EMPLOYMENT TRIBUNALS

Claimant: Mrs F Mercer

Respondents: 1. Alternative Future Group Ltd
2. Mr Ian Pritchard

Heard at: Manchester **On:** 8 April 2020

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Mr S Brittenden, Counsel
Respondents: Mr P Edwards, Counsel

RESERVED JUDGMENT
AFTER PRELIMINARY HEARING

The "activities of an independent trade union" protected by section 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 do not include participation in lawful industrial action, and that part of the claimant's complaint under section 146 is dismissed.

REASONS

Introduction

1. This was a preliminary hearing held in public to determine a preliminary issue under rule 53(1)(b).

2. The "Code V" in the heading indicates that this was a remote hearing by video conference call by means of Skype. The parties and their representatives consented to the hearing taking place in that way. In order to ensure that members

of the public had access to the hearing, it appeared on the daily cause list for Manchester Employment Tribunal at Alexandra House, which remains open to the public. I chaired the video hearing in one of the public hearing rooms in Alexandra House, and arrangements were in place to enable any member of the public who attended to view the video conference call. As it transpired, no members of the public attended and the conference call was restricted to myself, counsel for each side identified above, the respondents' solicitor, Mr Campbell, and the first respondent's People Manager, Ms Forshaw.

3. In the remainder of these reasons I will refer to the Trade Union and Labour Relations (Consolidation) Act 1992 as "TULRCA", to the European Convention on Human Rights as "the Convention", to the European Court of Human Rights as "the ECHR", and to the Human Rights Act 1998 as "the HRA".

4. As this issue did not involve the second respondent, Mr Pritchard, I will refer to the first respondent simply as "the respondent".

Case Summary

Factual Summary

5. It was agreed that for the purposes of this Judgment I should assume that the facts asserted by the claimant in her claim form would be proven at trial. I made no findings of fact and nothing in these reasons should be construed in that way. This summary is intended only to put the legal issue into context.

6. The respondent is a health and social care charity providing a range of care services across the North West. It employs over 2,500 staff. The claimant has been employed as a support worker by the respondent since 2009. At the relevant time she was a workplace representative for her trade union, Unison.

7. In early 2019 there was a trade dispute regarding payments for sleep-in shifts. Having gone through the balloting and notification requirements contained in Part 5 of TULRCA, the union called a series of strikes which ran intermittently between 2 March and 14 May 2019. There was no attempt by the respondent to seek an injunction preventing that industrial action taking place.

8. The claimant was involved in planning and organising the strikes. In that capacity she was interviewed by an online publication ("iNews") in January 2019, and some press material appeared in the Liverpool Echo in late March 2019. She also intended to participate in the strikes herself.

9. On 26 March 2019 the claimant was suspended. The respondent told her it was because of allegations that she had abandoned her shift on two separate occasions without permission, and that she had spoken to the press about the strike action without prior authorisation in way which conveyed confidential information and was considered likely to bring the organisation into disrepute.

10. The suspension was lifted on 11 April 2019, but the disciplinary matter proceeded and on 26 April 2019 the claimant was given a first written warning for leaving her shift. That sanction was overturned on appeal.

11. A grievance which she filed in June 2019 was rejected, and an appeal against that decision was also unsuccessful.

Procedural Summary

12. The claimant presented her claim form on 23 August 2019. It contained two complaints.

13. The first was a complaint of protected disclosure detriment contrary to section 47B Employment Rights Act 1996. That matter concerned the handling of her grievance and was not at issue in this hearing.

14. The second was a complaint under section 146 TULRCA that she had been subjected to a detriment by the first respondent by the decision to suspend her, a decision she alleged had been taken for the sole or main purpose of preventing or deterring her from taking part in the activities of an independent trade union at the appropriate time, or penalising her for having done so. The claimant's case was that the "activities" encompassed both the planning and organisation of the industrial action and her own participation in it.

15. The response form of 28 October 2019 defended both complaints on the merits. It asserted that the suspension and disciplinary proceedings were unrelated to any trade union activities, but also that taking part in industrial action could not be an activity protected by section 146.

16. At a telephone case management hearing before Employment Judge Shotter on 6 January 2020 it was agreed that the question of whether section 146 extended to participation in industrial action would be determined at this hearing.

Issue for Determination

17. Employment Judge Shotter's written Case Management Order identified that the issue to be determined was as follows:

> **"Whether the claimant's claim brought under section 146 TULRCA/Article 11 of the European Convention on Human Rights should be struck out on the basis that it has no reasonable prospect of success."**

18. At the outset of the hearing I raised some reservations about whether this was the appropriate way to proceed.

19. Firstly, dealing with the matter as an application to strike out would not require me to determine the point, but simply to assess whether the claimant had any reasonable prospect of success on the point at trial.

20. Secondly, the section 146 complaint could not be struck out in its entirety because (as Mr Edwards confirmed) the respondent accepted that planning or organising industrial action could fall within the scope of "activities" within section 146 as long as it was done at an appropriate time.

21. Thirdly, there might be practical benefits in leaving the dispute about participation in industrial action to be determined at the final hearing. I was being asked to determine this issue on the assumption that the Tribunal would make the required factual finding about the sole or main purpose of the suspension of the claimant. An appeal against my judgment was likely whichever way it went. There would therefore be a risk that after much time and cost this dispute of principle might be rendered entirely academic by a finding of fact made at the final hearing.

22. After discussion both sides indicated that despite those reservations they wished the hearing to proceed, but it was agreed that that I should treat this preliminary hearing as though it had been convened to determine a preliminary issue under Rule 53(1)(b). That issue was whether, in the light of Articles 10 and 11 of the European Convention on Human Rights, the activities protected by section 146 extend to participation in lawful industrial action as a member of an independent trade union.

23. Both advocates had prepared a written skeleton argument which I read prior to the hearing.

24. The skeleton arguments were accompanied by a bundle of authorities. It included a number of decisions of the ECHR in cases emanating from Turkey. They had been translated into English by an expert translator instructed by Unison, and a statement of truth appeared in the authorities bundle. Both sides proceeded on the basis that those translations were accurate.

25. I heard oral submissions and at the conclusion of the hearing I reserved my decision.

Relevant Legal Framework

26. In this section of the reasons I will summarise the statutory framework and the relevant provisions of the Convention. I will refer to and consider the authorities when dealing with the submissions and my conclusion.

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[1].

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**.**

[1] These provisions use the language of "official" and "unofficial" industrial action, the latter being defined by section 237(2). There is also the concept of "protected" official industrial action under section 238A. It is unnecessary to consider these definitions further since this preliminary issue was to be determined on the assumption that the industrial action was "official" and "protected".

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 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**
>
> **(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.

Respondent's Submissions

47. In this section I will summarise the main points made by Mr Edwards in his written skeleton argument and his oral submissions.

Domestic Construction

48. Mr Edwards submitted that as a matter of domestic statutory construction, ignoring the Convention, participation in industrial action could not amount in participation in the activities of an independent trade union at an appropriate time where it consisted of strike action during what would otherwise have been working hours. A contrary interpretation would undermine the careful distinction in TULRCA between the right to bring an unfair dismissal complaint where dismissal is for trade union activities (section 152), and the very different provisions which apply where there is industrial action (sections 237-239). If the relevant words in section 146 were interpreted as extending to participation in industrial action, the same would have to be true in section 152 where the identical wording appeared. In section 152 those words have to exclude participation in industrial action, since that is governed by the provisions of Part 5.

49. He argued that the express exclusion of industrial action from the definition of activities in section 170 did not assist the claimant, since that was simply there for the avoidance of doubt.

50. Mr Edwards suggested that there were two further considerations supporting the conclusion that industrial action was a different concept from trade union activities under Part 3. Firstly, distinguishing between industrial action which took place during working hours and that which did not would lead to the result that an employer could avoid liability under section 146 by simply stating that the detriment was imposed because of that part of the industrial action which occurred during working hours. Secondly, the entitlement of an employer to withhold pay from an employee engaging in industrial action would be undermined if section 146 were to be applicable, since the withholding of pay would be a detriment.

51. In support of this analysis Mr Edwards relied on two authorities. The first was the decision of the Employment Appeal Tribunal ("EAT") in **Drew v St Edmundsbury Borough Council [1980] IRLR 459**. A claimant dismissed for repeatedly making complaints about health and safety matters sought to argue that those complaints were part of a "go slow" ordered by his union and therefore that it was a dismissal for taking part in trade union activities. The Industrial Tribunal dismissed his complaint and the EAT dismissed his appeal. In paragraphs 10 and 11 the EAT upheld the decision of the Industrial Tribunal that the health and safety activities were not part of the "go slow" ordered by the union, and therefore were not the activities of an independent trade union. The appeal failed on that ground. However, the EAT went on (in paragraph 12 onwards) to decide the appeal for what it described as "an alternative reason". Having considered the unfair dismissal provisions then found in sections 58 and 62 of the Employment Protection (Consolidation) Act 1978, the EAT said in paragraph 13 that:

> **"…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."**

52. The second authority was the decision of the EAT in **Winnett v Seamarks Brothers Ltd [1978] IRLR 387**. The EAT upheld the decision of a majority of the Industrial Tribunal that an employee taking part in strike action or other industrial action could not at the same time be taking part in the activities of an independent trade union at an appropriate time.

53. Mr Edwards suggested that it was significant that although Parliament had amended TULRCA on several occasions since 1993, it had never sought to revisit that distinction between trade union activities and industrial action, even when doing so in 2004 after the introduction of the HRA.

54. Further, Mr Edwards opposed a suggestion from Mr Brittenden that "consent" to an employee engaging in industrial action during working hours could be inferred or deemed to have been given where there had been no legal challenge to the call for industrial action. He suggested that was an artificial and unworkable interpretation of the legislation. For example, it would be easy for an employer to undermine any implied consent by simply saying expressly that no consent was given.

Human Rights

55. Nor was it possible, Mr Edwards submitted, for section 3 of the HRA to be used so as to read section 146 as extending to participation in industrial action. He placed great emphasis on paragraph 33 of the decision of the House of Lords in **Ghaidan v Godin-Mendoza [2004] 2 AC**, a passage from the speech of Lord Nicholls. After reviewing the operation of section 3, Lord Nicholls said at paragraph 33 the following:

> **"Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."**

56. Mr Edwards submitted that the fundamental feature or "grain" of this legislation was to draw a careful distinction between the protection for engaging in trade union activities at an appropriate time, and protection when engaging in industrial action. To conflate the two by reading section 146 in a way that covered industrial action would be inconsistent with that fundamental feature. Even if (which he did not accept) Article 146 failed to give effect to Convention rights, that was ultimately a matter for Parliament.

57. Turning to the Convention rights, Mr Edwards submitted that domestic and ECHR decisions fell short of recognising that Article 11 extended to a right to strike. He relied on the comments made by the Court of Appeal in **Metrobus Limited v Unite the Union [2009] IRLR 851**, in which the balloting provisions in TULRCA were found to be proportionate restrictions on the rights under Article 11. The ECHR reached the same conclusion in relation to the ban on secondary strike action in TULRCA in **RMT v United Kingdom [2014] IRLR 467**. Strike action is protection by Article 11 but no decision was made as to whether taking industrial action should be accorded the status of an essential element of trade union freedom under Article 11.

58. In relation to the ECHR authorities relied upon by Mr Brittenden (see below), Mr Edwards argued that **Danilenkov v Russia [1014] 58 EHRR 19** was concerned with effectiveness of remedies provided by the state for conduct designed to get staff to relinquish union membership. Enforcement only by way of criminal proceedings brought by the state was insufficient to comply with Article 11. In the UK, in contrast, there were the individual rights found within TULRCA. Even though other ECHR decisions recognised that in certain circumstances there might be a right to strike, that was never an absolute right because it was always subject to the qualification in Article 11(2). The cases from Turkey relied upon by Mr Brittenden were of no real

assistance because they were concerned with a state with a very different regulatory regime.

59. Mr Edwards therefore submitted that even in the light of the Convention and section 3 HRA, there was no basis for looking to interpret section 146 as though participation in industrial action was protected.

Claimant's Submission

60. In his written and oral submissions Mr Brittenden argued that the rights guaranteed by Articles 10 and/or 11 extended to participation in industrial action, that the ECHR case law showed that subjecting individuals to a detriment for participation in such matters was impermissible, and that the introduction of section 3 HRA meant that earlier authorities were no longer binding and that section 146 should now be read in a way which gave effect to the Convention rights. He maintained that this was possible and appropriate despite the objections raised by Mr Edwards.

Interpretative Obligation

61. In addressing the extent of the interpretative obligation under section 3 HRA, Mr Brittenden emphasised the contents of paragraphs 26-33 of the speech of Lord Nicholls in **Ghaidan**. There was no requirement that the domestic legislation be ambiguous. The interpretative obligation required by section 3 was unusual and far reaching, and mighty require a departure from the unambiguous meaning which the legislation might otherwise require. It might also require the court or Tribunal to depart from the intention of the Parliament which enacted the legislation. Lord Nicholls explained in paragraphs 31 and 32 that section 3 enables the court or Tribunal to go beyond interpreting the words of the legislation itself, and to read in words which change the meaning of the legislation so as to make it Convention-compliant.

62. He acknowledged that in paragraph 33 Lord Nicholls cautioned against doing so in a way which was inconsistent with a fundamental feature of legislation, but suggested that the “grain” of section 146 was to provide protection against detriment for engaging in trade union activities. Reading this as extending to participation in industrial action would go with the grain of that section. He cautioned the Tribunal against being distracted by the dismissal regime found in section 152 and Part 5: those were arguments for another day.

63. Mr Brittenden also emphasised paragraph 46 of the speech of Lord Steyn in **Ghaidan** where there is recorded an observation by the Lord Chancellor in Parliament that in 99% of cases which will arise there will be no need for a judicial declaration of incompatibility, since in almost all cases the courts will be able to interpret the legislation compatibly with the Convention.

64. In support of his arguments on the interpretation point he also relied on the principles applied when construing legislation derived from European Union law, summarised in **Vodafone 2 v Revenue & Customers Commissioners [2010] CH 77**. He referred to other examples where employment legislation has had words

read into it in order to give effect to a parent Directive: **NHS Leeds v Larner [2012] ICR 1389** and **Plumb v Duncan Print Group Ltd [2016] ICR 125**. For an example of a situation where a court has disapplied or cut down definitions within primary legislation, as opposed to secondary legislation, he referred to **London Borough of Wandsworth v Vining [2018] ICR 499**, in which the Court of Appeal disapplied the exclusion of parks constables from section 188 of TULRCA.

Human Rights

65. Turning to the Convention rights, Mr Brittenden argued that Article 10 covers freedom of expression in a way which extends to engagement in industrial action. The close relationship between Articles 10 and 11 was recognised by the ECHR in **Ezelin v France (1991) 14 EHRR 362**.

66. As for Article 11, he reminded me of the positive obligation of the UK to ensure compliance with Article 11 (**Wilson/Palmer v United Kingdom [2002] IRLR 568**), which extends to the provision of effective and clear judicial protection against discrimination on the ground of trade union membership, according to the ECHR in **Danilenkov & Others v Russia [2009] ECHR 67336/01**, paragraphs 124 and 136.

67. The rights guaranteed by Article 11 included the right to strike. It was described as "an important aspect of the freedom of association" in **Ognevenko v Russia [2019] 69 EHRR 9**. That was also recognised in **RMT v United Kingdom**. He accepted, however, that the right to strike was not an absolute right: restrictions on it were permitted by Article 11(2).

68. Mr Brittenden then argued that a series of cases before the EHCR emanating from Turkey illustrated that imposing a detriment on a worker because of participation in industrial action would breach Article 11. Those authorities included the following.

69. In **Karacay v Turkey** (27 June 2007) a civil servant electrician who participated in a one day strike received a disciplinary warning. The court found that the strike had not been prohibited, and that in joining it the applicant exercised his freedom of peaceful association under Article 11. The sanction of a disciplinary warning, minimum as it was, was intended to dissuade members of trade unions from legitimately taking part in such strike action. The warning was not necessary in a democratic society and was therefore in breach of Article 11. Nor was there an effective remedy provided by national law.

70. **Dilek v Turkey** (30 January 2008) concerned civil servant toll booth operators who left their booths for three hours to protest against working conditions, allowing motorists to pass through without paying. A Turkish court ordered each of them to pay approximately 8,800 Euros as compensation for the losses sustained during the work stoppage. The imposition of this civil liability was found to be a disproportionate interference which was not necessary in a democratic society.

71. **Kaya & Seyhan v Turkey** (15 December 2009) concerned a disciplinary warning given to two teachers who participated in a lawful one day national strike.

As in **Karacay**, the court found the sanction, minimum as it was, to be unnecessary in a democratic society because it was intended to dissuade union members from taking part in legitimate strike action.

72. Criminal sanctions for participation in strike action were found to breach Article 11 in **Urcan & Others v Turkey** (17 October 2008) and **Ozcan v Turkey** (15 December 2009). In each case the court found that the purpose of the sanction was to dissuade union members from taking part in legitimate strike action.

Construction of Section 146

73. Turning to the construction of TULRCA, Mr Brittenden did not accept Mr Edwards' argument that interpreting section 146 to include participation in industrial action would undermine the right of an employer to withhold pay for that period. He pointed out that none of the ECHR cases argue that a reduction in pay for that reason is an interference with Article 11, and such a measure taken by an employer would be regarded as proportionate, unlike disciplinary (or criminal) sanctions. Alternatively, if one imported the test applicable to "detriment" cases under section 39 Equality Act 2010 (see **Shamoon v Chief Constable of Royal Ulster Constabulary [2003] IRLR 285**), it could be argued that an employee on strike who has pay withheld cannot reasonably regard that as a detriment.

74. As for domestic authorities**, Drew** should not be followed. The comments that industrial action did not amount to a trade union activity were not part of the legally binding basis of the decision, since the appeal had already been rejected on the alternative point. In any event it predated the introduction of the HRA.

75. The existence in section 170 (time off for trade union activities) of an exclusion making clear that industrial action should not be treated as part of trade union activities showed that otherwise it would be a union activity. There was no equivalent limitation in section 146.

76. As for the requirement that the activity be undertaken at an appropriate time, which requires consent if done during working hours, the Turkish cases showed that protection from detriment for union activities arose from when the strike date was announced. There was no further requirement for individuals to obtain express permission or consent to leave the place of work in order to participate. A requirement to obtain consent from the employer before engaging in industrial action would infringe Article 11. The reference to "consent" in section 146 should be interpreted in a way which gives effect to Article 11. Consent could be inferred from a situation in which the employer did not seek to challenge the industrial action, or alternatively should be construed as given where the industrial action is lawful, even if unsuccessfully challenged An alternative mechanism would be to read in additional words such as:

> **"Such consent deemed to have been given where the worker participates in official industrial action."**

77. Overall Mr Brittenden invited me to conclude that the Tribunal should use the interpretative powers granted by section 3 HRA to read section 146 in a way that encompassed participation in lawful industrial action during working hours.

Conclusions

Domestic Construction

78. As a matter of ordinary language, participation in industrial action as a trade union representative or member might well be regarded as part of the activities of a union. That was recognised in **Drew**. However, whether that is the effect of the provisions now found in TULRCA is a different question.

79. There is an analysis which at first sight appears to reconcile these various provisions in a way consistent with the ordinary meaning of trade union activities. If participation in industrial action is a trade union activity, it would explain why the right to time off under section 170 requires a specific exclusion for industrial action in section 170(2). The exclusion of industrial action from the scope of sections 146 and 152 is achieved by a different mechanism, namely the requirement that the participation take place at an "appropriate time". Striking during working hours would never be at the appropriate time unless pursuant to agreed arrangements or with employer consent.

80. However, there are some forms of industrial action which take place outside working hours. For example, a union might call upon its members to refrain from engaging in voluntary overtime beyond contracted working hours. Such action was found to be industrial action under section 238 by the Court of Appeal in **Power Packing Casemakers Ltd v Faust & Others [1983] ICR 292**. On the face of it such activity would be at the "appropriate time" under section 146(2)(a), and therefore protected. Yet if that were right, an employee dismissed for taking part in a voluntary overtime ban at the appropriate time would be able to avoid the regime in Part 5 by bringing the case solely under section 152 in Part 3 of the Act. The employer would be denied the protections of the part 5 regime.

81. I concluded that to read the legislation in that way is contrary to the decision in **Drew**. In my view **Drew** remains binding as a domestic authority for the proposition that participation in industrial action at any time is outside the section 146 regime. There were two valid bases for the decision to reject the appeal in that case.

82. Read in purely domestic terms, therefore, section 146 does not extend to any form of industrial action, and the purpose of section 170(2) is simply to make that clear beyond any doubt in the context of requests for time off for trade union activities.

Human Rights

83. The next question was whether Article 11 offers protection for those subjected to a detriment for the purpose of penalising or deterring them from engaging in lawful industrial action.

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 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.

Interpretation under section 3 HRA

88. That raised the issue of whether, in the light of section 3 HRA, section 146 can be interpreted or rewritten in a way which makes it compliant with that obligation.

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.

Case Management

96. It was agreed at the end of the hearing that there would be a telephone case management hearing arranged to consider how best to proceed in this case once

both sides have had a chance to consider this Judgment. The date and details of that hearing will be notified to the parties separately.

Employment Judge Franey

30 April 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
4 May 2020

FOR THE TRIBUNAL OFFICE