

David Reade comments for Lexis on the Supreme Court decision in *Secretary of State for Business and Trade (Respondent) v Mercer (Appellant)* [2024] UKSC 12

The right to strike, or more accurately to engage in collective industrial action, is a fundamental aspect of the rights secured by Article 11 ECHR for workers who take part in lawful industrial action organised by their trade union. TULR(C)A 1992, s 146 protects those dismissed for taking part in lawful industrial action. The issue in *Mercer* was the extent of the protection required under Article 11 ECHR for detriments, other than not paying striking workers which is permitted, which are less than dismissal. The Supreme Court judgment reviewed the judgments of the ECtHR and concluded that the right to strike was not an absolute right and did not require a State to confer universal protection in all circumstances to all workers against any detriment (however slight) intended to dissuade or penalise them from participating in a lawful strike. However, the Supreme Court concluded that the failure of the UK to provide for any legislative protection at all against any sanction short of dismissal for lawful industrial action against those who take it put the United Kingdom in breach of its positive obligation to secure effective enjoyment of the right to participate in a lawful strike.

The Supreme Court rejected the Union's argument that it was possible to address this by a compliant construction of TULR(C)A 1992, s 146. The Supreme Court did allow the appeal against the Court of Appeal's decision not to make a declaration of incompatibility under section 4 of the HRA and declared that [TULR\(C\)A 1992, s 146](#) was incompatible with Article 11, insofar as it fails to provide any protection against sanctions, short of dismissal, intended to deter or penalise trade union members from taking part in lawful strike action organised by their trade union.

For employees, unions and employers with issues which have been stayed pending *Mercer* or who have present or imminent disputes over alleged detriments, the decision of the Supreme Court means that as it stands, detriments short of dismissal are not protected by [TULR\(C\)A 1992, s 146](#). It is now then for Parliament, and in reality the government, to address this or face the issue being pursued against the UK before the ECtHR. The present administration has its own internal issues over membership of the Convention and immediate action would seem unlikely. It would be likely to be high on the agenda of a possible new government in the Autumn if of a different political persuasion. So, protection against detriments for those taking part in lawful strike action organised by their trade union is not yet present under the law but the polls might suggest it will be in the Autumn.