That warning aside, case law in climate justice has grown year-on-year, often yielding mixed results. Cases like *Urgenda v. Kingdom of the Netherlands*, *Greenpeace & Norwegian Ungdom Duarte Agostinho and Others* (Hague Court of Appeal, 9 October 2018), have seen successful elements, but arguably they have provided symbolic victories as they all relied on provisions of the developing jurisprudence of the European Convention on Human Rights in holding their respective governments to account. Will this trend continue? Will victims (or representative groups) now bring cases against public bodies, using relevant articles of the ECHR, and what evidence of non-compliance will be necessary for the courts to interfere? Further, will, or should, the courts involve themselves in scientific and policy detail in making any judgment, and what form of compensation, if any, will be granted? All these questions will soon need to be addressed by government, private bodies whose practice imposes an environmental hazard, support groups and individuals affected by such hazards, and lawyers and judges.

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Trade unions – Trade union activities - Industrial action- Detriment – Right of Association - Declarations of incompatibility

Secretary of State for Business and Trade v Mercer [2024] UKSC 12

Supreme Court

Background and facts

Mercer had been employed as a support worker by a care services provider, was a workplace representative for the trade union, UNISON, and had been involved in planning lawful strike action. During the strike action, she was suspended, and although she received normal pay during her suspension, she received nothing for the overtime she would have worked in that period. She brought an action under s.146 of the Trade Union and Labour Relations (Consolidation) Act 1992. The employment tribunal found that s.146 of the Act did not protect workers from detriment short of dismissal whilst participating in lawful industrial action as a member of an independent trade union, and thus dismissed the claim.

On appeal to the Employment Appeal Tribunal ([2021] IRLR 1958], it was held that the phrase 'activities of an independent trade union' in s.146 could include industrial action. Although on the ordinary principles of construction, s.146 excluded industrial action, using s.3 of the Human Rights Act 1998, the provision could be read down to comply with the right to freedom of association in Article 11 of the Convention. Thus, it was not going against the 'grain' of the 1992 Act to achieve a conforming interpretation of s.146 by adding a new sub-paragraph (c) to the definition of 'appropriate time' in s.146(2), to read 'a time within working hours when he is taking part in industrial action'. That would not involve judicial legislation, but would simply give effect to a clear and unambiguous obligation under Article 11 to ensure that employees were not deterred, by the imposition of detriments, from exercising their right to participate in strike action

That decision was overruled the Court of Appeal ([2022] EWCA Civ. 379), which held that as a matter of legislative design lawful industrial action was not included within the phrase 'activities of an independent trade union', and to interpret that provision compatibly with the ECHR would result in impermissible judicial legislation. In the Court's view, when s.146 was viewed as part of the Act as a whole, industrial action was not included within the phrase. Although legislation should be read down to give an ECHR-compliant meaning wherever possible, that was subject to the modified meaning being consistent with the fundamental features of the relevant legislation. In this case a number of policy

questions were engaged in this case: whether protection against detriment should be given to all industrial action or only to official industrial action called by the trade union; and whether Article 11 required protection to be given against every form of detriment, at any rate in a private sector case, in response to industrial action. In such a highly sensitive area, those issues of policy were best left to Parliament, and adding a sub-clause would result in impermissible judicial legislation rather than interpretation as sanctioned under the HRA. The Court of Appeal also refused to grant a declaration of incompatibility, under s. 4 of the HRA, as in this case there was a lacuna in the domestic law generally rather than a specific statutory provision that was incompatible. Thus, the extent of the incompatibility was unclear and the legislative choices were far from being binary questions.

Decision of the Supreme Court

Allowing Mercer's appeal in part, the Supreme Court first considered the compliance of the 1992 Act with Article 11 ECHR and relevant case law of the European Court of Human Rights. The Court noted that the protection afforded by s.146 was limited to activities that were outside working hours, whereas industrial action would normally be carried out during working hours if it were to have the desired effect. Further, separate protection against *dismissal* for participating in the activities of a trade union at an appropriate time was contained in s.152. By contrast, employees who participated in lawful industrial action had limited protection against dismissal under ss.237-238 of the Act. Thus, to interpret s.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 s.152, making redundant the carefully constructed regime that gave more limited protection for dismissal in s.237 to s.238A. It followed, therefore, that s.146 did not provide protection against detriment short of dismissal for taking part in or organising industrial action. However, under Article 11, the UK legislative scheme had to strike a fair balance between the competing interests of employers and workers, and domestic law did not provide any protection for a worker faced with a disciplinary sanction short of dismissal for a lawful strike. Employees were therefore unable to strike without exposing themselves to detrimental treatment, and that placed the UK in breach of its obligations under Article 11.

Moving to the question of interpretation and remedies, the Court stated that s.3 of the 1998 Act did not enable the court to change the substance of a provision from one where it said one thing into one that said the opposite. In the instant case, there was no reading of s.146 that would avoid having to make a series of policy choices with potentially far-reaching practical ramifications. That, in the Court's view, would amount to impermissible judicial legislation rather than interpretation, and would contradict a fundamental feature of the legislative scheme.

The Court then considered the granting of a declaration in incompatibility under s.4 of the Act. Noting that the Court of Appeal refused to 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 stressed that s.146 was the only route that could be available to the appellant to vindicate her Article 11 rights in domestic law, but that route was blocked by the interpretation given to that section. That, in the Court's view, was what was inherently objectionable in the terms of s.146, meaning that it was incompatible with Article 11. Courts had a discretion as to whether to make a declaration of incompatibility, and there might be cases where it was not appropriate to make a declaration, although this was not such a case. Such policy choices as might be required in determining how to strike a fair balance between the competing interests at stake were matters for Parliament to address, and it was for Parliament to choose whether to legislate in this area, and if so, how. However, that was not a basis for refusing to make a declaration. The Supreme Court thus made a declaration under s.4 that s.146 was incompatible with Article 11, insofar as it failed 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.

Analysis

The judicial challenges to the law and its application – from the employment tribunal proceedings, through to the appeals to the Employment Appeal Tribunal, the Court of Appeal and to the Supreme Court – have raised a number of issues surrounding employment law, trade union law and domestic and European Human Rights Law. The decision of the Supreme Court is, therefore, important in terms of employees' rights, the application of trade union law to employment protection rights, and the methods by which the domestic courts can ensure that domestic law is consistent with the European Convention and its case law. The case has also raised issues of statutory interpretation and judicial review, including the scope of the courts' power to interpret primary legislation in line with the Convention (s.3 Human Rights Act 1998 (HRA)), and its power to declare primary legislation incompatible with Convention rights (s.4 HRA).

The constitutional issues

The finding on interpretation and s.3 of the Human Rights Act 1998 approves of the Court of Appeal's traditional stance in this area: that interpretation must not amount to judicial legislation or destroy the fundamental meaning and purpose of the legislation. Thus, it was clear that the 1992 Act intended to give limited protection to employees on strike, and to interpret s.146 to include strike action as a trade union activity would have gone against the grain of the whole legislative scheme. The EATs approach in this case could be considered convoluted and clearly contrary to the intention of Parliament, as evidenced in the whole Act, and inspired by an intention to avoid an incompatibility with an ECHR right. Although the courts have taken a bold approach to interpretation, including adding words to an Act of Parliament (*R v A (Sexual History)* [2002] 1 AC 45), they cannot radically alter the statute (*Re S and W* [2002] 2 AC 291), and in this case adding the required protection would have done that.

Further, the desire to hand over the policy issues regarding the application and scope of compatible legislation to Parliament is another reason not to use s.3 in an overly generous manner. If there are still issues regarding scope and compatibility, even when it is technically possible to remove the incompatibility, then that is best left to Parliament (*Bellinger v Bellinger* [2003] 2 AC 467). However, in the Supreme Court's view, that was no reason for the Court of Appeal not to grant a declaration of incompatibility under s.4 in this case, as those policy questions could be addressed and resolved by Parliament once the declaration was made. That process avoids judicial legislation, but provides a suitable remedy to victims so as to address incompatible legislation. The Supreme Court then used its discretion to grant a declaration, overturning the Court of Appeal's reasoning that the statute merely evidenced a gap in statutory protection, rather than including a specifically incompatible provision. In the Court's view, the traditional interpretation of s.146 resulted in the lack of protection offered by Article 11, and thus that section blocked compatibility. The gaps, of course, will be resolved by the way in which Parliament responds to the declaration of incompatibility.

The decision and trade union rights

As was stated in the judgment by Lady Simler, there is no express statutory (or other) protection in domestic law against action short of dismissal for employees, or indeed, workers who participate in lawful strike action. As alluded to, the courts have traditionally been reluctant to support instances of industrial action (*Taff Vale Railway Co v Amalgamated Society of Railway Servants* 1901] AC 426, HL, *Quinn v Leathem* [1901] AC 495, HL), and there has been a degree of legislative hostility regarding industrial action in recent years (see the Strikes (Minimum Service Levels) Act 2023). The overall approach was reflected in the previous appellate decision in this case (see [2022] EWCA Civ 379, [2022] ICR 1034). Instructively, within the instant case, Lady Simler recounted the statutory matrix of the right in question by way of outlining its parameters and numerous qualifications. Regarding the crossover with human rights, Article 11 was regarded as the *lex specialis* as regards Trade Union activity. The European Court of Human Rights has been more accommodating as regards the 'right to strike' (*Enerji Yapi-Yol Sen v Turkey* (Application No.68959/01), ECtHR), with recent cases such as *Danilenkov and others v Russia,* (Application No.67336/01, ECtHR) indicating a more liberal approach in respect of detriment.

Significantly, in the instant case, the action taken by the respondent was regarded as being protected action being taken in relation to an official industrial action. In spite of arguments raised including an observation of the potential 'chilling effect' of detriment short of dismissal regarding industrial action, s.146 was held to offer no such protection in and of itself, and the state was held to be under no positive obligation to protect employees universally and in all conceivable circumstances from a range of detriments to dissuade them from taking lawful strike action. It was accepted that such a position should be viewed in the context of the range of other protections available to employees, both in legislation – such as relevant provisions within the TULRCA 1992 and the Employment Relations Act 1999 (Blacklist) Regulations 2010 (SI 2010/493) – and at common law (the implied term of mutual trust and confidence), in addition to relevant ACAS provisions. Crucially, however, these remedies were not regarded as adequate in the context of this particular case, and the chilling effect of the absence of any specific protection regarding detriments was regarded as unacceptable. Thus, the limited protection offered by s.146 meant that the United Kingdom was in breach of its Article 11 obligations and a declaration of incompatibility was made by the Court.

The absence of such specific protections, in the Supreme Courts view, meant that a 'fair balance' between the interests of labour and industry was effectively impossible. By not providing such specific protections against the elusively defined 'detriment' (this term has been defined broadly, see *British Airways Engine Overhaul Ltd v* Francis 1981 ICR 278, EAT, *Murphy v Blackpool Grand Theatre Trust* Ltd ET Case No.27062/81, *Robb v Leon Motor Services Ltd* 1978 ICR 506, EAT and *Edgoose v Norbert Dentressangle Ltd* ET Case No.2601906/08), the state had failed in its obligations to uphold human rights protections in its role as the regulator of private relationships.

Although falling short of declaring an 'absolute' right to strike – which is, in any case, unlikely to happen in the foreseeable future – this case is a significant and an unprecedented development in respect of industrial action specifically, and labour law generally. It marks the first time a declaration of incompatibility has been made regarding a piece of employment legislation. It will further be of great interest to labour lawyers and trade union members alike to observe the manner in which the declaration is to be resolved in the wake of the upcoming general election.

Conclusion

The decision, and indeed the entire legal challenges in all courts, raised a number of constitutional issues regarding the interpretation and compatibility of UK legislation with the Human Rights Act 1998. Whist the Court of Appeal showed a cautious approach to interpretation under s.3, the Supreme Court took a bolder approach to declaring the legislation incompatible with Article 11 of the ECHR. That allows Parliament the opportunity to confront the incompatibility of the Act with ECHR rights, or wait for a challenge and decision of the Strasbourg Court on this matter. What alternative is taken will depend on the government's views on whether the European Court would agree with the Supreme Court, or offer discretion to the UK on this matter.

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