UK's failure to confer protection against action short of dismissal for participating in strike action is an unjustified interference with ECHR Article 11 rights, and it is possible to interpret domestic legislation compatibly

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Mercer v (1) Alternative Future Group Ltd (2) Pritchard (UKEAT/0196/20/JOJ)[1]
(Judgment handed down on 2nd June 2021)

Introduction

1. Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") protects workers against detriment related to taking part in the activities of an independent trade union. However, the scope of trade union activities in that provision has been interpreted as not including industrial action. The issue in the appeal to the Employment Appeal Tribunal ("EAT") (Choudhury P sitting alone) was whether, having regard to the obligation under s.3 of the Human Rights Act 1998 ("HRA"), s.146 TULRCA ought to be interpreted as if it did include protection against detriment related to participation in industrial action. The Employment Tribunal ("ET") found that whilst there was an infringement of Article 11 of the European Convention of Human Rights ("ECHR"), it was not possible to interpret s.146 compatibly as to do so would go against the grain of the legislation[2].

The Facts

2. The First Respondent ('R1') is a health and social care charity providing a range of care services across the northwest of England, and the Second Respondent ('R2') was, at the time, its Acting Chief Executive.

[1] https://assets.publishing.service.gov.uk/media/60b754a88fa8f5488fbd793a/Mrs_F_Mercer_v_Alternative_Furture_Group_Ltd_and_Others_UKEAT_0196_20_JOJ.pdf
[2] 1st paragraph of the summary of the judgment.

3. The Claimant ('C') has been employed by R1 as a support worker since 2009. At the relevant time, she was a workplace representative for her trade union, Unison.

4. In early 2019, there was a trade dispute in respect of payments for sleep-in shifts. Unison called a series of strikes which took place between 2nd March and 14th May 2019. C was involved in planning and organising those strikes. She took part in some media interviews and communicated an intention to participate in the strike action herself.

5. On 26th March 2019, C was suspended. She was told that this was because she had abandoned her shift (presumably to take part in the strike) on two occasions without permission and that she had spoken to the press without prior authorisation. The suspension was lifted on 11th April 2019, but the disciplinary action proceeded and, on 26th April 2019, C was given a first written warning for leaving her shift. That sanction was overturned on appeal. A subsequent grievance lodged by C was rejected.

6. On 23rd August 2019, C presented a claim to the ET, complaining that, contrary to s.146, she had been subjected to a detriment by being suspended. She contended that the sole or main purpose of that suspension was to prevent or deter her from participating in the activities of an independent trade union at an appropriate time, or to penalise her for doing so. Her case was that the "activities of an independent trade union" within the meaning of s.146 included both the planning and organisation of the industrial action and her own participation in it.

7. R1 resisted the claims on the basis that the suspension and disciplinary action were unrelated to any trade union activities. R1 also contended that taking part in industrial action could not be an activity protected by s.146.

The ET decision[3]

8. At the Preliminary Hearing to consider the s.146 issue, R1 accepted that planning or organising industrial action could fall within the scope of "activities" within the meaning of s.146, as long as that was done at an appropriate time, but maintained that participation in industrial action could not.

[3] https://assets.publishing.service.gov.uk/media/5ebaab46d3bf7f5d37fa0d50/Mrs_F_Mercer_v_Alternative_Future_Group_Ltd__Other_-_2411052_2019.pdf

9. The ET identified the issue before it as being whether, in the light of Articles 10 and 11 ECHR, the activities protected by s.146 extended to participation in lawful industrial action as a member of an independent trade union.

10. The ET concluded that, although, as a matter of ordinary language, participation in industrial action was part of the activities of a trade union, the proper interpretation of s.146, in light of the domestic authorities, was that it did not extend to any form of industrial action (relying on **Drew v St Edmundsbury Borough Council [1980] IRLR 459**).

11. However, the ET also concluded that it was clear that the right to strike forms part of the rights guaranteed by Articles 10 and 11 ECHR, but that those rights can be restricted if the requirements of the second paragraph of each Article are satisfied.

12. In the ET's view, it was clear from reading the ECHR cases that where a detriment is imposed by the State in its capacity as employer for the purpose of penalising someone for taking part in lawful industrial action, or deterring them from doing so, without any redress being available to the employee, there will be a breach of Article 11. It followed that for the State to allow a private employer to act in this way without any legal redress for the employee is a breach of the obligation to provide an effective remedy under Article 13.

13. Nonetheless, in considering whether, in light of s.3 HRA, s.146 TULRCA could be interpreted in a way which made it compliant with Article 11 ECHR, the ET held that the "grain" of TULRCA is to draw a clear distinction between trade union activities governed by Part 3, and industrial action which is governed by Part 5. That distinction is most evident in the differences between the right to bring a complaint of automatic unfair dismissal under s.152, which includes the ability to seek interim relief, and the very different provisions which apply where dismissal occurs during or because of industrial action. To read s.146 as extending to industrial action would be inconsistent with this fundamental feature of TULRCA and would undermine it.

14. Accordingly, whilst C could still pursue her case under s.146 on the basis that the sole or main purpose of the suspension was to prevent or deter her from taking part in the planning and organisation of industrial action, her complaint that s.146 was breached if the sole or main purpose was to prevent or deter her from actually participating in that industrial action was unsustainable.

15. C appealed contending that, although the ET was correct to conclude as it did as to the effect of Article 11 ECHR, it erred in failing to exercise the duty under s.3 HRA so as to

interpret s.146 TULRCA in a way that was compliant with the rights guaranteed by that Article.

16. R appealed contending that the ET erred in relation to Article 11 but that it reached the correct conclusion in respect of s.3 HRA.

Issue on appeal

17. Whether, having regard to the obligation under s.3 HRA, s.146 ought to be interpreted as if it did include protection against detriment related to participation in industrial action.

EAT Decision[4]

18. Allowing the appeal, the EAT held that the ET was correct to conclude that the failure to confer protection against detriment for participating in industrial action does amount to an infringement of Article 11, but wrong to find that a compatible interpretation of s.146 would go against the grain of the legislation. A compatible interpretation of s.146 is possible so as to include protection against detriment for participating in industrial action within its scope[5].

19. Following a review of the relevant European Court of Human Rights ("ECtHR") case law, including citation of the domestically significant case of **National Union of Rail, Maritime and Transport Workers v UK [2014] IRLR 467** ("RMT") (upon which Choudhury P commented that the right to take industrial action, and more specifically to strike, although not an "essential element" of the Article 11 right is "clearly protected" by it)[6], the EAT held that what the cases demonstrated is that the EctHR regards any restriction, however minimal, on the right to participate in a trade union-sanctioned protest or strike action as amounting to an interference with Article 11 rights[7].

20. It followed that the failure in the UK to confer protection against action short of dismissal for participating in strike action similarly amounted to an infringement of C's Article 11 rights[8].

21. Furthermore, a fair balance had not been struck between the competing interests of workers seeking to exercise their trade union rights and those of the employer and

[4] https://assets.publishing.service.gov.uk/media/60b754a88fa8f5488fbd793a/Mrs_F_Mercer_v_Alternative_Furture_Group_Ltd_and_Others_UKEAT_0196_20_JOJ.pdf
[5] 2nd paragraph of the summary of the judgment.
[6] Paragraph 33.
[7] Paragraph 43.
[8] Ibid.

community as a whole. There was therefore an unjustified interference and thus violation of Article 11[9].

22. Finally, the EAT held that there was nothing to suggest that the "grain" of TULRCA is to exclude protection against detriment for those participating in industrial action. The very fact that dismissal for participation in industrial action is protected (albeit in limited circumstances) militates against any argument that it is a cardinal feature of TULRCA that protection against detriment for such participation should not be protected[10].

23. Accordingly, the proposal of a new sub-paragraph 146(2)(c) stating "*a time within working hours when he is taking part in industrial action*" results in a compatible interpretation of s.146 that is sufficiently clear and does not involve judicial legislation or the Court making any policy choices. Rather it is simply giving effect to what is a clear and unambiguous obligation under Article 11 to ensure that employees are not deterred, by the imposition of detriments, from exercising their right to participate in strike action[11].

Commentary

24. English courts have historically been very reluctant to tread on the legislature's toes where such sensitive social and political issues arise in respect of restrictions on the exercise of trade union rights and the numerous difficult policy choices that may be involved, thus being either reluctant to find that Article 11 is engaged at all or, if it is, affording employers a wide margin of appreciation for the purpose of Article 11(2)[12].

25. Ever since the seminal ECtHR case of **Demir and Baykara v Turkey [2008] ECHR 1345, (2009) 48 EHRR 54**, in which it was held that the right to bargain collectively with an employer has 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[13], claimants, unions, their lawyers, and some leading academics alike have sought to use the reasoning in that case to advance the view that it should logically apply to the right strike - whether as an aspect of the right to bargain collectively, or as a separate free-standing right relating to but extending beyond collective bargaining[14].

[9] Paragraph 68.
[10] Paragraph 82.
[11] Paragraph 90.
[12] **Metrobus Ltd v Unite the Union [2009] EWCA Civ 829.**
[13] **Demir and Baykara v Turkey**, paragraph 154.
[14] Alan Bogg and K.D. Ewing, 'The Implications of the RMT Case', (2014) ILJ Vol.43, No.3, 221 – 252.

26. And whilst the ECtHR in **RMT** on the one hand affirmed that the right to strike is 'clearly protected' under Article 11, it simultaneously held that a complete ban on secondary strike action was regarded as justified under Article 11(2) on the basis of a wide margin of appreciation accorded to the UK. Thus despite this apparent setback in **RMT**, unions will likely interpret the **Mercer** judgment as another incremental step on the road to establishing further worker / union rights under Article 11 and meaning they will potentially be able to have another attempt in the right case at establishing that a complete ban on secondary action cannot be justified under Article 11(2).

27. Thus whether or not one agrees with Choudhury P's statements that the approach of adding a new sub-paragraph to domestic legislation enacted by Parliament does not involve judicial legislation or the Court making any policy choices[15], the **Mercer** judgment is without doubt a significant development in the field of trade union / industrial relations and a resounding victory for Mrs Mercer and trade unions generally.

28. However, employers / respondent representatives may be relieved to note that it is not all one-way claimant / union traffic with the interpretation of ECHR rights in the English courts. Albeit decided in a completely different area of employment law, the decision in **Mercer** contrasts with the Court of Appeal judgment in **IWGB v CAC and Roofoods Ltd t/a Deliveroo [2021] EWCA Civ 952** (handed down on 24th June 2021), in which it was held that Deliveroo riders do not fall within the scope of trade union rights under Article 11 ECHR. Thus their claims to 'worker' status were again dismissed (as they had been by the Central Arbitration Committee and the High Court).

[15] Ibid. n.11.

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2 July 2021

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