Mercer: TULR(C)A does not protect striking employees from action short of dismissal

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The Court of Appeal has overturned the EAT's decision, which had read down s.146 TULR(C)A to give workers who participate in industrial action protection from action short of dismissal. The court confirmed that TULR(C)A, as drafted, does not provide this protection.

Background

- TULR(C)A s.238A provides that an employee will be automatically unfairly dismissed if the reason for dismissal is that they took part in protected industrial action.
- TULR(C)A s.146 provides that an employer must not subject workers to a detriment where the sole or main purpose is to deter them from taking part in the activities of an independent trade union at an appropriate time.
- TULR(C)A s.152 provides that an employee will be automatically unfairly dismissed if they are dismissed for taking or proposing to take part in the activities of an independent trade union at an appropriate time.

An 'appropriate time' is defined as being either outside working hours or during working hours but with the employer's consent. As most industrial action will take place within working hours (and not with the employer's consent), the majority of workers who participate will not, on a strict reading of the legislation, be protected under either s.146 or s.152. The legislation therefore makes a distinction between 'industrial action' and 'activities of a trade union'. Protection from detriment is only expressly protected in relation to the latter.

ECHR Article 11 provides a qualified right to freedom of association and assembly that includes the right to participate in trade union activity. Restrictions on the exercise of Article 11 rights are permitted only where they are 'prescribed by law' and 'are necessary in a democratic society … for the protection of the rights and freedoms of others'.

The facts

Mrs Mercer was a workplace representative for Unison. In early 2019, she was suspended and, ultimately, given a written warning for abandoning her shift to take part in strikes she had helped organise. She brought a claim under s.146, arguing that participating in industrial action amounted to 'activities of a trade union' and that she had consequently been subjected to detriments.

The tribunal held that, as a matter of ordinary language, participation in industrial action would constitute activities of a trade union. However, this is not how previous case law had interpreted it. The tribunal considered that Article 11 was infringed by the lack of protection for detriment from participating in industrial action. However, it considered that interpreting s.146 more broadly to encompass industrial action would 'go against the grain' of the legislation.

The EAT decision

The EAT agreed with the tribunal that the lack of protection from detriment for participating in industrial action under TULR(C)A was a breach of Article 11. It also considered that the phrase 'activities of an independent trade union' include a reference to participation in industrial action, but that the requirement that those activities take place at an 'appropriate time' (ie outside of working hours or within working hours but with employer consent) breached Article 11.

The EAT considered however that it was possible to read down s.146 to make it compatible with Article 11, without going against the grain of TULR(C)A.

It noted that '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 TULR(C)A that protection against detriment for such participation should not be protected' (para 82, page 38). It also noted that Parliament's express aim was that trade union law should comply with Article 11.

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The EAT decided to read down s.146 by adding a new definition of 'an appropriate time' in s.146(2) to include '(c) a time within working hours when he is taking part in industrial action'. This means that a worker would be protected from suffering action short of dismissal for participating in industrial action even if they did so within working hours without the employer's consent.

Court of Appeal decision

The Court of Appeal overturned the EAT's decision. While the court agreed that 'activities of a trade union' would, on their face, *include* industrial action, it was satisfied that, viewing the entire scheme of protections in TULR(C)A as a whole, it was clear that the protection from detriment under s.146 *was not* intended to capture industrial action.

However, the court considered that it didn't necessarily follow that English law provides no protection at all against measures short of dismissal. Bean LJ stated:

> '[It] … may be that if, for example, an employer were to say to a striker "you are hereby suspended without pay indefinitely until and unless you sign an undertaking never to take industrial action again", the employee would be able to treat that as a repudiation of the contract amounting to unfair constructive dismissal. The law of contract might also have a part to play in a suspension case, particularly if an employer has no power under the contract to suspend. Any such claim would have to be brought in the High Court or County Court: as the law stands employment tribunals have no jurisdiction over claims for breach of contract (other than deductions from wages) so long as the employee has not been dismissed' (para 56, page 13).

Likewise, the court disagreed with the claimant that any detriment (other than a failure to pay wages for days spent on strike) required protection under Article 11. However, the court held that the failure to provide any legislative protection against *any* sanction short of dismissal against employees participating in official industrial action may put the UK in breach of Article 11, if the sanction strikes at the core of trade union activity.

The court considered whether it could use its interpretive tools under the HRA to ensure compatibility with Article 11. Ultimately, however, the court held that it could not read down s.146 so as to find an Article 11 compliant solution.

It was far from obvious that Article 11 requires protection to be given against every form of detriment in response to industrial action, and ECtHR case law did not give any clear direction as to where that line might be. In those circumstances, the court held that it was not entitled to read the legislation down under the HRA.

The court considered that the extent of how much protection to give is essentially an issue of policy, which is for Parliament to decide rather than the courts. The court therefore declined to make a declaration of incompatibility given the scope for variation on when the ECHR may be breached in these cases.

Comment

This is a potentially significant decision for employers and workers. Although it is a welcome clarification of the law, the court has identified a breach of the UK's obligations under the ECHR and it seems likely that the Government will legislate to bridge that gap.

At present, the result of the court's decision is that the only *legislative* protections for participation in industrial action during working hours are the prohibitions on dismissals under TULR(C)A. There are theoretical common law remedies available to employees (to the extent that a 'detriment' also constitutes a repudiatory breach of contract), but this remedy seems relatively limited in practice, and is likely to be fraught with risk for the employees seeking to rely on it.

KEY:

Mercer	*Mercer v Alternative Future Group* [2022] EWCA Civ 379
TULR(C)A	Trade Union and Labour Relations (Consolidation) Act 1992
ECtHR	European Court of Human Rights
ECHR	European Convention of Human Rights
HRA	Human Rights Act 1998