Press Summary

17 April 2024

Secretary of State for Business and Trade (Respondent) v Mercer (Appellant)

[2024] UKSC 12

On appeal from [2022] EWCA Civ 379

Justices: Lord Lloyd-Jones, Lord Hamblen, Lord Burrows, Lord Richards, Lady Simler.

Background to the Appeal

The appellant, Ms Mercer, was employed as a support worker in the care sector by a care services provider, Alternative Futures Group Ltd ("**AFG**"). As a workplace representative of UNISON, she was involved in planning and took part in lawful strike action. She was subsequently suspended by AFG. While suspended, Ms Mercer received normal pay but was unable to earn pay for the overtime she would otherwise have worked.

Ms Mercer brought a claim against AFG under section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("**TULRCA**") that she had suffered detrimental treatment done for the sole or main purpose of preventing or deterring her from taking part in the activities of an independent trade union "at an appropriate time" or penalising her for having done so.

By agreement between the parties, the Employment Tribunal determined as a preliminary issue whether, in light of articles 10 and 11 of the European Convention on Human Rights ("the **Convention**"), section 146 of TULRCA protected workers from detriment short of dismissal for participation in lawful industrial action as a member of an independent trade union. The Employment Tribunal held that it did not. However, the Employment Appeal Tribunal allowed Ms Mercer's appeal and held that it could be interpreted as doing so. The Court of Appeal allowed a further appeal by the intervener, the Secretary of State for Business and Trade, holding that section 146 could not be interpreted compatibly with article 10 of the Convention but refused to make a declaration of incompatibility. Ms Mercer now appeals to the Supreme Court.

Judgment

The Supreme Court unanimously allows the appeal to the extent that it makes a declaration that section 146 TULRCA is incompatible with article 11 ECHR. Lady Simler gives the only judgment, with which the other justices agree.

Reasons for the Judgment

Employees who are dismissed for taking part in lawful strike action have some statutory remedies for unfair dismissal; however, there is no express statutory (or other) protection in domestic law against action taken by an employer short of dismissal for participation in lawful strike action. The question in this appeal is whether section 146 can be interpreted to provide such protection, and if not, what is the consequence **[1]**.

Construction of section 146 and compliance with Article 11

Section 146 of TULRCA protects a worker against detrimental treatment by their employer done with the sole or main purpose of preventing or deterring them from taking part in the activities of an independent trade union "at an appropriate time". However, as a matter of domestic interpretation, section 146 does not provide protection from detriment short of dismissal to workers participating in lawful strike action. This is because the words "at an appropriate time" are defined to exclude working time (except with the employer's consent). Protection is therefore limited to activities which are outside working hours and/or done at a time that is not inconsistent with the worker's job responsibilities. Industrial action will normally be carried out during working hours if it is to have the desired effect, since for workers to withhold their labour at a time when the employer has no expectation of labour being provided is unlikely to have any consequence for the employer.

This interpretation is reinforced by other provisions of TULRCA. For example, an employee (though not the wider category of "worker") may benefit from protection against dismissal for participating in trade union activities at an appropriate time by section 152 of TULRCA, which is in similar terms to section 146. By contrast, employees who participate in lawful industrial action have limited protection against dismissal under sections 237 to 238A of TULRCA. An employee cannot fall within both schemes at the same time. To interpret section 152 as including protection for participation in lawful industrial action in working hours would mean that an employee dismissed for engaging in such industrial action at an appropriate time could bring a claim for unfair dismissal under section 152, thus avoiding and making redundant the carefully constructed regime giving more limited protection for dismissal in sections 237 to 238A of TULRCA. Sections 146 and 152 are sibling provisions and should be interpreted consistently with each other. It therefore follows that section 146 does not provide protection against detriment short of dismissal for taking part in or organising industrial action **[3], [8], [44]-[48]**.

The Supreme Court had therefore to consider whether the absence of any protection in TULRCA for workers taking part in lawful industrial action against detriments short of dismissal is compatible with article 11 of the Convention **[60]**. The cases decided by the European Court of Human Rights ("the **ECHR**") demonstrate that, although the right to strike is protected by article 11, it is not a core right, nor is it absolute. This case concerns the UK's positive obligations to protect the right to strike as regulator of relationships between private employers and workers. In such cases, the ECHR has afforded states a wider margin of appreciation because of the sensitive social and political issues engaged. The UK is not required to provide universal protection in all circumstances to all workers against any detriment (however slight) intended to dissuade or penalise them from participating in a lawful strike. However, it is not the case that the UK has no positive obligations at all. The legislative scheme must strike a fair balance between the competing interests of employers

and workers, and any restriction to the protection of article 11 rights must be justified, recognising the margin of appreciation to be accorded to the state **[81]-[83]**.

In the UK, domestic law does not provide any protection for a worker faced with a disciplinary sanction short of dismissal for taking part in a lawful strike. The right of an employer to impose any sanction it chooses, short of dismissal, for participation in lawful strike action nullifies the right to strike, as employees are unable to strike without exposing themselves to detrimental treatment. In that sense, section 146 both encourages and legitimises unfair and unreasonable conduct by employers. Had there been legislation addressing detrimental treatment short of dismissal for lawful strike action, it might be possible to say that a fair balance had been struck. However, no protection is provided and this places the UK in breach of its obligations under article 11 **[85]-[90]**.

Section 3 of the HRA

The Supreme Court had therefore to consider whether it is possible to interpret section 146 in a way that is compatible with article 11 of the Convention within the meaning of section 3 of the HRA. Section 3 of the HRA requires the courts to interpret primary legislation compatibly with the Convention unless the legislation itself makes it impossible to do so. However, it does not enable the court to change the substance of a provision from one where it says one thing into one that says the opposite. In this case, there is no reading of section 146 that would avoid having to make a series of policy choices with potentially far reaching practical ramifications. This would amount to impermissible judicial legislation rather than interpretation. Further, to interpret the legislation as proposed by Ms Mercer would contradict a fundamental feature of the legislative scheme in TULRCA. Therefore, in this case, section 146 cannot be interpreted as providing the protection sought **[92], [94], [102]-[108]**.

Section 4 of the HRA

The Supreme Court had therefore to consider whether to make a declaration of incompatibility under section 4 of the HRA. A declaration of incompatibility does not affect the validity, continuing operation or enforcement of the relevant provision.

The Court of Appeal held that it could not make a declaration because the incompatibility arose from a gap in domestic law, rather than from a specific provision in primary legislation. The Supreme Court disagrees. Section 146 is the only route that could be available to the appellant to vindicate her article 11 right in the domestic courts or tribunals. But this route is blocked by the conventional interpretation given to section 146 of TULRCA. That is what is inherently objectionable in the terms of section 146 of TULRCA as it stands and means that section 146 is incompatible with article 11 of the Convention **[116]-[117]**.

The court has discretion as to whether to make a declaration of incompatibility. There may be cases where it is not appropriate to make a declaration. However, this is not such a case. Such policy choices as may be required in determining how to strike a fair balance between the competing interests at stake are matters for Parliament to address, and it is for Parliament to choose whether to legislate in this area, and if so, how. But this is not a basis for refusing to make a declaration in this case **[118]-[120].**

The court therefore makes a declaration under section 4 of the HRA that section 146 of TULRCA is incompatible with article 11, insofar as it fails to provide any protection against sanctions short of dismissal, intended to deter or penalise trade union members from taking part in lawful strike action organised by their trade union **[121]**.

References in square brackets are to paragraphs in the judgment.

NOTE:
This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative

document. Judgments are public documents and are available at: Decided cases - The Supreme Court