UK Supreme Court finds trade union legislation in breach of ECHR

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Introduction

Could section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA') be interpreted as protecting workers who participate in lawful strike action from detriment short of dismissal, by the effect of article 11 of the ECHR (the right to freedom of assembly and association) and section 3 of the Human Rights Act 1998 ('HRA 1998')?

No, according to the unanimous judgment of the UK Supreme Court in *Secretary of State for Business and Trade v Mercer* [2024] UKSC 12, as delivered by Lady Simler. As a result, the Court made a declaration of incompatibility under section 4 of the HRA 1998. It is over to Parliament to address the gap identified in the protection of workers' rights and trade union freedoms.

The legal framework

Among other things, section 146(1) of TULRCA 1992 confers the right on a worker not to be subjected to any detriment by their employer for the sole or main purpose of preventing or deterring them from participating in union activities '*at an appropriate time*' or penalising them for doing so. Subsection (2) provides that '*appropriate time*' refers to time outside of working hours or time within working hours where an employer agrees to permit the person to participate in trade union activities. In the absence of such agreement, subsection (1) does not protect workers who participate in strike action (ie. during working hours) from being subjected to detriments by their employer based on such activities.

The factual background

The claimant was a support worker with AFG (a private sector care services provider) and a trade union representative for UNISON. AFG and UNISON had a trade dispute over payments

for sleep-in shifts at care homes. UNISON had complied with the requirements in Part V of TULRCA as to balloting and notification and then organised a series of industrial actions. The claimant was involved in the strikes as both an organiser and a participant. AFG suspended her for abandoning her shifts and speaking to the media without AFG's authorisation. She was subject to disciplinary action which resulted in a written warning (later rescinded following an internal appeal).

The claim and the appeals

The claimant brought a claim alleging detriment contrary to section 146(1)(b) of TURLCA. Before the Employment Tribunal, she argued that section 146 of TULRCA could be read compatibly with article 11 ECHR to extent its protection from detriments short of dismissal to workers who participate in strike action. The Tribunal concluded that section 146 of TULRCA 1992 did not protect workers' participation in lawful strike action and could not be interpreted as doing so.

On appeal to the EAT, the Secretary of State for Business and Trade ('SoS') intervened and argued in support of the Employment Tribunal's decision. The EAT, *per* Choudhury P, reversed the Tribunal's decision and held that it was necessary and possible to expand the definition of the phrase '*at an appropriate time*' in section 146(2) to include time *within* working hours when a person is participating in industrial action.

On the SoS's appeal to the Court of Appeal, the claimant accepted that the EAT's formulation had gone too far by failing to recognise that the ECHR was concerned with the protection of *lawful* strike action. The Court allowed the SoS's appeal, holding, among other things, that interpreting section 146(2) compatibly with article 11 resulted in inappropriate judicial re-drafting of the statute. The Court declined to grant a declaration of incompatibility, seeing as there was a gap in the legislation rather than a provision that offended the ECHR.

The UK Supreme Court's judgment

The Court held that on its plain wording, the protection offered by section 146(1) of TULRCA did not extend to participation in lawful strike action. The intention of the phrase '*at an appropriate time*' in section 146(2) is to limit protection to activities that do not conflict with the worker's main contractual duties. This was reinforced by the detailed scheme in Part V of TULRCA which enables an employer to fairly dismiss an employee for participating in unofficial industrial action in certain circumstances (§§45-47). Universal protection for participation in

strike action could not be derived from TULRCA nor from article 1 of the International Labour Organisation ('ILO') Convention and the domestic predecessor provisions,[1] all of which formed the basis of sections 146 and 152 (§§48 & 59).

On the requirements of the qualified right in article 11 ECHR, Strasbourg recognised that although strike action was protected by that article, it is neither an absolute nor a '*core right*' (see *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2014) 60 EHRR 10 at §§84-88). States are afforded a wide margin of appreciation in balancing the interests of workers against management and limiting the right to strike (*Mercer* at §72).

Where state authorities are the employer, they are afforded a narrow margin because of their potential sway over the workforce. By contrast, a wide margin applies where private sector employers are concerned.

In private sector cases like this one, article 11 imposes a positive obligation on the state as a regulator to ensure effective enjoyment of trade union freedoms.[2] That obligation must be proportionate and acknowledge that states are better placed to strike the appropriate balance between labour and management interests based on social and political factors. However, the state's legislative framework must strike a fair balance between the various interests and any interference with article 11 must be justified, with reference to the wide margin of appreciation (§82-83).

Applying these principles to section 146(2) of TULRCA, the Court held that the absence of protection from detriments for workers participating in lawful strike action was not justified. There was no other source of domestic legal protection for such workers (§§86-87). The lack of any or any effective protection exposed workers to detriments and in consequence the right itself '*dissolves*'. That was not justified as a proportionate means of meeting a legitimate aim and put the UK in breach of its positive obligation under article 11 (§89-90).

Section 3 of the HRA 1998 did not permit the Court to interpret section 146(2) of TULRCA in a manner that was inconsistent with the substance of that provision. As found in the Court of Appeal, there were uncertainties over whether protection should be read as extending to cover lengthy industrial action or read as protecting against any form of detriment. The upshot was

[1] See section 5 of the Industrial Relations Act 1971, subsequently repealed and replaced by Schedule 1, paragraphs 6 and 8 of the Trade Union and Labour Relations Act 1974; section 53 of the Employment Protection Act 1975; and sections 23, 58 and 62 of the Employment Protection Consolidation Act 1978.
[2] Such as the right to form and to join a trade union, the union's right for its views to be heard on behalf of its members and to collectively bargain with the employer (see §§63-64).

that it was not possible to interpret section 146(2) compatibly with article 11. There was no compatible interpretation that could avoid making policy choices that properly belong to Parliament (§105) or avoid '*stark inconsistency*' between identically worded provisions (sections 146(2) and 152) within TULRCA.

Lastly, the Court reminded itself that faced with a provision of primary legislation that was incompatible with article 11, a declaration of incompatibility would only be made where the provision itself was inherently incompatible rather than due to a gap in the law or a failure to legislate (§§114-116). The policy factors that the SoS relied on to argue against a declaration of incompatibility were in fact reasons for granting it, so that the legislature could evaluate those factors (§120-121). The Court made a declaration of incompatibility under section 4 of the HRA 1998 and allowed Ms Mercer's appeal.

Comment

Mercer marks a significant victory for the protection of trade union freedoms and workers' rights in the UK. A positive result for ECHR-watchers and trade union lawyers alike, it is another recent example of the significant impact of the ECHR in employment law, including in cases concerning private sector employers.

The Court's recognition of the positive duty on the state under ECHR article 11 develops an enduring theme of ECtHR jurisprudence: that rights must be practically effective, not illusory. Where legislation has the effect of severely limiting rights protection, the Court takes a restrictive approach to such measures. A declaration of incompatibility may be appropriate precisely because of the social and political policy questions that arise.

The constitutional choreography on display in *Mercer* highlights the interplay between sections 3 and 4 of the HRA 1998 and the respective roles of the judiciary, executive and Parliament. Section 146(2) of TULRCA remains unaffected and in force. It is now over to Parliament to analyse the policy factors and address the breach of article 11 as and when it sees fit.

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