Employment

The Supreme Court makes a declaration of incompatibility in Mercer

Posted on 24 April, 2024 by | Andrew Burns | John Platts-Mills

1. Lady Simler has provided the Supreme Court's much anticipated Judgment in *Secretary of State for Business and Trade (Respondent) v Mercer (Appellant)* [2024] UKSC 12. The Court allowed Ms Mercer's appeal on one subsidiary point - exercising its discretion to make a declaration that s.146 Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) is incompatible with Article 11 ECHR. The section 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.

Five points for practice

2. First, the Supreme Court agreed with the Court of Appeal as regards the domestic law interpretation of s.146 TULRCA – it does not cover detriment short of dismissal arising out of a strike or industrial action and cannot be interpreted to do so as Ms Mercer contended. It is not currently unlawful for employers - particularly private employers to impose a detriment against workers taking industrial action. However it may be prudent for employers to avoid imposing disproportionate detriments as a matter of good industrial relations.

3. Second, whilst the Supreme Court has made a declaration of incompatibility, it does not affect the validity, continuing operation or enforcement of s.146 TULRCA. If Parliament does not respond to the declaration by amending the legislation in question, the complainant can continue to pursue the matter in Strasbourg: section 4(6)(b) Human Rights Act 1998.

4. Third, Article 11 does not prevent pay being withheld from a striking worker. Public sector employers may be held to a higher standard than private employers as regards taking action to deter workers from joining industrial action. It is possible for a public sector worker to bring a claim against the State if s/he is subjected to a disproportionate detriment which unreasonably interferes with Article 11 rights.

5. Fourth, putting to one side the issue in the case (namely, the failure to afford any protection for detriment short of dismissal), the Supreme Court speculated as to circumstances which may amount to a breach of Article 11 where domestic law provided no or limited protection against sanctions on employees taking lawful industrial action, at §87: if an employer sued strikers for loss of profits caused by their breach of contract in going on strike; and if striking workers returning to work were suspended without pay as a disciplinary measure.

6. Fifth, the Judgment at §§16-17 provides a helpful summary of the mechanics of Part V of TULRCA headed "Industrial Action", including the 'golden formula' and potential immunity for unions in respect of certain economic torts.

Factual background and decision of the Employment Tribunal

7. Ms Mercer was employed as a support worker by a care provider. She was also a union representative. Following a dispute over payment for sleep-in shifts, the union called a series of lawful strikes which Ms Mercer helped to organise and in which she participated.

8. She was subsequently suspended. The allegations were that she had abandoned her shift on two separate occasions without permission, and that she had spoken to the press about the strike action without prior authorisation in a way which conveyed confidential information and was considered likely to bring her employer into disrepute.

9. She presented a claim under s.146 TULRCA, arguing that the reason she had been suspended was that she had participated in lawful industrial action and that this was within the scope of *'activities of an independent trade union'.*

146 Detriment on grounds related to union membership or activities.

(a) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of:

…

(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so

…

10. Whilst the factual basis of the suspension was disputed, the case proceeded on the assumption that the decision to suspend Ms Mercer was taken to deter her participation in lawful strike action. On that basis, the Employment Tribunal decided as a preliminary issue that s.146 of TULRCA did not protect workers from detriment short of dismissal for

participation in lawful industrial action as a member of an independent trade union, notwithstanding the ECHR.

Trajectory through the appellate courts

11. Ms Mercer successfully appealed to the EAT, Choudhury P held that the failure to provide protection to workers participating in industrial action interfered with their Article 11 rights and no legislative objective had been identified that was sufficiently important to justify the limitation. However, he held that s.146 TULRCA could be read down to achieve Article 11 compatibility by inserting an additional limb to the definition of 'an appropriate time'.

12. The Court of Appeal allowed a further appeal by the intervener, the Secretary of State for Business and Trade. It held: (i) lawful industrial action was not within the phrase 'activities of an independent trade union' in s.146; (ii) this failure to give legislative protection against any sanction short of dismissal for participation in lawful strike action may put the United Kingdom in breach of Article 11 even in the case of a private sector employer, if the sanction is one which strikes at the core of trade union activity; (iii) s.146(2) could not be interpreted compatibly with the ECHR; and (iv) it would not be appropriate to grant a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998 because the case involved a lacuna in the law rather than a specific statutory provision that was incompatible.

In the Supreme Court

13. **How should section 146 being construed as a matter of domestic law?** In line with the Court of Appeal, the Supreme Court concluded that as a matter of domestic interpretation, s.146 TULRCA did not provide protection from detriment short of dismissal to workers participating in lawful strike or other industrial action.

14. The definition of ‘an appropriate time’ as set out at s.146(2) TULRCA excludes working time (save where the employer has consented to the activities in question). Protection is therefore limited to activities which are outside working hours. Industrial action will almost always be carried out during working hours if it is to have the desired effect.

15. That Parliament intended to exclude participation in strike action was, in Lady Simler’s judgment, reinforced by considering the wider scheme of TULRCA, and the limited protection available to individuals who participate in lawful industrial action in Part V (sections 237 to 238A) of TULRCA.

16. **What protection does Article 11 require for workers who take part in lawful industrial action?** Pursuant to an endorsement of common ground between the parties at §61 - Article 11 does not prevent an employer from withholding pay from a striking worker – it is not a question of imposing a sanction, rather there is no right to pay in circumstances where a worker is acting in breach of contract by withdrawing labour. The Supreme Court did not address whether Article 11 prevented deductions for action short of strike – for instance where an employer refuses to accept part performance.

17. Pursuant to a review of the Strasbourg jurisprudence, although the right to strike is protected by Article 11, it is not a ‘core right’. Given the competing considerations at stake, the protection afforded to striking workers and unions is also neither absolute nor unlimited.

18. **What are the state’s obligations?** The case concerned the state’s positive obligations as regulator of relationships between private employers and workers in relation to a right that is protected but is not a core right. Lady Simler noted that the Strasbourg court has afforded states a wider margin of appreciation in this context given the ‘sensitive social and political issues’ involved in achieving a proper balance between the competing interests of labour and management, the individual and the community.

19. In Lady Simler’s judgment, the legislative scheme must strike a fair balance between the competing interests at stake and any provision of the scheme that restricts the protection of Article 11 rights must be justified, recognising the margin of appreciation to be accorded to the state.

20. **Has a fair balance been struck?** The legislative scheme had to be looked at as a whole. The Supreme Court did not agree with the respondent that the Acas Code of Practice on Disciplinary and Grievance Procedures, the implied term of trust and confidence in employment contracts, the absence of criminal sanctions for strikes, and other protections in TULRCA and the Blacklisting Regulations justified the failure to provide any protection in respect of detriment short of dismissal for taking part in a lawful strike. None of those provisions prevent an employer unreasonably restricting the Article 11 right to strike by imposing a disproportionate detriment.

21. **Is it possible for s.146 to be interpreted in a Convention-compliant way?** No, so doing would amount to impermissible judicial legislation rather than interpretation as Bean LJ held in the Court of Appeal. In Lady Simler’s judgment there was no formulation that did not involve making a series of policy choices that may have far-reaching practical ramifications.

22. **Should a declaration of incompatibility have been made under section 4 of the HRA?** In Lady Simler’s judgment it should - the existence of policy choices in the means of giving effect to the lawful strike rights protected by article 11 is a reason in favour of making a declaration of incompatibility, not refusing one.