Mercer v Alternative Future Group

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In brief

In November 2021 we analysed the Employment Appeal Tribunal's decision in *Ryanair DAC v Morais*. Broadly speaking, that case concerned the scope of legal protection afforded to striking workers – if you need a reminder, click here for our summary. As we warned might be the case, this has now been superseded by the Court of Appeal's decision in *Mercer v Alternative Future Group Ltd* on 24 March 2022. Following this CoA decision, the law in this area has reverted to the pre-EAT position: workers are **not** legally protected from suffering detriment for participating in industrial action.

Detail

Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 protects workers from suffering detriment as a result of having taken part in the activities of an independent trade union. As explained in our November case summary, until recently most commentators have interpreted that this protection does **not** extend to those who go on strike. Effectively, this has meant that employers are able to take formal action against employees (e.g. by suspending, docking pay, or giving formal warnings) who go on

strike, as long as the action taken falls short of dismissal (which is prohibited).

A series of EAT decisions in *Mercer* and *Ryanair* briefly changed this position. In both cases, the EAT decided that section 146 needed to be interpreted so as to give striking workers protection from suffering detriment. Part of the reasoning given in the EAT's decision in *Mercer* was that not giving workers such protection was effectively a breach of Article 11 of the European Convention on Human Rights (the right to form and join trade unions) and that section 146 therefore needed to be read in a way that was compatible with Article 11.

The EAT's decision in *Mercer* went to the CoA. They effectively had two issues to consider:

- Is it an infringement of Article 11 to fail to prohibit detrimental treatment taken against employees who take part in industrial action?
- If so, is it possible to read section 146 in a way that is compatible with Article 11 in order to prohibit such treatment?

The CoA's decision on the first issue was: not necessarily. They took a different view to the EAT by deciding that European case law does not make clear that employers should be absolutely prohibited from taking any formal action (short of dismissal) against striking employees. They suggested that the gap in protection under section 146 TULRCA may well be a breach of Article 11, but only if the detrimental treatment taken by the employer goes to the core of trade union activity. There is an unanswered question here – when exactly will detrimental treatment breach Article 11? – which may well be addressed by the European Court of Human Rights in the future.

On the second issue, the CoA decided that it was not possible to read section 146 in a way which addressed this gap in protection (to be compatible with Article 11). The CoA said they were unable to do so because doing so would give rise to a number of new questions, including whether protection against detriment should apply to all forms of industrial action, or only to official industrial action under Part 5 of TULRCA. The CoA also felt that it was not absolutely clear that Article 11 demanded that employers be prohibited from subjecting striking employees to any form of detrimental treatment. Accordingly, they decided that this gap in protection could only be addressed by Parliament, and not by interpretation.

The EAT's decision in *Ryanair*, which has also gone to the CoA, was heavily reliant on the EAT's decision in *Mercer* – we can therefore expect that decision to be overturned as well.

Although the CoA appeared to call on the UK Government to address this gap in protection for striking workers through legislative action, the fact that the Secretary of State sought permission to appeal the EAT's decision in *Mercer* and put forward the argument that section 146 was compatible with Article 11 makes this seem an unlikely prospect. If the legal position is to change and striking workers are to be afforded protection from suffering detriment, it is now most likely to come as a result of an appeal (to the Supreme Court) or further action in the European Court of Human Rights.

