section 145B(1)(b) must be interpreted as excusing the employer where, even though acceptance of the offer would have the prohibited result, that is not the employer's sole or main purpose in making the offers because the employer has a genuine business purpose. Once one reaches the conclusion that, on these facts, the prohibited result would be achieved by the acceptance of the offers (ie these facts did constitute contracting out on this occasion), the findings of fact of the ET (set out at para 95 above), as upheld by the EAT, are determinative in relation to Kostal's main purpose being to achieve that prohibited result (ie that Kostal did not have a genuine business purpose). The EAT was correct that the ET was perfectly entitled to make those findings of fact and the Court of Appeal did not suggest the contrary.

121.
Indeed, in our view, this is a strong case for holding that there has been a breach of section 145B. As has been set out at para 95 above, although Kostal purported to be seeking to ensure that a Christmas bonus would be paid to employees, the ET found that Kostal took a conscious decision to by-pass further meaningful negotiations and contact with the union in favour of a direct and conditional offer to individual employees. This was not a case where an impasse had been reached. On the contrary, Kostal abandoned the agreed procedures before stage 4 (the reference to ACAS) had been attempted. Bogg and Ewing (2021) 50 ILJ 125, 126, make this point forcefully in criticising Bowers for having said that Kostal had engaged in an "exhaustive succession of discussions with the union":

"As the factual findings of the Employment Tribunal in Kostal make clear, the collective negotiations were not exhausted in this case. … The employer issued the individual offers before a further meeting with the union during the collective negotiation process which took place on 14 December. The individual offers were also issued before the exhaustion of the parties' own agreed dispute resolution procedure, the final stage of which provided for ACAS conciliation.

In short, it is inconsistent with the tribunal's findings of fact to describe the collective negotiations as 'exhaustive'. They were not 'exhaustive' because they failed to exhaust the procedural steps provided for in the parties' own recognition agreement. That the employer bypassed its own agreed procedures and issued individual offers during the collective bargaining process was critical to the reasoning of the ET and EAT that this constituted the statutory prohibited purpose."

(6) The interpretation taken by the Court of Appeal would render it very difficult in practice to establish a breach of section 145B

122.
The approach we are here putting forward is further strengthened by a concern that, if one were to take the narrow approach favoured by the Court of Appeal or even if, beyond that, one insisted that there must be express reference to contracting out including on one occasion, one would be rendering it very difficult in practice to establish a breach of section 145B. Indeed, one might go so far as to say that it would render section 145B a virtual dead letter. This was the point made by the EAT that we have set out at para 97(iii) above. The facts of this case beautifully illustrate the point. If we were to dismiss this appeal, employers would be advised that, provided they do not expressly mention in

individual offers that the workers must give up or surrender rights to have terms fixed by collective bargaining, and provided they continue to show commitment to collective bargaining by little more than what the ET described as “window dressing” (see para 94 above), they can avoid being in breach of section 145B. Although strongly supportive of the Court of Appeal’s approach, Bowers (2020) 136 LQR 186, 191, recognised the reality that that approach would render it very difficult to establish a breach of section 145B:

“In reality, unless there is a pattern of behaviour from which inferences might be drawn of anti-union hostility, it is likely to become very difficult to establish a breach of section 145B in future cases. This is because any well-advised employer is likely to emphasise the particular reasons for an offer being made at that time, and that it is not about withdrawing from collective bargaining in future.”

(7) The timing difficulty

123.
A further difficulty with any narrow interpretation that would require a worker to wait and see how collective bargaining might in future progress is that the wrong in question is committed by the making of the offer. Under section 145C(1)(a), the worker to whom the offer is made then has a limitation period of three months to bring a claim (or, if the offer is part of a series of similar offers to the complainant, the three months runs from when the last of them was made). By section 145C(1)(b), this is subject to the time limit running from such later date as considered reasonable by the tribunal “where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period”. Apart from the possibility of a tribunal applying that exception in section 145C(1)(b), the short limitation period would plainly render it problematic for a worker to wait and see how any collective bargaining might progress. This was a point clearly and correctly made by Simler J at para 54:

“[I]t must be possible for a worker to determine what the effect of acceptance would be within the time limit prescribed. The approach we adopt allows that and creates a coherent scheme. On the other hand, absent an express statement as to the effect of acceptance of the offers on collective bargaining, if the effect of acceptance is only to be judged at some future unidentified date such as the next collective bargaining round, the time limits are unworkable (and not merely difficult, as Mr Burns concedes). On Mr Burns’ construction, the worker would have to put in a complaint before necessarily knowing the outcome of the next bargaining round (which could be a year away) and therefore without knowing what effect acceptance would have. As Mr Burns put it, the worker would have to decide whether the unexpressed intention (and effect) of the offer if accepted would be for one or more terms of employment to be determined outside collective bargaining in the next collective bargaining round, irrespective of the immediate effect of acceptance on terms of employment. That to our minds is unworkable.”

(8) Additional flaws in the Court of Appeal’s reasoning

124.
With respect, there are two linked additional flaws in the Court of Appeal’s reasoning. First, it is misleading to portray the union as having a veto over the negotiation of any terms with individuals. As we have made clear, where the employer’s main motive for individual negotiation is a genuine business purpose, section 145B does not prevent offers to individuals. A genuine business purpose includes rewarding particular employees with incentive pay and seeking to retain particular employees (both of which, as we have seen, are expressly set out as being permitted in section 145D); and the need to meet urgent business demands. Secondly, Bean LJ’s hypothetical example set out at

para 103 above is problematic because one needs to know more facts in order to determine whether this would constitute an infringement of section 145B or not. For example, if there were urgent business demands requiring work to be done on the August Bank holiday, there would probably be no breach of section 145B. The employer would have a genuine business purpose for the offers and its main purpose would not be to bypass the collective bargaining procedures. Bogg and Ewing (2020) 49 ILJ 430, 456, make a similar point:

"In our view, it is not at all clear that [Bean LJ's] example constitutes a breach of section 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, section 145D might suggest that this was not a prohibited purpose."

125.
It is also our view that the Court of Appeal misinterpreted Simler J when it suggested, at para 43, that she had said, in the last sentence in para 61 (set out at para 97(iv) above), that "an employer who has acted 'reasonably and rationally' will not be liable". Simler J was not saying that. All she was saying, correctly, was that, in assessing an employer's main purpose, an employer is more likely to be found to have a genuine business purpose, the more reasonable and rational its conduct has been.

(9) The decision in this case and the wider context

126.
It is important to stress that, on the facts of this case, we need go no further than deciding that an employer is in breach of section 145B: (i) where an offer, if accepted, would constitute contracting out of collective bargaining on this occasion, so that that offer falls within the prohibition in section 145B as satisfying the "prohibited result" requirement; and (ii) where the employer's main purpose was to achieve that result rather than having a genuine business purpose (and the factual findings of the ET are determinative on that). We do not think it would be helpful to speculate as to what the position would be on other hypothetical facts. But in applying the statutory provisions we think it is useful always to have in mind the following two questions:

(a) is the employer, in form or in substance, making an offer for the workers to contract out of collective bargaining whether in the future or on this occasion?

(b) is the employer seeking to bypass the agreed (or, if the union is seeking recognition, the contemplated) collective bargaining procedures or does the employer have a genuine business purpose in making the individual offers?

On the facts of this case, Kostal was making an offer for the workers to contract out of collective bargaining on this occasion; and Kostal was seeking to bypass the agreed collective bargaining procedures and did not have a genuine business purpose in making the individual offers.

127.
One point raised at the hearing was how precisely these statutory provisions operate where the relevant trade union is seeking recognition but has not yet been recognised. It is unnecessary for us to decide this but we see no difficulty in applying the provisions in the way that we have explained above. We have explained above, at para 116, that one needs an existing or envisaged collective agreement in order to establish the "prohibited result". Plainly an offer requiring the trade union member (even though the trade union is merely seeking recognition), formally to contract out of a

future collective agreement would be covered. But assuming that, even in this context, the prohibited result may extend beyond that formal contracting out, the employer is, as ever, excused where it has a genuine business purpose. And, although we are hesitant to speculate without facts, one can readily anticipate that, where a trade union is only at the stage of seeking recognition, it is likely to be easier for the employer to establish that it has a genuine business purpose than where a union has already been recognised.

(10) Article 11?

128.
Mr Segal submitted, as an alternative argument to his primary submissions applying ordinary statutory interpretation, that the Court of Appeal's interpretation of sections 145B and 145D contravened article 11 of the ECHR so that the provisions should be read down so as to be ECHR-compliant under section 3 of the Human Rights Act 1998. He referred us to relevant decisions of the ECtHR, since Wilson and Palmer v UK, including, most importantly, Demir v Turkey (2009) 48 EHRR 54 and to the helpful summary of the Strasbourg case law by Underhill LJ in Pharmacists' Defence Association Union v Boots Management Services Ltd [2017] EWCA Civ 66; [2017] IRLR 355, paras 29-47. Although we have seen that one of the purposes of sections 145B and 145D was to ensure that domestic law was brought into line with the ECtHR decision on article 11 in Wilson and Palmer v UK, we have not found it necessary to explore in any further detail the law on article 11. We therefore prefer to say nothing further on that issue.

9. The judgment of Lord Leggatt

129.
Since writing this judgment we have had the benefit of reading the judgment of Lord Leggatt (with whom Lord Briggs and Lord Kitchin agree). While we agree with the decision that he reaches in this case, it will be apparent from our judgment that we take a different interpretation of sections 145B and 145D which does not turn on considering the causal question as to whether there was a real possibility that, if the offers had not been made and accepted, the workers' relevant terms of employment would have been determined by a new collective agreement reached for the period in question (see Lord Leggatt's judgment at para 65). We have explained above (see in particular paras 113 and 116) what we consider to be the correct interpretation of sections 145B and 145D. On our interpretation, contrary to Lord Leggatt's approach (see his judgment at para 67), it does not necessarily follow that the employer escapes liability just because the collective bargaining process for this round has been exhausted. For example, an employer who has been determined to thwart the bargaining process does not have a genuine business purpose (and indeed would fall within section 145D(4)(a)). Nor, as we indicate at para 125 of our judgment, do we share Lord Leggatt's criticism (see para 47 of his judgment) of the emphasis on reasonableness, which the EAT held would apply in assessing the employer's purpose. We do not accept that a reasonableness test without precise criteria is unworkable. For example, a test of whether the employer has acted within "a band or range of reasonable responses" to an employee's misconduct is applied in the context of unfair dismissal (see, eg, Graham v Secretary of State for Work and Pensions [2012] EWCA Civ 903; [2012] IRLR 759, para 36). In general terms, we consider, with respect, that the words, context and purpose of the statutory provisions lead to the interpretation we favour rather than that put forward by Lord Leggatt.

10. Conclusion

130.
For these reasons, we would allow the appeal.