Appeal No. UKEAT/0196/20/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 6 May 2021
Judgment handed down on:
2 June 2021

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

MRS F MERCER — APPELLANT

(1) ALTERNATIVE FUTURE GROUP LIMITED — RESPONDENTS
(2) MR I PRITCHARD

-and-

SECRETARY OF STATE FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY — INTERVENER

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	MR MICHAEL FORD One of Her Majesty's Counsel And MR STUART BRITTENDEN Of Counsel Instructed by: UNISON Legal Services UNISON Centre 130 Euston Road London NW1 2AY
For the Respondents	MR PETER EDWARDS Of Counsel Instructed by: DWF LLP 5 St Paul's Square Old Hall Street Liverpool L3 9AE5
For the Intervener	MR DANIEL STILITZ One of Her Majesty's Counsel Instructed by: The Secretary of State for Business Energy and Industrial Strategy Employment Group 102 Petty France Westminster London SW1H 9GL

SUMMARY

TRADE UNION RIGHTS

Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 protects workers against detriment related to taking part in the activities of an independent trade union. However, the scope of trade union activities in that provision has been interpreted as not including industrial action. The issue in this appeal is whether, having regard to the obligation under s.3 of the Human Rights Act 1998, s.146 ought to be interpreted as if it did include protection against detriment related to participation in industrial action. The Employment Tribunal found that whilst there was an infringement of Article 11, ECHR, it was not possible to interpret s.146 compatibly as to do so would go against the grain of the legislation.

Held, allowing the appeal, that the Tribunal was correct to conclude the failure to confer protection against detriment for participating in industrial action does amount to an infringement of Article 11, ECHR, but wrong to find that a compatible interpretation of s.146 would go against the grain of the legislation. A compatible interpretation of s.146 is possible so as to include protection against detriment for participating in industrial action within its scope.

THE HONOURABLE MR JUSTICE CHOUDHURY

Introduction

1. Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") protects workers against detriment related to taking part in the activities of an independent trade union. However, the scope of trade union activities in that provision has been interpreted as not including industrial action. The issue in this appeal is whether, having regard to the obligation under s.3 of the Human Rights Act 1998 ("HRA"), s.146 of TULRCA ought to be interpreted as if it did include protection against detriment related to participation in industrial action.

Background

2. I shall refer to the parties as the Claimant and the Respondents as they were below. The following summary of the factual background is taken from the judgment ("the Judgment") of Employment Judge Franey ("the Judge") sitting alone in the Manchester Employment Tribunal ("the Tribunal"). The Tribunal determined the preliminary issue before it on the basis of assumed facts.

3. The First Respondent (referred to here as "the Respondent") is a health and social care charity providing a range of care services across the North West of England, and the Second Respondent was, at the time, its Acting Chief Executive.

4. The Claimant has been employed by the Respondent as a support worker since 2009. At the relevant time, she was a workplace representative for her trade union, Unison.

5. In early 2019, there was a trade dispute in respect of payments for sleep-in shifts. Unison called a series of strikes which took place between 2 March and 14 May 2019. The Claimant was

involved in planning and organising those strikes. She took part in some media interviews, and communicated an intention (it is not clear precisely when) to participate in the strike action herself.

6. On 26 March 2019, the Claimant was suspended. She was told that this was because she had abandoned her shift (presumably to take part in the strike) on two occasions without permission and that she had spoken to the press without prior authorisation. The suspension was lifted on 11 April 2019, but the disciplinary action proceeded, and, on 26 April 2019, the Claimant was given a first written warning for leaving her shift. That sanction was overturned on appeal. A subsequent grievance lodged by the Claimant was rejected.

7. On 23 August 2019, the Claimant presented a claim to the Tribunal, complaining that, contrary to s.146 of TULRCA, she had been subjected to a detriment by being suspended. She contended that the sole or main purpose of that suspension was to prevent or deter her from participating in the activities of an independent trade union at an appropriate time, or to penalise her for doing so. Her case was that the "activities of an independent trade union" within the meaning of s.146 included both the planning and organisation of the industrial action and her own participation in it.

8. The Respondent resisted the claims on the basis that the suspension and disciplinary action were unrelated to any trade union activities. The Respondent also contended that taking part in industrial action could not be an activity protected by s.146, TULRCA. I refer to this as 'the s.146 issue'.

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The Tribunal's Judgment

9. A Preliminary Hearing was held to consider the s.146 issue on 8 April 2020. Both parties were represented by Counsel: Mr Brittenden appeared for the Claimant and Mr Edwards for the Respondent. Mr Edwards accepted that planning or organising industrial action could fall within the scope of "activities" within the meaning of s.146, TULRCA as long as that was done at an appropriate time, but maintained that participation in industrial action could not.

10. The Tribunal identified the issue as being whether, in the light of Articles 10 and 11 of the **European Convention on Human Rights** ("ECHR"), the activities protected by s.146 extend to participation in lawful industrial action as a member of an independent trade union.

11. In an admirably clear and concise judgement, the Tribunal, having set out the legal framework and the parties' respective submissions, concluded that, although, as a matter of ordinary language, participation in industrial action was part of the activities of a trade union, the proper interpretation of s.146, in light of the domestic authorities, was that it did not extend to any form of industrial action: see paras 78 to 82 of the judgment.

12. The Tribunal then considered whether Article 11, ECHR offered protection to those subjected to a detriment for the purposes of penalising or deterring them from engaging in lawful industrial action. As to this issue, the Tribunal held as follows:

> **"84. It is clear that the right to strike forms part of the rights guaranteed by Articles 10 and 11, but that right can be restricted if the requirements of the second paragraph of each Article are satisfied. Mr Edwards argued that the decisions in the cases arising from Turkey should be treated with caution, partly because of the nature of ECHR jurisprudence, but also because the legislative environment in relation to trade union rights appears to be very different there from how it stands in the UK. He submitted that [if] the provisions of TULRCA were taken as a whole, the absence of any protection for detriment because of engaging in industrial action was within the margin of appreciation allowed to the UK because the provisions formed part of a delicate balance between the right to freedom of assembly and association under Article 11 on the part of trade**

> **union members, and the rights of employers and businesses to carry on their economic activities without interference. Engaging in trade union activities at an appropriate time could be something of benefit to the employer as well as to the union and its members, yet industrial action was by its nature intended to cause some difficulty or harm to the employer's business as a means of putting pressure on it to resolve the trade dispute in a manner acceptable to the union. Those differing considerations explained the differing protections. The protection of the rights and freedoms of the employer explained the absence of any protection for detriment short of dismissal imposed for the purpose of penalising or deterring participation in industrial action.**
>
> **85. Attractively as Mr Edwards presented those arguments, I rejected them. In my view it is clear from a reading of the ECHR cases emanating from Turkey that where a detriment is imposed by the State in its capacity as employer for the purpose of penalising someone for taking part in lawful industrial action, or deterring them from doing, without any redress being available to the employee, there will be a breach of Article 11. In two of the Turkish cases the detriment imposed was described by the court as at the minimum, being in the form of a disciplinary warning, yet the court was ready to find that this was action which interfered with the right to freedom of association in a way which was not proportionate and justified.**
>
> **86. It follows that for the State to allow a private employer to act in this way without any legal redress for the employee is a breach of the obligation to provide an effective remedy under Article 13.**
>
> **87. I therefore accepted Mr Brittenden's submission that as the relevant provisions in TULRCA have been interpreted in domestic law the UK has failed to provide effective and clear judicial protection in respect of industrial action which is part of the rights guaranteed by Article 11. 2**

13. Finally, the Tribunal considered whether, in the light of s.3, HRA, s 146, TULRCA could be interpreted in a way which made it compliant with Article 11. As to this issue, the Tribunal held as follows:

> **"89. Mr Brittenden urged me to be both fearless and dynamic in my application of section 3 HRA. His written submission suggested it was eminently feasible to interpret these provisions in a way which gave effect to Article 11. It mattered not whether that was done by adopting an expanded interpretation of "consent", or by reading in additional words which made clear that participation in lawful industrial action is protected. Either would, he submitted, be in line with the guidance given by the House of Lords in Ghaidan. Lord Nicholls recognised (paragraph 32) that it may be apt for a court to read in words which change the meaning of the enacted legislation so as to make it compliant with the Convention. In paragraph 41 Lord Steyn observed that the will of Parliament set out in words enacted in 1992 has to be read in the light of the will of Parliament enacted in the HRA in 1998, and there is nowhere in the legal system where a literalistic approach is more inappropriate.**
>
> **90. Equally, however, I had to take into account the caution expressed in paragraph 33 of Ghaidan by Lord Nicholls about the extent to which a court or Tribunal can adopt a meaning which is inconsistent with a fundamental feature of the legislation, or which goes against the "grain". I noted that it was anticipated in the passage of the HRA through Parliament that in 99% of cases**

> **an interpretation would be possible which rendered the domestic legislation compliance with the Convention.**
>
> **91. Even so, I concluded that this is one of those exceptional cases where that is simply not possible.**
>
> **92. Firstly, I did not accept Mr Brittenden's contention that only the "grain" of section 146 should be considered. It was not appropriate to leave section 152 and the provisions in Part 5 out of the picture. In my judgment Mr Edwards was right to contend that the legislation as a whole should be taken into account.**
>
> **93. Secondly, in my judgment the "grain" of this legislation is to draw a clear distinction between trade union activities governed by Part 3, and industrial action which is governed by part 5. That distinction is most evident in the differences between the right to bring a complaint of automatic unfair dismissal under section 152, which includes the ability to seek interim relief, and the very different provisions which apply where dismissal occurs during or because of industrial action. In my judgment to read section 146 as extending to industrial action by any of the mechanisms proposed by Mr Brittenden would be inconsistent with this fundamental feature of TULRCA, and indeed would undermine it.**
>
> **94. Whether a formal declaration of incompatibility should be made under section 4 HRA is not a matter for this Tribunal.**
>
> **95. It follows from my judgment that the claimant can still pursue her case under section 146 on the basis that the sole or main purpose of the suspension was to prevent or deter her from taking part in the planning and organisation of industrial action. However, her complaint that section 146 was breached if the sole or main purpose was to prevent or deter her from actually participating in that industrial action is unsustainable."**

14. Accordingly, the Claimant's claim under s.146, TULRCA was dismissed insofar as it was based on her participation in industrial action.

Legal Framework

15. As I cannot improve upon the Tribunal's excellent summary of the relevant provisions of TULRCA, ECHR and HRA at paras 27 to 46 of the Judgment, I set it out in full:

> **"TULRCA Parts 3, 4 and 5**
>
> **27. Part 3 of TULRCA deals with rights in relation to union membership and activities. Section 146 is headed "Detriment on grounds related to union membership or activities" and its material parts read as follows:**
>
> **"(1) 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 –**
> **(a) …**

(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…

(2) In subsection (1) 'an appropriate time' means –

(a) A time outside the worker's working hours, or

(b) A time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union…,

and for this purpose, 'working hours', in relation to a worker, means any time when, in accordance with his contract of employment…he is required to be at work."

28. The remedy for a breach of section 146 is a complaint to an Employment Tribunal under section 147. If the Tribunal finds that the complaint is well-founded, it makes a declaration to that effect and may make an award of compensation.

29. Corresponding protection against dismissal (as opposed to detriment short of dismissal) appears in section 152. The material part is as follows:

"(1) For the purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee –

(a) …

(b) Had taken part, or proposed to take part in the activities of an independent trade union at an appropriate time…"

30. Section 152(2) defines "an appropriate time" in exactly the same way, save that as this is a right confined to employees, not "workers", the wording of the definition of working hours is slightly different. Nothing turns on that distinction for present purposes.

31. A complaint of "automatic" unfair dismissal under section 152 does not require any qualifying period of service (section 154), and interim relief is available (section 161).

32. Part 3 also contains provisions dealing with time off for trade union duties and activities. Section 170 reads as follows (so far as material):

"(1) An employer shall permit an employee of his who is a member of an independent trade union recognised by the employer in respect of that description of employee to take time off during his working hours for the purpose of taking part in:

(a) Any activities of the union, and

(b) Any activities in relation to which the employee is acting as a representative of the union.

(2) The right conferred by subsection (1) does not extend to activities which themselves consist of industrial action, whether or not in contemplation or furtherance of a trade dispute."

33. Part 4 of TULRCA is concerned with industrial relations; none of its provisions were directly relevant.

34. Part 5 of TULRCA is entitled "Industrial Action". It contains the conditions with which a trade union must comply before calling industrial action in order to be immune under section 219 from civil action by the employer for torts such as inducing its members to breach their contracts of employment. Its provisions include the definition of what will amount to a trade dispute, the detailed requirements about balloting the membership, and the requirements for notice to be given to the employer of an intention to ballot, of the result of the ballot and

of proposed industrial action. An employer that regards a union calling industrial action to be in breach of these provisions can seek an injunction to prevent that industrial action from taking place.

35. Part 5 also contains some provisions about unfair dismissal complaints where industrial action is taken. A broad summary of sections 237, 238 and 238A is enough for present purposes.

36. Section 237 provides that an employee dismissed whilst taking part in unofficial industrial action has no right to complain of unfair dismissal unless the reason or principal reason was one of a small number of automatically unfair reasons for dismissal (or for selection for redundancy). The reasons specified do not include dismissal for trade union activities under section 152. Section 152 protection is therefore lost whilst the employee participates in unofficial industrial action.

37. Section 238 provides that an employee dismissed whilst taking part in official industrial action has no right to pursue a claim of unfair dismissal save in two situations:
• The first is if there have been selective dismissals (i.e. other employees in the same position have not been dismissed or, if dismissed, are swiftly re-engaged). If there are selective dismissals the two-year qualifying period is still required.
• The second is if the reason or principal reason for dismissal (or for selection for redundancy) is one of a small number of automatically unfair reasons, in which cases no qualifying period is required. The reasons specified do not include dismissal because of trade union activities under section 152, but they do include dismissal because of taking official industrial action to which section 238A applies.

38. Section 238A applies to employees dismissed because of taking part in official industrial action. Such dismissals are automatically unfair during a protected period of 12 weeks. The two-year qualifying period does not apply. Unlike section 152 dismissals, there is no right to seek interim relief.
Human Rights

39. The Convention contains three provisions of relevance.

40. The first is Article 10, which is concerned with freedom of expression. It reads as follows:

"(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosing of information received in confidence, or for maintaining the authority or impartiality of the judiciary."

41. The second is Article 11, concerned with the freedom of assembly and association. It reads as follows:
"(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

42. These two Articles were amongst the Convention rights given effect in domestic law by section 1 HRA and to which the remainder of the HRA applies.

43. The third is Article 13 [which has not been incorporated into domestic law and] which reads as follows:
"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

44. Section 2(1) of the HRA provides as follows:
"A Court or Tribunal determining a question which has arisen in connection with a Convention right must take into account any…judgment, decision, declaration or advisory opinion of the European Court of Human Rights…whenever made or given, so far as, in the opinion of the Court of Tribunal, it is relevant to the proceedings in which that question has arisen."

45. Section 3 is headed "Interpretation of Legislation" and in its entirety reads as follows:
"(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
(2) This section –

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and 43. The third is Article 13 [which has not been incorporated into domestic law and] which reads as follows:
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(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility or revocation) primary legislation prevents removal of the incompatibility."

> **46. Section 4 of the HRA empowers the High Court, the Court of Appeal or the Supreme Court to make a declaration that a provision is incompatible with a Convention right. An Employment Tribunal is excluded from the definition of a "Court" for the purposes of section 4."**

16. To that summary, I need only add that the Employment Appeal Tribunal ("EAT") is also excluded from the definition of a "Court" for the purposes of s.4, HRA.

Grounds of Appeal

17. The Claimant contends that, although the Tribunal was correct to conclude as it did as to the effect of Article 11 ECHR, it erred in failing to exercise the duty under s.3, HRA so as to interpret s.146, TULRCA in a way that was compliant with the rights guaranteed by that Article. That is the primary ground of appeal. The Respondent contends that the Tribunal erred in relation to Article 11 but that it reached the correct conclusion in respect of s.3, HRA.

Outline of the Claimant's submissions

18. The Claimant was represented at the EAT by Mr Ford QC (who did not appear below) and Mr Brittenden. Mr Ford submitted that it is clear from the caselaw of the European Court of Human Rights ("ECtHR") that any sanction, however minor, that has the effect of restricting the right to participate in trade union activities, including industrial action, amounts to an infringement of Article 11, ECHR rights. Reliance was placed on cases such as **Ezelin v France** [1991] 14 EHRR 195, in which a Barrister (Avocat) in Guadeloupe was subjected to a minor reprimand by the relevant Bar Council for participating in a protest against the judiciary. At para 53 of its judgment, the ECtHR held as follows:

> **"53. Admittedly, the penalty imposed on Mr. Ezelin was at the lower end of the scale of disciplinary penalties given in Article 107 of the Decree of 9 June 1972;it had mainly moral force, since it did not entail any ban, even a temporary one, on practising the profession or on sitting as a member of the Bar Council. The Court considers, however, that the freedom to take part in a peaceful assembly—in this instance a demonstration that had not been prohibited—is of such importance**

> **that it cannot be restricted in any way, even for an avocat, so long as the person concerned does not himself commit any reprehensible act on such an occasion. In short, the sanction complained of, however minimal, does not appear to have been 'necessary in a democratic society.' It accordingly contravened Article 11."**

19. Mr Ford highlights the absence of any reference to the State's margin of appreciation in this majority judgment, submitting that when it comes to individual sanctions in respect of attempts to exercise Article 11 rights, that margin is extremely narrow and effectively diminishes to nothing; in other words, the State has no real option but to prohibit any limitation by an employer on the exercise of the right to participate in industrial action that is protected by Article 11.

20. The approach in **Ezelin** is carried through to several subsequent cases including, **Karaçay v Turkey** [2007] App No 6615/03 at paras 35 to 37; **Danilenkov v Russia** [2009] App No. 67336/01 at paras 124 and 136, **Kaya and Seyhan v Turkey** [2009] App No.30946/04 at paras 29 to 31 and **Ognevenko v Russia** [2019] IRLR 195.

21. The effect of these judgments, submits Mr Ford, is that the right to strike is not to be restricted and the justification for any interference would need to be properly evidenced by reference to, for example, the relevant legislative history or parliamentary debates. It is emphasised that in every case where such interference has been considered by the ECtHR, it has been found to be an unjustified infringement of the Article 11 right.

22. As for the s.3, HRA duty, Mr Ford submitted that the principles established in cases such as **Ghaidan v Godin-Mendoza** [2004] 2 AC 557 clearly permit the interpretation of s.146, TULRCA for which the Claimant contends and would not involve a change that amounts to a rewriting of the legislative scheme. In particular, it cannot be said that the Claimant's

interpretation would go against the "grain" of the legislation, taking account of the legislative history of the provisions in question. Mr Ford did not propose a definitive amendment to s.146, but suggested, in line with the decision in **Wandsworth v Vining** [2018] ICR 499, that it was not necessary to do so to give effect to the s.3, HRA duty. The Tribunal erred in not undertaking the s.3, HRA interpretative exercise.

Outline of the Respondent's Submissions

23. The Respondent was represented, as below, by Mr Edwards. Mr Edwards submitted that the Tribunal's construction of the domestic provisions was clearly correct in that s.146 does not extend to industrial action. He submitted that in matters concerned with Article 11 rights, where there was a need for a careful balance between the rights of employees and those of employers and the wider community, there was wide margin of appreciation. He did not accept (at least in his skeleton argument) that the ECtHR authorities relied on by Mr Ford supported a narrow margin of appreciation. In any case, those authorities largely involved State employers and their negative obligation not to infringe Article 11 rights rather than positive obligations requiring the implementation of legislation to protect workers' rights under Art 11 vis-à-vis private employers.

24. Mr Edwards submits that the fundamental difficulty with the Claimant's position is that it fails to address the fact that the deduction of pay, which is permissible, would amount to a detriment, and no drafting solution in respect of s.146 has been proposed to deal with that. It is not enough, submits Mr Edwards, for the Claimant simply to put forward vague and unclear suggestions as to how s.146 is to be reinterpreted when any amendment is likely to have ramifications for other provisions in TULRCA, including s.152 and those in Part V of the Act. The EAT is in effect being invited to legislate rather than interpret and that is impermissible.

Outline of the Intervener's Submissions

25. Permission was granted to the Secretary of State for Business Energy and Industrial Strategy to intervene. He was represented by Mr Stilitz QC. Mr Stilitz submitted that sections 146 and 152 of TULRCA are sister provisions operating in parallel to protect lawful trade union activities at an appropriate time and have nothing to say about industrial action, which is dealt with in an entirely different part of the Act. The Claimant's suggested interpretation amounts to an inadmissible attempt to shoehorn in additional protections to those provided by s.146 and would do considerable violence to the legislation. In particular, the identical wording, "activities of an independent trade union", used in two provisions in the same Act would end up having radically different meanings, whereby under s.146, it includes industrial action, and under s.152, it does not. The logical outcome of the Claimant's approach is that the carefully constructed regime under Part V of TULRCA, which provides limited protection against dismissal for taking part in industrial action, would be rendered a dead letter. He, like Mr Edwards, submits that the Claimant's interpretation would clearly go against the 'grain' of the legislation. The inability to propose a coherent or precise amendment of s.146, which deals e.g. with the difficulty that deduction of pay is a detriment, militates against any suggestion this is a case where it is possible to read s.146, in the way that the Claimant invites the EAT to do.

26. As to the caselaw of the ECtHR under Article 11, Mr Stilitz submits that it is clear that this is a case about the State's positive obligations, in which case there is a wide margin of appreciation afforded to States. The sensitive social and political issues that arise in respect of restrictions on the exercise of trade union rights and the numerous difficult policy choices that may be involved, dictate that this is a matter properly left to the legislature. Any attempt by the EAT to read s.146 down, pursuant to s.3, HRA, would, in the circumstances, amount to judicial legislation.

Discussion

27. As has been stated in previous cases, as a matter of ordinary language, the phrase, "activities of an independent trade union" would be apt to include industrial action sanctioned by that trade union. Mr Edwards did suggest in his skeleton argument that a distinction may be drawn between the two in that participation by a worker in a strike cannot itself be an activity of an independent trade union. He submits (although this was not a point pursued orally) that whereas a trade union may call or organise a strike, it does not of itself engage in strike action; instead, it is the individual trade union member who takes the industrial action by withholding their labour, and, as such, strike action is not the activity of an independent trade union. In my judgment, Mr Edwards was right not to pursue this argument as it appears to me to lack any real merit. It would be artificial to suggest that a strike that is organised and called by a trade union is not one of its own activities. In any event, it is not the meaning of the words, "activities of an independent trade union", in s.146 that leads to the exclusion of industrial action from its scope, but the effect of s.152, which protects against dismissal on the grounds of participating in the activities of an independent trade union, read with those provisions in Part V of TULRCA dealing specifically with dismissal for participating in industrial action. The short point is that if dismissal for taking part in industrial action is dealt with in Part V of the Act, such action cannot fall within the activities of an independent trade union under s.152. Furthermore, consistent with the presumption that words or phrases used in an Act have the same meaning throughout the Act (see **Bennion on Statutory Interpretation**, at 21.3), s.146 must be to the same effect.

28. This interpretation of s.146 is well-established. The EAT in **Drew v St Edmundsbury Borough Council** [1980] ICR 513 considered whether a dismissal for participating in industrial action in the form of a "go slow" direction from the union, fell within s.58 of the **Employment Protection (Consolidation) Act 1976** ("EPCA 1976"), which rendered a dismissal unfair if the

reason for it was that the employee had, at any appropriate time, taken part in the activities of an independent trade union. That provision was the predecessor to what is now contained in s.152 of TULRCA. The industrial tribunal held that the employee had been dismissed for activities which did not really form part of the go-slow direction, and which were not, therefore, the activities of an independent trade union. The EAT (Slynn J) upheld that decision, but went on to dismiss the appeal for an alternative reason (at 517E to 518D):

> **"But the tribunal finally decided that the appeal failed for an alternative reason. They considered that there was a distinction between the activities of an independent trade union and taking part in a strike or other industrial action. It was their view, that if what happened was taking part in industrial action, then it could not be a trade union activity for the purposes of section 58 of the Act whatever might be the position as a matter of ordinary language.**
> **That view of the tribunal, which Mr. Tabachnik supports in argument before us, is based on a contrast between section 58 and section 62 of the Act. Under section 58, if an employer dismisses because a man has taken part in the activities of an independent trade union, then the dismissal, is unfair. Under section 62, if an employee takes part in a strike or other industrial action, the position is entirely different. There, a man is not entitled to bring a claim that he has been unfairly dismissed when at the date of his dismissal he was taking part in a strike or other industrial action, unless he can show that other employees who, to put it broadly, were taking part in industrial action were not dismissed at the same time, or, if some were offered re-engagement, that he was one who was not. It is quite impossible, it seems to us and as Mr. Tabachnik submits, for the same person to fall under both of those sections. Accordingly, it seems to us quite clear that there is intended by Parliament to be a distinction for the purposes of a claim for unfair dismissal between what is an activity of an independent trade union and taking part in industrial action. It seems to us that that distinction is borne out, for the purpose of the legislation, when one considers the terms of section 23 and section 28 (1) of the Act which are dealing with trade union membership and activities and time off for trade union activities. We do not find it necessary to set those sections out in detail or to refer to the argument which turns upon them in any detail. Suffice it to say that it seems to us that they support the distinction which is drawn between section 58 and section 62." (Emphasis added).**

29. There is no suggestion that **Drew** was wrongly decided, at least as a matter of domestic law. The only basis therefore for declining to follow it would be if the interpretative obligation under s.3, HRA required it.

30. Another reason for construing s.146 as not extending to industrial action is the requirement that the activity in question is "at an appropriate time". The phrase, "at an appropriate time" is defined as meaning outside working hours, or within those hours where the

A employer consents: see s.146(2). Industrial action will normally be carried out during working hours if it is to have the desired effect: there would be little point in withholding labour at a time when the employer has no expectation of that labour being provided. The Tribunal below correctly noted that there are some forms of industrial action, for example a refusal to work voluntary overtime beyond contracted working hours, that would on the face of it be "outside working hours" and therefore "at an appropriate time". However, to construe s.146 as including that type of industrial action would mean (applying the normal rules of statutory construction) that the same must apply to s.152. If that were correct, then an employee dismissed for engaging in industrial action at an appropriate time could bring his claim for unfair dismissal under s.152 and thereby avoid the carefully constructed regime in respect of dismissals for industrial action under Part V of TULRCA. For the reasons set out in **Drew**, that cannot be right: the employee dismissed for taking part in industrial action cannot fall within both s.152 and s.238-238A of TULCRA at the same time. If that were not the case, then the same employee would be entitled to a finding of automatic unfair dismissal under the former provision but would be subject to the limited protections against unfair dismissal under the latter. The only logical way to avoid that difficulty is to treat s.152 as not encompassing dismissal for industrial action.

31. Accordingly, as a matter of ordinary principles of construction, s.146 excludes industrial action. The question is whether the legislation needs to be read differently, pursuant to s.3 HRA, in order to comply with the rights under Article 11, ECHR. To answer that question, it is necessary to consider Article 11 and the relevant ECtHR caselaw.

Article 11

32. Article 11, ECHR confers a qualified right to freedom of association and assembly. This includes the right to participate in trade union activity. Restrictions on the exercise of the right are permitted where these are "prescribed by law" and "are necessary in a democratic society …

for the protection of the rights and freedoms of others". The obligations on the State under Article 11 include both the negative one not to commit any act amounting to an infringement of the right and the positive one to "secure the enjoyment of the rights under Article 11…": **Wilson, Palmer and Doolan v UK** [2002] IRLR 568 at para 48.

33. The right to take industrial action, and more specifically to strike, although not an "essential element" of the Article 11 right is "clearly protected" by it: see **National Union of Rail, Maritime and Transport Workers v United Kingdom** [2014] IRLR 467 ("RMT") at para 84, in which the UK's ban on secondary strike action was considered. It is instructive to consider the kinds of restrictions on that right which the ECtHR has considered to be an infringement

34. In **Ezelin** (discussed above), a reprimand issued to a Barrister for participating in a demonstration against the judiciary was considered to be an infringement of Article 11, notwithstanding the minor nature of the reprimand.

35. In **Karaçay**, a civil servant was alleged to have participated in a national one-day strike organised to protest against declining salary levels. He was issued with a warning and complained that this sanction, which was intended to put him under "pressure" because of his activities as a member of the trade union, amounted to an infringement of his Article 11 rights. The ECtHR held as follows:

> **"36. The Court highlights that the national one-day strike in question was previously announced to the national authorities and was not prohibited. In joining it, the applicant uses his freedom of peaceful association (Ezelin v. France, judgment of 26 April 1991, series A No. 202, p. 21, § 41).**
> **37. The Court examined the contested disciplinary sanction in light of all the facts, to determine, in particular, if it was proportionate to the legitimate purpose allegedly pursued, given the prominent place of freedom of peaceful assembly. The Court notes that the applicant was given a warning as a disciplinary sanction because of his participation in the national one-day strike organised by the Kesk, of which he was a member, to protest against the bill relating to the purchasing power of civil servants (paragraphs 7 and 9 above). Yet the sanction in question, as minimum as it was, is intended to dissuade members of trade unions from**

> **legitimately taking part in such a strike day or from taking actions to defend the interests of their members (Ezelin, cited above, § 53).**
> **38. The Court concludes that the warning given to the applicants was not "necessary in a democratic society".**
> **39.Therefore, there was a breach of Article 11 of the Convention." (Emphasis added)**

36. In deciding that this "minimum" sanction still amounted to an infringement, was clearly signalling the importance of being able to participate in such strike action without pressure or attempts to dissuade.

37. In **Danilenkov**, the ECtHR considered claims brought by employees of a private seaport company who, having participated in a strike, were penalised in various ways including by being given less lucrative work and being moved to part-time work. Such action short of dismissal was taken with a view to getting the employees to relinquish their trade union membership. The State's anti-discrimination laws failed to provide any civil remedy for such detriments, instead providing only criminal sanctions. In determining whether there was an infringement of Article 11 rights, the ECtHR had regard to Article 5 of the European Social Charter (which conferred a "right to organise") and Article 1 of ILO Convention No.98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively. It went on to hold as follows:

> **"123. Nevertheless, as to the substance of the right of association enshrined in art.11 , the Court takes into consideration the totality of the measures taken by the State concerned in order to secure trade union freedom, subject to its margin of appreciation. An employee or worker should be free to join or not join a trade union without being sanctioned or subject to disincentives. The wording of art.11 explicitly refers to the right of "everybody", and this provision obviously includes a right not to be discriminated against for choosing to avail oneself of the right to be protected by a trade union, given also that art.14 forms an integral part of each of the articles laying down rights and freedoms whatever their nature. Thus, the totality of the measures implemented to safeguard the guarantees of art.11 should include protection against discrimination on the ground of trade union membership which, according to the Freedom of Association Committee, constitutes one of the most serious violations of freedom of association, capable of jeopardising the very existence of a trade union.**
>
> **124. The Court finds crucially important that individuals affected by discriminatory treatment should be provided with an opportunity to challenge it and should have the right to take legal action to obtain damages and other relief. Therefore, states are required under arts 11 and 14 of the Convention to set up a judicial system that ensures real and effective protection against anti-union discrimination."**

38. In that case, the system of criminal sanctions for discriminatory conduct based on trade union membership of activities was held not to confer sufficient protection against such discrimination: see para 134. The ECtHR concluded:

> **"136. In sum, the Court considers that the state failed to fulfil its positive obligations to adopt effective and clear judicial protection against discrimination on the ground of trade union membership. It follows that there has been a violation of art.14 of the Convention taken together with art.11."**

39. In **Kaya**, as in **Karaçay**, two employees of the Civil Service in Turkey received "warnings" for their participation in a one-day strike organised by their trade union. Once again, the ECtHR found that the sanction of a warning, "as minimum as it was" was intended to dissuade union members from taking part in the strike, and concluded:

> **"31. The Court finds that the disciplinary sanctions given to the applicants did not correspond to a "pressing social need" and it concludes, thus, that they were not "necessary in a democratic society". It follows that in this case, there was a disproportionate interference with the applicants' effective enjoyment of the right to protest under Article 11 of the Convention.**
> **32. Therefore, there was a breach of this provision."**

40. More recently, in the case of **Ognevenko**, a locomotive driver working for the national railway had participated in strike action notwithstanding a ban on such action in respect of railway workers, and was dismissed. The ECtHR held that a complete ban on the right to strike, even in respect of key workers, would require "solid evidence" from the State to justify its necessity: see para 73. At para 61, the ECtHR said as follows:

> **"As noted above, the right to strike is one of the means whereby a trade union may attempt to be heard and to bargain collectively in order to protect employees' interests, and strike action is clearly protected by art 11 (see National Union of Rail, Maritime and Transport Workers, cited above). Furthermore, the term 'restrictions' in para 2 of art 11 of the Convention is not limited to bans and refusals to authorise the exercise of Convention rights, but also embraces punitive measures taken after such rights have been exercised, including various disciplinary measures (see Ezelin v France (App no 11800/85) (1991) 14 EHRR 362, para 39; Maestri v Italy (App no 39748/98), (2004) 39 EHRR 832, para 26; Kuznetsov v Russia (App no 10877/04) [2008] ECHR 10877/04, para 35; and Trofimchuk v Ukraine (App no 4241/03) (28 October 2010), para 35)."**

41. Having referred to various international materials, including the ILO Convention and the Charter, the ECtHR held at para 83:

> **"The Court finds that the applicant's participation in the strike action was considered as a breach of disciplinary rules which, when taken together with the previous transgression, resulted in the most severe penalty – dismissal (for a similar assessment, see section 666mof the ILO's Digest of decisions and principles, cited in para 20 above). <u>The Court has previously found that such sanctions inevitably had a 'chilling effect' on trade union members taking part in industrial actions such as strikes to protect their professional interests</u> (see Ezelin, cited above, para 53; Karacay cited above, para 36; and Urcan v Turkey (App nos 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04) (unreported, 17 July 2008), para 34)." (Emphasis added)**

42. This "chilling effect" on trade union members taking part in industrial action was clearly deprecated by the ECtHR.

43. What this series of cases demonstrates, in my judgment, is that the ECtHR regards any restriction, however minimal, on the right to participate in a trade union-sanctioned protest or strike action as amounting to an interference with Article 11 rights. That supports Mr Ford's contention that the failure in the UK to confer protection against action short of dismissal for participating in strike action similarly amounts to an infringement of the Claimant's Article 11 rights.

44. Mr Edwards and Mr Stilitz sought to persuade me that these cases should not be seen as providing any support for the Claimant for two main reasons. First, it is submitted that the margin of appreciation is much wider in such cases and questions as to whether there should be protection for action short of dismissal and how wide that protection should be are quintessentially matters for the legislature. Second, it is said that these cases are mainly concerned with the State as employer. As such, they are not concerned with the State's positive obligations and have little to say where the alleged infringement is by a private employer acting in accordance with law.

45. The margin of appreciation was considered in some detail by the ECtHR in **RMT**. The ECtHR began by considering an argument that the right to strike is to be regarded as an "essential element" of the Article 11 right:

> **"84 The Court will consider first the applicant's argument that the right to take strike action must be regarded as an essential element of trade union freedom under Article 11, so that to restrict it would be to impair the very essence of freedom of association. It recalls that it has already decided a number of cases in which restrictions on industrial action were found to have given rise to violations of Article 11 (see for example Karaçay v Turkey, no. 6615/03, 27 March 2007; Dilek and others v Turkey, nos. 74611/01, 26876/02 and 27628/02, 17 July 2007; Urcan and others v Turkey, nos. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, 17 July 2008; Enerji Yapi-Yol Sen v Turkey, no. 68959/01, 21 April 2009). The applicant placed great emphasis on the last of these judgments, in which the term 'indispensable corollary' was used in relation to the right to strike, linking it to the right to organise (Enerji, at paragraph 24). It should however be noted that the judgment was here adverting to the position adopted by the supervisory bodies of the ILO rather than evolving the interpretation of Article 11 by conferring a privileged status on the right to strike. More generally, what the above-mentioned cases illustrate is that strike action is clearly protected by**

Article 11. The Court therefore does not discern any need in the present case to determine whether the taking of industrial action should now be accorded the status of an essential element of the Article 11 guarantee." (Emphasis added)

46. Here, the ECtHR cites its earlier decisions in which restrictions on industrial action were found to have given rise to violations of Article 11. These include **Karaçay** (which itself cited **Ezelin** and is considered above). There can be no doubt that the Court is here endorsing those earlier decisions. At paras 86 and 87 of **RMT**, the ECtHR discusses the margin of appreciation in trade union cases:

"86 In previous trade union cases, the Court has stated that regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole. Since achieving a proper balance between the interests of labour and management involves sensitive social and political issues, the Contracting States must be afforded a margin of appreciation as to how trade-union freedom and protection of the occupational interests of union members may be secured. In its most recent restatement of this point, and referring to the high degree of divergence it observed between the domestic systems in this field, the Grand Chamber, considered that the margin should be a wide one (Sindicatul 'Pastorul cel Bun', cited above, paragraph 133). The applicant relied heavily on the Demir and Baykara judgment, in which the Court considered that the respondent State should be allowed only a limited margin (see paragraph 119 of the judgment). The Court would point out, however, that the passage in question appears in the part of the judgment examining a very far-reaching interference with freedom of association, one that intruded into its inner core, namely the dissolution of a trade union. It is not to be understood as narrowing decisively and definitively the domestic authorities' margin of appreciation in relation to regulating, through normal democratic processes, the exercise of trade union freedom within the social and economic framework of the country concerned. The breadth of margin will still depend on the factors that the Court in its case law has identified as relevant, including the nature and extent of the restriction on the trade union right at issue, the object pursued by the contested restriction, and the competing rights and interests of other individuals in society who are liable to suffer as a result of the unrestricted exercise of that right. The degree of common ground between the member States of the council of Europe in relation to the issue arising in the case may also be relevant, as may any international consensus reflected in the apposite international instruments (Demir and Baykara, paragraph 85).

87 If a legislative restriction strikes at the core of trade union activity, a lesser margin of appreciation is to be recognised to the national legislature and more is required to justify the proportionality of the resultant interference, in the general interest, with the exercise of trade union freedom. Conversely, if it is not the core but a secondary or accessory aspect of trade union activity that is affected, the margin is wider and the interference is, by its nature, more likely to be proportionate as far as its consequences for the exercise of trade union freedom are concerned.

88. As to the nature and extent of the interference suffered in the present case by the applicant in the exercise of its trade union freedom, the Court considers that it was not as invasive as the applicant would have it. What the facts of the case

> **reveal is that the applicant led a strike, albeit on a limited scale and with limited results. It was its wish to escalate the strike, through the threatened or actual involvement of hundreds of its members at Jarvis, another, separate company not at all involved in the trade dispute in question, that was frustrated. The Court has noted the applicant's conviction that secondary action would have won the day. Inevitably, that can only be a matter of speculation – including as to the result of any ballot on the subject – since that course of action was clearly ruled out. It cannot be said that the effect of the ban on secondary action struck at the very substance of the applicant's freedom of association. On this ground the case is to be distinguished from those referred to in paragraph 84 above, which all concerned restrictions on 'primary' or direct industrial action by public-sector employees; and the margin of appreciation to be recognised to the national authorities is the wider one available in relation to the regulation, in the public interest, of the secondary aspects of trade union activity." (Emphasis added)**

47. The effect of these passages in **RMT**, taken together with para 84, appears to me to be as follows:

a. The ECtHR has repeatedly acknowledged that the right to strike is protected by Article 11;

b. Cases such as **Karaçay** establish that restrictions on industrial action can give rise to a violation of Article 11. I note that the restrictions in cases such as **Karaçay** were fairly minor but were nevertheless found to amount to an infringement;

c. Contracting states are to be afforded a wide margin of appreciation in the area of trade union rights given the sensitive social and political issues involved;

d. However, the breadth of the margin will depend on matters such as the nature and extent of the restriction and the competing rights of others: para 86;

e. Where a restriction strikes at the "core of trade union activity", a lesser margin of appreciation will apply and more will be required to justify the interference, whereas a restriction on a secondary or accessory aspect of trade union activity will attract a wider margin: para 87;

f. Whilst a ban on secondary action (as in the RMT case) did not strike at the very substance of freedom of association, restrictions on primary or direct industrial action did do so: para 88;

g. Accordingly, the cases referred to at para 84 of **RMT**, including **Karaçay**, were ones where the margin of appreciation is narrower.

48. Mr Edwards, in his oral submissions, did not dispute that there may be a narrower margin of appreciation in relation to restrictions on industrial action. Mr Stilitz sought to maintain that the wider margin of appreciation ought to apply and referred me to para 86 of **RMT** and to the decision of the Court of Appeal in **Metrobus v Unite the Union** [2010] ICR 173.

49. It seems to me, however, that reading paras 84 to 88 of **RMT** together, it is tolerably clear that the ECtHR's view is that the wider margin of appreciation does not apply to all restrictions that might be imposed in respect of any trade union activity; measures directed at primary or direct industrial action do not attract the same wide margin. The earlier decision of the Court of Appeal in **Metrobus** needs to be considered in that light.

50. Mr Stilitz also submitted that the cases relied upon by Mr Ford are of limited relevance here because they were, apart from two instances, dealing with public sector employees and the State's own infringement, whereas what is in issue in the present appeal is the State's positive obligation in respect of which different considerations apply. Mr Stilitz acknowledges that **Danilenkov** involved a private employer but submits that that was an unusual case brought under the Article 14 right against discrimination in relation to the Article 11 right.

51. The ECtHR in **Sindicatul Pastoral Cel Bun** [2014] 58 EHRR 10 acknowledged that:

> **"132. The boundaries between the State's positive and negative obligations under Article 11 of the Convention do not lend themselves to precise definition. The applicable principles are nonetheless similar. Whether the case is analysed in terms of a positive duty on the State or in terms of interference by the public**

> **authorities which needs to be justified, the criteria to be applied do not differ in substance. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole.**
>
> **133. In view of the sensitive character of the social and political issues involved in achieving a proper balance between the respective interests of labour and management, and given the high degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how trade-union freedom and protection of the occupational interests of union members may be secured (see Sørensen and Rasmussen v. Denmark [GC], nos. 52562/99 and 52620/99, § 58, ECHR 2006-I)."**

52. These passages confirm that whether or not the case is analysed in terms of the positive or negative obligations on the State, the essential question remains the same: has a fair balance been struck between the competing interests of the individual and of the community as a whole? Although in that case the ECtHR stated that States enjoy a wide margin of appreciation, that must be considered in light of the ECtHR's subsequent pronouncements in **RMT** that the breadth of that margin will depend on the factors that the Court in its case law has identified as relevant. For reasons already set out, it appears to me that that margin is narrower in cases such as the present where it is alleged that there is a lack of protection in respect of participation in direct industrial action. It is right to note that, in distinguishing such cases from those where a wider margin would apply, the ECtHR in **RMT** did acknowledge that those cases involved "direct industrial action by public-sector employees": see **RMT** at para 88, that appears simply to be an acknowledgement of a fact, rather than an attempt to confine the applicability of the narrower margin to cases involving public-sector employees. If that were not the case, then there would have been little need for the ECtHR in **RMT** to go through the analysis it did, whereby it drew a distinction between cases where margins of different breadths might apply: it could simply have said that, as the **RMT** case was concerned with a private employer (and hence the State's positive obligations under Article 11), the wider margin applied.

53. In dealing with an argument in **Danilenkov** that the private ownership of the company precluded a claim based on the direct intervention of the State, the ECtHR held:

> **"120. The Court notes that the parties disagree as to whether the circumstances of the present case involved direct intervention by the state, given the status of the Kaliningrad Seaport Company. It considers that it is not necessary to rule on this issue, since the responsibility of the Russian Federation would, in any case, be engaged if the matters complained of resulted from a failure on its part to secure to the applicants under domestic law the rights set forth in art.11 of the Convention."**

54. As Mr Ford submits, this passage shows that, irrespective of whether the employer was a private non-State entity, the obligations of the State would be engaged in respect of the failure to comply with its positive obligations under Article 11. Mr Ford further submits that the fact that the claim was brought as an Article 14 claim does not diminish its relevance in the present context. I agree. As the ECtHR makes clear in para 120 of its judgment, the positive obligation is engaged "in any case" if the matters complained of resulted from a failure to secure Article 11 rights.

55. Mr Stilitz correctly points out that Mr Ford has not been able to point to any ECtHR authority where the positive obligation of the State has meant that it was required to protect workers against action short of dismissal for engaging in industrial action. However, the authorities to which I was taken emphasise the high importance attached to workers being able to exercise the right to participate in such action without restriction, and they do not explicitly or implicitly suggest that the State does not have any positive obligation in respect of that right. Indeed, **Danilenkov** strongly suggests that there is such an obligation. Similar views were expressed by the ECtHR in the more recent 2017 decision in **Tek Gida v Turkey** (No.35009/05), another case involving a private employer. There, the employer had dismissed several employees who were union members to prevent the number of such employees in its workforce from reaching the threshold for collective bargaining recognition. Although the dismissed employees were awarded substantial compensation for wrongful dismissal, they complained that the

dismissals had the effect of eradicating trade unionism at the employer's factories and that the State's failure to safeguard the right to organise amounted to an infringement of the Article 11 right. The ECtHR (at paras 35, 36 and 50) reiterated what was said in **RMT** about the narrower margin of appreciation where the restriction strikes at the core of trade union activity and went on to conclude:

> **"55. The Court considers that this loss of membership amounted to a restriction striking at the core of the applicant union's trade-union activities, meaning that the national authorities had a narrower margin of appreciation and that more was required to justify the proportionality of the interference. However, there is nothing in the case file to suggest that when the civil courts involved in the case awarded the minimum amounts permitted by law in compensation for wrongful dismissal, they gave careful consideration to the deterrent effect of such awards, for example by taking into account the low wages of the dismissed employees and/or the significant financial power of the company that had employed them.**
>
> **56. The Court notes that the employer's refusal to reinstate the dismissed employees and the award of insufficient compensation to deter the employer from carrying out any further wrongful dismissals did not infringe the law as interpreted in the judicial decisions in the present case. It infers from this that the relevant law, as applied by the courts, did not impose sufficiently deterrent penalties on the employer, which, by carrying out large-scale wrongful dismissals, negated the applicant union's freedom to seek to persuade employees to join it. Accordingly, neither the legislature nor the courts involved in the case satisfied their positive obligation to secure the effective enjoyment of the applicant union's right to seek to persuade the employer to hear what it had to say on behalf of its members and, in principle, its right to bargain collectively with the employer. It follows that a fair balance between the competing interests of the applicant union and of the community as a whole has not been struck in the present case. There has therefore been a violation of Article 11 of the Convention in this respect."**

56. In the light of these decisions, I do not accept that the fact that the present case is concerned with positive obligations or a private employer either diminishes the relevance of the case law on which Mr Ford relies or affects the analysis on margin of appreciation.

57. If, as I find to be the case, the failure of s.146 to encompass industrial action gives rise to an interference with the Article 11 right, the next question is whether such interference is justified under Article 11(2). That involves a consideration of proportionality. It is well-established that the correct approach to this question is that set out in the judgment of Lord Sumption at para 20 of **Bank Mellat v HM Treasury** [2014] AC 700. Four matters need to be considered:

a. Whether the objective of a measure is sufficiently important to justify the limitation of a fundamental right;

b. Whether it is rationally connected to the objective;

c. Whether a less intrusive measure could have been used; and

d. Whether, having regard to these matters and the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

58. Mr Ford submitted that the **Bank Mellat** approach is about common law proportionality and should not be applied here. He referred me to para 72 of the dissenting judgment of Lord Reed in **Bank Mellat**:

> **"72. The approach to proportionality adopted in our domestic case law under the Human Rights Act has not generally mirrored that of the Strasbourg court. In accordance with the analytical approach to legal reasoning characteristic of the common law, a more clearly structured approach has generally been adopted, derived from case law under Commonwealth constitutions and Bills of Rights, including in particular the Canadian Charter of Fundamental Rights and Freedoms of 1982…"**

59. In my view, Lord Reed is doing no more there than providing an explanation for the difference in approach between the ECtHR and the domestic Courts; it is not suggested, and nor could it be, that the domestic approach to proportionality as summarised by Lord Sumption should be eschewed in favour of the less "clearly structured" approach favoured by the ECtHR. This appeal tribunal is, in any case, bound to apply the **Bank Mellat** approach.

60. The first question under the **Bank Mellat** criteria is whether the legislative objective of the measure is sufficiently important to justify the limitation of a fundamental right. The objective of excluding protection against detriment short of dismissal in cases involving industrial action is said by Mr Edwards and Mr Stilitz to be the need to relieve employers of the need to

pay workers who, by participating in industrial action, withhold their labour in breach of contract. The difficulty with that contention is that it is not in dispute that employers are entitled to withhold pay in such circumstances. Indeed, that would appear to be the accepted position of international expert bodies deciding complaints under ILO Convention No.87 on the Freedom of Association and Protection of the Right to Organise. I was referred to paras 942 to 944 of the 6th edition of a compilation of decisions of the ILO. These provide:

> **"942. Salary deductions for days of strike give rise to no objection from the point of view of freedom of association principles. (See the 2006 Digest, para. 654; …)**
> **943. Additional sanctions, such as deductions of pay higher than the amount corresponding to the period of the strike, amount in this case to a sanction for the exercise of legitimate industrial action. (See 362nd Report, Case No. 2741, para. 773.)**
> **944. In a case in which the deductions of pay were higher than the amount corresponding to the period of the strike, the Committee recalled that the imposition of sanctions for strike action was not conducive to harmonious labour relations. (See the 2006 Digest, para. 655;…)"**

61. The accepted position of the ILO appears, therefore, to be that deductions for the days of the strike are unobjectionable but additional deductions going beyond that are. I was not taken to any ECtHR authority suggesting otherwise. The position under domestic law was of course made clear in **Sim v Rotherham MDC** [1986] ICR 897 per Scott J at 942H-G and **Miles v Wakefield MDC** [1987] ICR 368 per Lord Bridge at 382C-E: a worker has no entitlement to pay in respect of strike action. Given these matters, a worker could not legitimately claim to have a justified sense of grievance in not being paid for the time spent on strike action and so would not be able to assert any detriment at all. The worker who sought redress for deductions of pay by invoking Article 11 would find no support in any ECtHR authority on the point, or from the ILO, the international body whose Conventions inform the approach taken by the ECtHR to Article 11. In these circumstances, the suggestion that the exclusion of industrial action from s.146 is due to the need to avoid imposing an obligation on employers to pay workers who go on strike, seems to me to be one without real substance.

62. If that objective falls away, then what is left? Mr Stilitz sought to advance the suggestion that there is a legitimate aim in permitting employers to discipline or otherwise penalise employees who have breached their contract by participating in strike action. However, to permit disciplinary action against workers simply for exercising the right to strike would be fundamentally in contradiction with the ECtHR authorities considered above, in which even limited restrictions on strike action which have the effect of deterring or penalising such action were held to amount to an infringement. That is not to say that the employer would have no recourse where the worker's actions go beyond legitimate industrial action or where the manner in which the worker participates in the action causes particular harm. In such cases, the employer might well be able to argue that the disciplinary measures taken were by reason of the manner in which the worker engaged in the industrial action and not because of such engagement itself. That approach, whereby the detriment is considered to be the result of some feature of the worker's conduct that is separable from the prohibited reason - in this case participating in trade union activity - is one that is well-established in employment law in any case where the reason for the employer acting as it did is relevant: see e.g. **Page v Lord Chancellor & anor** [2021] EWCA Civ 254.

63. No other objective was identified by either Mr Edwards or Mr Stilitz.

64. For these reasons, it does not appear to me that the objective for the measure in question is sufficiently important to justify the limitation on the Article 11 right.

65. Section 146, TULRCA in its current form therefore fails to satisfy the first proportionality hurdle. Even if it had done, (and assuming that the second and third **Bank Mellat** criteria are satisfied) it would still need to be considered whether a fair balance has been struck between the

rights of the individual on the one hand and the interests of the wider community, including the employer, on the other. As the analysis above shows, the margin of appreciation in this context, where protection against detriment is denied in respect of primary or direct industrial action, is narrow. I do not accept Mr Ford's submission that the margin is so narrow as to be reduced to nothing: that would leave the State no room for manoeuvre at all in what remains a sensitive area of legislation. However, I am satisfied that the margin of appreciation is a narrower one than for other aspects of trade union related activity. Accordingly, there would need to be "solid evidence" from the State to justify its necessity: see **Ognevenko** at para 73. There is no such evidence here. I have not been taken to any Parliamentary debate or other document that might begin to provide an explanation for the exclusion of industrial action from s.146.

66. Mr Stilitz argues that the balance has been struck fairly as there are sufficient protections for the worker elsewhere. He relies upon the fact that the worker will have the procedural protections under the ACAS Code of Practice on Disciplinary and Grievance Procedures as well as, at least in the case of an employee, the implied duty of trust and confidence. However, the procedural protections afforded by the Code of Practice would not preclude the detrimental action being taken. It is small comfort to the employee who is subjected to a detriment that the employer followed a fair procedure before imposing it. As for the duty of trust and confidence, even putting aside for the moment the fact that there remains a question mark as to whether a worker can invoke that duty, it would only protect against behaviour amounting to a fundamental breach of the contract. The detriment, whether it is disciplinary action or some other detriment, would probably be both contractually and statutorily permissible and breach of trust and confidence would be difficult to establish.

67. Mr Stilitz also points to the fact that no criminal sanctions or civil fines are imposed on workers who strike. However, that does not diminish the potential deterrent effect of detriment in the course of employment. As the ECtHR in **Tek Gida** confirmed, the failure by the State to impose

"sufficiently deterrent penalties on the employer" meant that it had failed in its positive obligation to secure the effective enjoyment of the applicant union's right. Here, there is little to deter the employer at all from imposing sanctions short of dismissal for participating in industrial action. Such sanctions, whether these amount to a suspension, disciplinary warning, removal of privileges or otherwise could dissuade workers from exercising their trade union rights, or amount to punishment for having done so.

68. For these reasons, it is my view that a fair balance has not been struck between the competing interests of workers seeking to exercise their trade union rights and those of the employer and the community as a whole. There is therefore a violation of Article 11. The Tribunal reached the same conclusion but did so by a different route. Its reasoning involved a consideration of Article 13. I accept Mr Stilitz's submission that that Article has little relevance here since it has not been incorporated into UK law under the HRA. However, in referring to a "breach of the obligation to provide an effective remedy", the Tribunal could equally be regarded as basing its decision on the State's failure to comply with its positive obligation under Article 11 to secure the effective enjoyment of the Claimant's Article 11 rights. The Tribunal's error in reasoning does not, in this case, affect the correctness of its conclusion as to the effect of Article 11.

69. Having concluded that there was a violation of Article 11, the next question is whether it is possible, pursuant to s.3, HRA to read or give effect to s.146 so as to be compatible.

Should s.146 be read down under s.3, HRA?

70. The principles to be applied under s.3, HRA were set out in **Ghaidan** in the speeches of Lord Nicholls at paras 25 to 33, Lord Steyn at paras 44 to 45 and Lord Rodger at paras 107 to 124. It is not necessary to set out these speeches in full as the principles are not in dispute. The relevant ones for present purposes may be summarised as follows:

a. The interpretative obligation under s.3, HRA is of "unusual and far-reaching character". It may require a court to "depart from the unambiguous meaning the legislation would otherwise bear"; per Lord Nicholls at para 30;

b. The duty may require a court to depart from the intention of Parliament and to read in words which change the meaning of the legislation;

c. The only limits on this duty are that the proposed change must go with the "grain" or the "underlying thrust" of the legislation and should not be inconsistent with its cardinal principles: per Lord Nicholls at para 33 and Lord Rodger at paras 114-115;

d. The intention underlying s.3, HRA was that it would be the primary remedy such that "in 99% of the cases that will arise, there will be no need of judicial declarations of incompatibility": per Lord Steyn at para 46, citing the Lord Chancellor in Parliament.

e. A declaration of incompatibility is a "measure of last resort. It must be avoided unless it is plainly impossible to do so. If a clear limitation on Convention rights is stated in terms such an impossibility will arise" (Emphasis in original): per Lord Steyn in **R v A (No.2)** [2002] 1 AC 45 at para 44;

f. Whether or not is "possible" to interpret the offending provision in a compatible way does not depend on the precise formulation of words that may be devised by the Court or the parties to do so: per Lord Rodger in **Ghaidan** at 123 to 124.

71. Mr Edwards and Mr Stilitz submitted that a compatible interpretation of s.146 is not possible because the inclusion of industrial action within its scope would introduce an inconsistency between two provisions using the same wording, would render the provisions at Part V of TULRCA a dead letter, and, more fundamentally, would go against the grain of the legislation.

72. Mr Ford relied on the case of **R (Hurst) v London Northern District Coroner** [2007] 2 AC 189, in support of the proposition that the s.3 duty permits a court to adopt a different meaning of the same legislative provision in a context where it is necessary to interpret a provision compatibly with ECHR than it adopts in other contexts. In **Hurst**, the issue was whether a provision in the **Coroners Act 1998** could be read compatibly with Article 2 rights. It was argued that applying the interpretative obligation to that provision would require the same interpretation to be applied in other cases where no Convention rights were in play. That argument was rejected:

> **"11 In the Jordan appeal, Jordan v Lord Chancellor [2007] 2 AC 226, Mr Blake took the matter a stage further, however. His argument, as applied to Mrs Hurst's case, would be that, even assuming that, for the reasons given in McKerr, Mrs Hurst had no article 2 Convention right to require an investigation into her son's death, nevertheless the broader construction of section 11(5)(b)(ii) of the 1988 Act established by R (Middleton) v West Somerset Coroner [2004] 2 AC 182 should be applied whenever the provision was in play - whether or not the person seeking the resumption of the inquest had an article 2 Convention right. The result would seem to be that the ambit of the jury's verdict would be widened in every inquest.**
> **12 A somewhat similar point has arisen in cases where legislation has to be given a particular interpretation in order to comply with a requirement of European Community law. Where no potential infringement of Community law is involved, can a party insist on the legislation being applied in the same way? As Lord Brown shows, the answer given by the courts is that he cannot: the legislation is interpreted differently, depending on whether or not community rights are involved. The same should apply in the present context also.**
> **13 Although at first sight this may seem strange, any other solution would be even stranger…" (per Lord Rodger in Hurst)**

73. At para 52, Lord Brown said as follows:

> **"52 I turn, therefore, to the other limb of this argument, the submission that Middleton is now binding authority on the meaning of section 11 in all circumstances, a conclusion, as already explained, plainly contrary to what the House in Middleton intended. The answer to it in my judgment is to be found, as the intervener argues, in the analogous field of European Community law where, pursuant to Marleasing SA v La Comercial Internacional de Alimentacion SA (Case C-106/89) [1990] ECR I-4135, a similarly strong interpretive obligation is imposed on member states to construe domestic legislation whenever possible so as to produce compatibility with European Community law. The closeness of this analogy has been recognised by the House in Ghaidan v Godin-Mendoza [2004] 2 AC 557: see particularly Lord Steyn's opinion, at para 45. Where the Marleasing approach applies, the interpretative effect it produces upon domestic legislation is strictly confined to those cases where, on their particular facts, the application of the domestic legislation in its ordinary meaning would produce a result incompatible with the relevant European Community legislation. In cases where no European Community rights would be infringed, the domestic legislation is to be construed and applied in the ordinary way. Thus in R v Secretary of State for Transport, Ex p Factortame Ltd [1990] 2 AC 85, Part II of the Merchant Shipping Act 1988 was to be disapplied in those cases where its**

operation would infringe directly effective European Community rights; but not otherwise. Similarly in Imperial Chemical Industries plc v Colmer (No 2) [1999] 1 WLR 2035 the House, following a reference to the Court of Justice of the European Communities (Imperial Chemical Industries plc v Colmer [1999] 1 WLR 108), held that ICI remained bound by domestic legislation upon its ordinary meaning notwithstanding that in certain circumstances such a construction would be incompatible with European Community rights. This principle was again applied by the Court of Appeal in Gingi v Secretary of State for Work and Pensions [2002] 1 CMLR 587 where Arden LJ expressly approved the following passage from Bennion, Statutory Interpretation, 4th ed (2002), p 1117:

"It is legitimate for the national court, in relation to a particular enactment of the national law, to give it a meaning in cases covered by the Community law which is inconsistent with the meaning it has in cases not covered by the Community law. While it is at first sight odd that the same words should have a different meaning in different cases, we are dealing with a situation which is odd in juristic terms."

Buxton LJ, who gave the leading judgment in Gingi, recognised the relevance of the principle to the present case and, as already stated, rejected this limb of the respondents argument. He was right to do so."

74. What emerges from these passages is that to interpret a provision conformably with the Convention is not to require that that same interpretation should apply even where no Convention rights are in play. The interpretative obligation only applies where it is necessary to comply with the Convention right. That might well give rise to odd results, even ones that fly in the face of the normal rules of statutory interpretation, as the extract from **Bennion** in the passage above confirms. If the same legislative provision can have different meanings depending on whether or not Convention rights are in play, then it is no great leap to conclude that the same applies where the same wording appears in different provisions within the same Act. Were that not so, then the interpretative obligation would be readily defeated by pointing to another provision containing the same wording which does not engage Convention rights. That would confer primacy on domestic rules of interpretation, whereas, as is clear from the speeches in **Ghaidan**, such rules must yield to the interpretative obligation under s.3, HRA.

75. In my judgment, the inconsistency that might arise between s.146 and s.152 if the former were interpreted so as to include industrial action is not reason enough to reject that interpretation. Mr Stilitz submits that the problem is more than just one of inconsistency; the Claimant's interpretation would, he says, in fact render ss. 237 to 238A of TULRCA a dead letter. However,

A that contention rests on the same incorrect premise, namely that ss. 146 and 152 would both have to be read consistently following the application of the interpretive obligation to one of them. Sections 237 to 238A of TULRCA would only end up being a dead letter if one were to accept that, as a result of the interpretative obligation being applied to s.146, the same interpretation had to be applied to s.152. But that is precisely what is not required.

B

C 76. There is of course the possibility that a claimant might seek to argue that Article 11 rights are engaged in relation to s.152 as well, and that it is contrary to those rights not to deem dismissal on the grounds of industrial action automatically unfair. However, that hypothetical is not before the EAT and it should not deflect a proper approach to the interpretative exercise in respect of

D s.146. Even if it were, the possibility of different Convention-compliant interpretations being applied to the same wording in different provisions, would not be inconsistent with the interpretative principles established in **Ghaidan**, **Hurst** and **Wandsworth London Borough Council v Vining** [2018] ICR at paras 74 to 75.

E

77. I do not, therefore, accept that the internal inconsistencies in the Act that might arise from a Convention compliant reading of s.146 would be reason enough on their own to regard that

F reading as not possible. Of course, such inconsistencies might support an argument that the claimed interpretation simply goes against the grain of the legislation. It is that to which I turn next.

G

Would the Claimant's interpretation go against the grain of the legislation?

H 78. The Tribunal held that the "grain" of the legislation as a whole drew a clear distinction between protection for participation in trade union activities in Part III of TULRCA and taking

industrial action in Part V, and that to interpret s.146 as including industrial action would undermine the legislative scheme.

79. Mr Ford submits that the Tribunal's reasoning has less to do with "grain" of the legislation and more to do with the internal inconsistency in the Act that would result. As such, the Tribunal erred since the s.3 interpretative exercise can produce outcomes which might appear odd if applying the normal rules of statutory construction. There is some force in this submission, but, as I said above, the fact that an inconsistency results might be evidence that the claimed interpretation goes against the grain.

80. What is the grain here? It is instructive to consider the legislative history of the provisions in question. Mr Ford's and Mr Brittenden's skeleton argument contains a comprehensive history of the relevant provisions from their origin in the **Industrial Relations Act 1971** (IRA) to the present day. That history, which was not disputed, is replicated here (omitting the footnotes):

> **"15. The domestic legislative history … is … summarised below:**
> **(1) The Industrial Relations Act 1971 ("IRA") gave workers the right to take part in the activities of an independent trade union "at an appropriate time", and made it an "unfair industrial practice" for an employer (i) to prevent or deter a worker from exercising such rights or (ii) to dismiss or penalise the worker for doing so: see s.5(1)(2). The definition of "appropriate time" in s.5 IRA was very similar to that in s.146 TULRCA. IRA also introduced the statutory right not to be unfairly dismissed in ss.22-32. The Act deemed dismissals to be (i) unfair if the reason was based on s.5 (s.23(4)) but (ii) fair where the principal reason was taking part in industrial action if all strikers were dismissed: s.26.**
> **(2) The IRA was repealed by the Trade Union and Labour Relations Act 1974 ("TULRA 1974"). However, that Act also re-enacted, with some amendments, the unfair dismissal protections in ss 22-33 IRA 1971: see TULRA 1974, s.1 and Schedule 1, §§6-7. At this stage, then, there was no protection for action short of dismissal for taking part in the activities of a trade union but there was protection for unfair dismissal, subject to the original rules on deemed fairness and unfairness.**
> **(3) An individual right to protection against employers taking action short of dismissal to prevent or deter an individual taking part in the activities of a trade union resurfaced in a substantially different guise in s.53 of the Employment Protection Act 1975 ("EPA 1975). Four points are relevant. First, the right was restricted to employees (cf. IRA 1971 s.5 and s.146 TULRCA). Second, again in contrast to s.5 IRA, the right was explicitly restricted to "action short of dismissal". Third, the right was restricted to the participation in the activities of "specified" unions: s.53(4). Fourth, the EPA adopted the same definition of "appropriate time" as was formerly found in s.5 IRA: see EPA 1975, s.53(2). At this stage, then, the individual right not to be subject to action short of dismissal**

because of trade union activities was set out in separate primary legislation, with its own distinct rules, from the provisions protecting against unfair dismissal because of trade union activities and industrial action in TULRA 1974.
(4) The two separate streams, unfair dismissal in TULRA 1974 and protection against action short of dismissal in s.53 EPA, were then brought together in a single Act - EPCA 1978 (see s.23 (action short of dismissal) and Part V (unfair dismissal)). As its short and long title states, this was a consolidating Act.
(5) The provisions in s.23 of EPCA were subject to some amendments to deal with the closed shop. The core provision of s.23(1)(2) EPCA 1978, however, survived intact and was consolidated again in s.146 of TULRCA. The analogue unfair dismissal protection for dismissals relating to trade union membership or activities in s.58 EPCA was also consolidated in s.152 TULRCA. Subsequent to the enactment of EPCA 1978, further changes were made to unfair dismissal law and industrial action by s.9 of the Employment Act 1990, which prevented an employee complaining of unfair dismissal if he or she was taking part in unofficial industrial action. This provision was consolidated in s.237 of TULRCA.

16. Following its original enactment, TULRCA itself has been subject to two relevant amendments.
(1) First, the Employment Relations Act 1999 ("ERA 1999") introduced changes to the exclusionary rules on unfair dismissal for those taking part in strikes, originally found in IRA 1971. In particular, s.16 and Schedule 5 ERA 1999 introduced a new s.238A of TULRCA making it automatically unfair to dismiss those taking "protected industrial action". This typically means lawful, balloted action authorised and endorsed by a trade union. No equivalent protection was introduced for those who were subject to action short of dismissal, whether the industrial action was official or not.
(2) Second, the Employment Relations Act 2004 ("ERA 2004") amended TULRCA following the judgment of the ECtHR in *Wilson v United Kingdom* [2002] IRLR 568. As well [as] introducing new protections for inducements relating to trade union membership, ERA 2004 also made changes to s.146 of TULRCA: see s.31. This included extending the section to protect a "worker" instead of the narrower category "employees" and giving protection to individuals who made use of union services. The purpose of these provisions were, according to the Government, to bring UK law into line with Article 11 and the principles underlying the decision in *Wilson*: see (i) the preceding publication, "Review of the Employment Relations Act 1999: Government Response to the Public Consultation" (December 2003) at §3.9, stating that the "Government intends that as a matter of principle trade union law should comply with the European Convention" and setting out various changes which fed into ERA 2004; and (ii) the Explanatory Notes to ERA 2004, §193. No similar changes were made to the unfair dismissal regime in s.152, which remained restricted to employees."

81. A number of points emerge from that history:

a. First, although ss.146 and 152 of TULRCA have their origins in IRA, the provisions setting out protection against unfair dismissal for participating in trade union activities developed separately from those protecting against detriment for such activities;

b. Indeed, by the time the EPA 1975 came into force, the two types of protection were contained in separate Acts. That they were subsequently brought together in

consolidating legislation under the EPCA 1978 does not alter that fact. That tends to suggest that the two provisions are not necessarily of a piece or do not have the same underlying thrust or grain;

c. Parliament has made it clear that its intention is that trade union law should be compliant with the ECHR. There is nothing in the legislative history to suggest that there was any intention to impose a clear limitation on Convention rights when it came to action short of dismissal for participating in industrial action.

82. In my judgment, there is nothing to suggest that the "grain" of the legislation is to exclude protection against detriment for those participating in industrial action. Indeed, 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 TULRCA that protection against detriment for such participation should not be protected. As Mr Ford submits, it is anomalous that those taking part in official strikes are protected against unfair dismissal by s.238 TULRCA but have no equivalent protection for action short of dismissal.

83. Mr Edwards' and Mr Stilitz's positions on the grain of the legislation are very much predicated on the "violence" that would be done to the legislative scheme by adopting an interpretation of s.146 that includes participation in industrial action, in particular by requiring the same wording in two provisions in the same Act to be interpreted differently. However, once it is accepted as correct (as it is in my view) that on a proper application of s.3, HRA, it is possible that the same wording can bear different interpretations depending on whether or not Convention rights are engaged, then it is clear that there is no such violence; merely a lawful and mandatory reading of the provision in question. It is further submitted by Mr Stilitz that the fact that protection under s.146 only applies to activities undertaken "at an appropriate time" means that

it cannot have been intended that the protection ought to apply to industrial action, which, almost by definition, would not be at "an appropriate time". I do not accept that submission for two reasons:

a. First, as has been stated above, industrial action can take place outside working hours. If the intention had been to exclude any form of industrial action from s.146 protection, then doing so by reference to "at an appropriate time" would create an imprecise and highly permeable barrier between what is and what is not actually excluded;

b. Second, the fact that the words "at an appropriate time" do not clearly and unambiguously exclude industrial action means that the provision is amenable to being interpreted conformably with ECHR rights.

84. Mr Edwards' and Mr Stilitz's final line of attack against a compatible reading of s.146 is that Mr Ford has not been able to devise a precise and unambiguous form of words to achieve the desired interpretation. They submit that the uncertainties that would result in terms of what is or is not a detriment and the circumstances in which participation in industrial action would be protected mean that the Court would be forced, when undertaking the interpretative exercise, to make policy choices and to engage in judicial legislation. I do not accept those submissions.

85. The House of Lords in Ghaidan confirmed that in undertaking the interpretative exercise under s.3, the focus is on substance rather than on whether a precise form of words can be devised:

> **"123. Attaching decisive importance to the precise adjustments required to the language of any particular provision would reduce the exercise envisaged by section 3(1) to a game where the outcome would depend in part on the particular turn of phrase chosen by the draftsman and in part on the skill of the court in devising brief formulae to make the provision compatible with Convention rights. The statute book is the work of many different hands in different parliaments over hundreds of years and, even today, two different draftsmen might choose different language to express the same proposition. In enacting section 3(1), it cannot have been the intention of Parliament to place those asserting their rights at the mercy of the linguistic choices of the individual who happened to draft the provision in question. What matters is not so much the particular phraseology chosen by the draftsman as the substance of the measure**

which Parliament has enacted in those words. Equally, it cannot have been the intention of Parliament to place a premium on the skill of those called on to think up a neat way round the draftsman's language. Parliament was not out to devise an entertaining parlour game for lawyers, but, so far as possible, to make legislation operate compatibly with Convention rights. This means concentrating on matters of substance, rather than on matters of mere language.

124. Sometimes it may be possible to isolate a particular phrase which causes the difficulty and to read in words that modify it so as to remove the incompatibility. Or else the court may read in words that qualify the provision as a whole. At other times the appropriate solution may be to read down the provision so that it falls to be given effect in a way that is compatible with the Convention rights in question. In other cases the easiest solution may be to put the offending part of the provision into different words which convey the meaning that will be compatible with those rights. The preferred technique will depend on the particular provision and also, in reality, on the person doing the interpreting. This does not matter since they are simply different means of achieving the same substantive result. However, precisely because section 3(1) is to be operated by many others besides the courts, and because it is concerned with interpreting and not with amending the offending provision, it respectfully seems to me that it would be going too far to insist that those using the section to interpret legislation should match the standards to be expected of a parliamentary draftsman amending the provision: cf R v Lambert [2002] 2 AC 545, 585, para 80, per Lord Hope of Craighead . It is enough that the interpretation placed on the provision should be clear, however it may be expressed and whatever the precise means adopted to achieve it." (Emphasis added)

86. Two main formulations have been devised by Mr Ford and Mr Brittenden to interpret s.146 compatibly with the Article 11 rights:

a. Before the Tribunal (but not before me) it was suggested that insofar as the phrase "at an appropriate time" includes a time within working hours to which the employer has consented, there could be deemed consent on the part of the employer in respect of industrial action.;

b. Before me, Mr Ford suggested that a new sub-paragraph (c) could be added to the definition of "an appropriate time" in s.146(2) as follows:

"(c) a time within working hours when he is taking part in industrial action".

87. I agree with Mr Edwards that the first of these is unattractive because it is highly incongruous to treat an employer as having consented to action that is potentially contrary to its commercial interests. As this was not, in any event, an option pursued by Mr Ford before me I need say no more about it.

88. The second option is said by both Mr Edwards and Mr Stilitz to be vague and unworkable. I do not agree. As a matter of substance, the meaning is tolerably clear: there would be no doubt under the new sub-paragraph (c) that all industrial action would fall within the scope of "at an appropriate time" whether it is within working hours or not. It is also said that in terms of detriment, there is no answer in the proposed wording to address the difficulty that a deduction from pay would be a detriment. I have already considered that above: the deduction of normal pay in respect of the period not worked would not amount to a detriment under domestic law or the ECHR. It does not appear to me that the issue of pay renders a compatible interpretation not possible within the meaning of s.3, HRA. In respect of any detriment other than a deduction from pay, the Tribunal would approach that issue in precisely the same way as it would in respect of a detriment for trade union activity not amounting to industrial action.

89. I accept that Mr Ford's proposed additional wording does not address every situation and almost certainly falls short of what the Parliamentary draftsman might have devised. However, as stated by Lord Rodger in **Ghaidan**, it cannot be decisive that those seeking to rely on s.3, HRA are unable to match those high standards: "It is enough that the interpretation placed on the provision should be clear, however it may be expressed and whatever the precise means adopted to achieve it."

90. In my judgment, the proposed new sub-paragraph (c) in s.146(2), TULRCA does result in a compatible interpretation of that provision that is sufficiently clear. Taking that approach does not involve judicial legislation or the Court making any policy choices. It is simply giving effect to what is, in my judgment, a clear and unambiguous obligation under Article 11, ECHR to ensure that employees are not deterred, by the imposition of detriments, from exercising their right to participate in strike action.

91. The Tribunal found that the Claimant's interpretation of s.146 went against the grain of the legislation for two reasons:

> **"92. Firstly, I did not accept Mr Brittenden's contention that only the "grain" of section 146 should be considered. It was not appropriate to leave section 152 and the provisions in Part 5 out of the picture. In my judgment Mr Edwards was right to contend that the legislation as a whole should be taken into account.**
> **93. Secondly, in my judgment the "grain" of this legislation is to draw a clear distinction between trade union activities governed by Part 3, and industrial action which is governed by part 5. That distinction is most evident in the differences between the right to bring a complaint of automatic unfair dismissal under section 152, which includes the ability to seek interim relief, and the very different provisions which apply where dismissal occurs during or because of industrial action. In my judgment to read section 146 as extending to industrial action by any of the mechanisms proposed by Mr Brittenden would be inconsistent with this fundamental feature of TULRCA, and indeed would undermine it."**

92. The first of these reasons is, as Mr Ford submits, not so much a "grain" point as it is a reason based on the internal inconsistency that would result if s.146 were interpreted as the Claimant proposed. For reasons already discussed, such inconsistency is not reason enough in itself to avoid a compatible interpretation. However, even if it is a "grain" point, the fact that dismissal is subject to a different treatment than action short of dismissal does not necessarily mean that including industrial action within the scope of s.146 would go against the grain.

93. I accept that where the Act has expressly drawn a distinction between dismissal for trade union activities (dealt with under s.152) and dismissal for industrial action (dealt with under Part V), it would go against the grain to interpret s.152 as also encompassing industrial action. That would be inconsistent with a cardinal principle of the legislation that dismissal for industrial action is to be treated differently from dismissal for other trade union activity. Similarly, if another part of TULRCA had dealt with action short of dismissal in respect of industrial action, it might have gone against the grain to suggest that s.146 should also encompass industrial action. However, s.146 does not, as a matter of ordinary language, exclude industrial action from its ambit, and the words "at an appropriate time" do not unequivocally do so either. There is nothing else in the Act to suggest that one of its cardinal features is to deny workers protection against detriment by reason of participating in industrial action. Furthermore, as discussed above, there is nothing in the legislative history or any Parliamentary debate to suggest that the denial of such protection was a core aim; on the contrary,

Parliament's expressly stated aim is that trade union law should comply with Article 11 rights. In those circumstances, it seems to me that it is not going against the grain to interpret s.146 as proposed, and the Tribunal erred in concluding otherwise.

Conclusion

94. For these reasons, it is my view that the Tribunal was correct to conclude that there was an infringement of Article 11 but wrong to find that it was not possible to read or give effect to s.146 so as to be compatible. The appeal succeeds and s.146 is to be read as encompassing participation in industrial action.