



## By-passing the union - yes or no?

By **Paul Quain** - 31 October 2019

### Can you bypass a recognised trade union and make offers direct to the workforce?

Yes, but you need to be careful!

Where you have a recognised trade union in your workforce, there is law which says that workers who are a member of that union have the right not to be made offers by their employer if the effect is that the workers terms of employment will not (or will no longer) be determined by collective agreement. This only applies to members of a trade union and it relates to inducements about collective bargaining. It applies even when offers to unions are rejected.

If that feels as clear as mud, it is probably because it is!

### Scenario - recognised trade union

Imagine the following scenario. A group of shop floor and manual workers ballot in favour of recognising a particular trade union in the UK. The employer, following the path of least resistance, decides to sign a Recognition Agreement with the union (let's call them Unite who happen be a union in the UK!) giving Unite sole recognition and bargaining rights. Unsurprisingly, once recognised Unite wants to have discussions about pay!

### Pay negotiations

The employer comes up with what it believes is an affordable and generous offer of a 2% pay rise, a lump sum offer of 2% of base salary (to be paid as a Christmas bonus) and an additional 2% for those earning less than £20,000. In return for these increases the employer asks for a reduction in sick pay cover for new starters, a reduction in Sunday overtime and consolidation of two individual 15 minute breaks into a single 30 minute break.

### Breakdown



The Union rep asks what would happen to the Christmas bonus if the rest of the deal is rejected. The Company says that it relates to profits of the previous year and if not accepted as a whole (with the deal) would be lost. The union rep does not recommend acceptance of the deal and there is then a ballot at which there is an 80% turnout and just under 80% vote to reject the deal and just over 20% vote to accept the deal.

### **Negotiating with individual employees**

Can the employer now write to the individual employees offering the pay increase and Christmas bonus on the terms discussed with the Union (making it clear that if the employees do not accept the offer they will not receive the Christmas bonus)?

### **Back to the Union**

This is what an actual company (Kostal) did in 2015. To continue the story, there is a further negotiation meeting in December and unsurprisingly the trade union rep complains that the company is "bypassing the collective agreement". He says the union would agree to get the pay offer through if the company removes the provision about changing breaks. The Company says "No Way!"

### **Company issues a Notice to ramp up the pressure!**

The Company then issues a General Notice saying the pay offer was made to all individual employees so that the majority of employees had the opportunity to be paid their Christmas bonus in their December pay and 77% had accepted including Trade Union representatives. The notice urged employees to agree changes by a deadline in December.

### **ACAS negotiation**

The dispute was then referred to ACAS for conciliation. The Company said to ACAS that it simply wanted its employees to have the opportunity to receive the Christmas bonus. The Company also said to the Union that it was never the company's intention to induce staff to opt out of collective bargaining, and that the only reason for making the offer was so that the Christmas bonus would be paid before the end of the year.

### **The Company writes to individuals again**

On 29 January 2016, Kostal wrote letters to those employees who had not accepted the pay proposal. These letters stated that the changes would not be implemented without the employees' express agreement, but that "you should be aware that in the event that no agreement can be reached ... this may lead to the company serving notice on your contract of employment". (Nothing was said about whether dismissal would be followed by re-engagement on new terms.) These letters offered a 4% pay increase, backdated to 1 January 2016.

### **Resolution?**

A collective agreement was eventually reached as to pay and the amended terms and conditions on 3 November 2016.

So a happy ending? Well not quite. Was there an issue with what the employer did here?

### **Court action**

As you will have guessed this case went to court and ended up going all the way to the Court of Appeal. Yes, that is no fewer than three court hearings! This was because a large group of employees initially brought claims in the employment tribunal, alleging that their rights had been infringed on two occasions, by the letters of 10 December 2015 and 29 January 2016.

The employment tribunal were not very impressed with parallel approaches to individual workers which it saw as anathema to the notion of collective bargaining. The tribunal found for the union and the Employment Appeal Tribunal agreed (although it was not unanimous). The Court of Appeal, however, were very uncomfortable with the idea that a recognised trade union had an effective veto over any direct offer to any employee concerning any term of the contract, major or minor, on any occasion. It concluded that it was extremely unlikely that this was intended by Parliament (when it made the law) and overturned the two lower court decisions. In other words at the moment making "one off" direct offers to the workforce which by-pass a trade union seem ok. The case is likely to go to the Supreme Court so watch this space!

