

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

Case ID: 2022/0080

## Case summary

### Issues

Can a worker who is subject to detriment for the purpose of preventing or deterring her participation in a union-organised industrial action can potentially bring a claim under s. 146(2)(b) of the Trade Union & Labour Relations (Consolidation) Act 1992 ("TULRCA")?

In particular: (i) does Article 11 ECHR protect workers in such circumstances, and can the absence of sufficient protection under s. 146 TULRCA as conventionally interpreted be justified under Article 11(2)?; and (ii) is it possible to interpret s. 146 TULRCA so as to be compatible with Article 11 pursuant to the duty in s. 3 HRA 1998, or should the court make a declaration of incompatibility pursuant to s. 4 HRA 1998?

### Facts

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

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

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

### Judgment appealed

[\[2022\] EWCA Civ 379](#)

### Parties

#### Appellant(s)

Fiona Mercer

#### Respondent(s)

Secretary of State for Business and Trade

## **Appeal**

### **Justices**

Lord Lloyd-Jones, Lord Hamblen, Lord Burrows, Lord Richards, Lady Simler

### **Hearing start date**

12 December 2023

### **Hearing finish date**

13 December 2023

### **Watch hearing**

12 December 2023 [Morning session](#) [Afternoon session](#)

13 December 2023 [Morning session](#)