

# Trade union detriment and human rights: Supreme Court delivers its decision

30 April 2024  Claire Rosney

The Supreme Court has given its long-awaited judgement in the case [Secretary of State for Business and Trade v Mercer](#). In short, the Court held that the lack of protection for workers against action short of dismissal for taking part in industrial action breaches workers' human rights.

## Brief facts

The case concerned Ms Mercer who was employed as a support worker by Alternative Futures Group ("AFG") a social care charity. Ms Mercer was a UNISON workplace representative and as such was involved in planning and taking part in lawful strike action at her workplace. She was suspended by AFG for abandoning her shift without permission and speaking to the press without permission. Although the suspension was on normal pay, Ms Mercer lost out on the overtime she would have worked. Ms Mercer therefore brought a claim under section 146 of the Trade Union Labour Relations (Consolidation) Act 1992 ("TULRCA") for detriment short of dismissal for taking part in trade union activities at an appropriate time.

## Decisions of the lower courts

The Tribunal dismissed Ms Mercer's claim on the basis that taking part in trade union activities at an appropriate time does not extend to taking industrial action.

The EAT subsequently held that TULRCA's failure to provide protection against action short of dismissal for workers who take industrial action breached Article 11 of the European Convention on Human Rights ("ECHR") which safeguards the right to freedom of assembly and association. However, the EAT held that words could be read into section 146 to make it compatible with Article 11 ECHR.

The Court of Appeal disagreed and held that reading the required words into section 146 amounted to "impermissible judicial legislation". However, the Court of Appeal declined to issue a declaration of incompatibility under the Human Rights Act on the basis that it was not appropriate where there was a gap in the law rather than a specific provision which was incompatible with human rights.

## Decision of the Supreme Court

Ms Mercer therefore appealed to the Supreme Court which held that:

- Section 146 does not provide protection for action short of dismissal for taking part in strike action
- The lack of protection amounts to a breach of Article 11 of the ECHR.
- It isn't possible to read words into section 146 to make it compliant.
- This was not a case where it was "inappropriate to make a declaration of incompatibility"

The Supreme Court therefore upheld the appeal and issued a declaration of incompatibility. However, whilst this does not mean that section 146 is no longer valid or unenforceable, it will now be up to parliament to legislate to ensure that the law is compliant with Article 11 and a failure to do so could result in further challenges.

## What this means in practice

Given that a general election is imminent, it is unlikely that there will be any change in the law prior to this. Further, if Labour win, they have already promised to reform laws on industrial action, so it is likely this would be included in those reforms. In the meantime, employers should take care not to subject workers who participate in industrial action to any detriments (such as withdrawing discretionary benefits) as aside from any reputational damage this could lead to a significant risk of litigation.

## Key contact



**Claire Rosney**

Professional Development Lawyer

[claire.rosney@brownejacobson.com](mailto:claire.rosney@brownejacobson.com)

+44 (0)3300452768

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