Case No: 3300711/2023
3300712/2023
3300713/2023
3300714/2023

EMPLOYMENT TRIBUNALS

Claimants: Mr A Sochon
Mr J Parsley
Mr P Stead
Mr K Wright

Respondent: The Felixstowe Dock and Railway Company

JUDGMENT

1. The complaints under s. 146(1)(b) and s. 152(1)(b) Trade Union and Labour Relations (Consolidation) Act 1992 are struck out as having no reasonable prospects of success.

2. The Claimants' other complaints will proceed to the final hearing.

REASONS

1. By ET1 claim forms dated 24 February 2023 the Claimants make a number of complaints arising out of a dispute over pay occurring during 2022. There were in the region of 796 claimants including the four named above who brought complaints under s. 145B Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A"). The majority of those complaints have since been withdrawn.

2. The four named Claimants had also made complaints of the following:

   2.1 Ordinary Unfair Dismissal – s. 98 Employment Rights Act 1996 ("ERA")

   2.2 Automatic Unfair Dismissal – s. 238A(2) TULR(C)A 1992

   2.3 Automatic Unfair Dismissal – 152(1)(b) TULR(C)A 1992

   2.4 Automatic Unfair Dismissal – 104F(1) ERA

2.5 Detriment – s. 146(1)(b) TULR(C)A.

2.6 Detriment – Regulation 9 Employment Relations Act 1999 (Blacklists) Regulations 2010

2.7 Wrongful dismissal

3. The four named Claimants have been referred to as the "Sochon Claimants" in order to distinguish them from the other Claimants who only sought to bring complaints under s. 145B TULR(C)A.

4. A preliminary hearing for case management took place before me on 10 November 2023 where the parties were most helpful in clarifying the legal issues to be decided and agreeing directions for the final hearing which has been listed for 13 October 2025 for 12 days.

5. The Respondent made reference to the appeal in the matter of ***Secretary of State for Business and Trade v Mercer*** **[2022] EWCA Civ 379** which concerned s. 146 TULR(C)A. In that case the Claimant said that she had suffered detrimental treatment 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 having done so.

6. The Court of Appeal had decided in that case that TULR(C)A does not protect employees from action short of dismissal for having taken part in industrial action. This reversed an earlier judgment on the matter from the Employment Appeal Tribunal.

7. In the immediate claims the Claimants are arguing that they were automatically unfairly dismissed (contrary to s. 152(1)(b) TULR(C)A) because they had taken part in the activities of an independent trade union at an appropriate time.

8. The "activities of an independent trade union" relied upon by the named Sochon Claimants is participation in industrial action by not attending work on a strike day and by being present outside the Respondent's premises in support of the industrial action. In addition, Mr Stead relies on filming of the picket line between 6am and 7am.

9. The industrial action took place during August 2022.

10. The Claimants also argue that they were subjected to detriments for having done so contrary to s. 146(1)(b). Seven alleged detriments are relied upon.

11. I have pasted at Annex A below an extract from the agreed list of issues which sets the complaints brought under s. 146(1)(b) and also s. 152(1)(b) TULR(C)A.

12. On 17 April 2024 the Supreme Court issued its decision in ***Secretary of State for Business and Trade v Mercer*** **[2024] UKSC 12.**

13. It was the decision of the Court that:

    i. Section 146 TULR(C)A is 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;

    ii. Whereas section 3 Human Rights Act 1998 requires courts to interpret primary legislation in a way which is compatible with Convention rights (unless the legislation itself makes it impossible to do so), a Convention compatible interpretation of section 146 of TULR(C)A is not possible and would amount to impermissible judicial legislation rather than interpretation;

    iii. Accordingly section 146 TULR(C)A cannot be interpreted as providing protection from detriment short of dismissal for having taken part in industrial action.

14. Within that judgment at paragraph 44 the Court made reference to the judgment of the EAT in ***Drew v St Edmundsbury Borough Council*** **[1980] ICR 513** where it was held that Parliament had intended there to be a distinction between what is an activity of an independent trade union and taking part in industrial action.

15. Lady Simler in ***Mercer*** makes it clear that the requirement in section 146(1) that the activity must be carried out "at an appropriate time" to qualify for protection, and the phrase "at an appropriate time" is defined as meaning outside working hours, or within those hours where the employer consents, and further:

    "45…Industrial action will normally be carried out during working hours if it is to have the desired effect since to withhold labour at a time when the employer has no expectation of labour being provided is unlikely to have any consequence. Although as both tribunals below noted, there are some forms of industrial action (for example, refusing to work voluntary overtime beyond contracted working hours) that would, on the face of it, be carried out outside working hours and therefore "at an appropriate time", the intention is plainly to limit that protection to activities which are not inconsistent with the performance by workers of primary duties owed to the employer."

16. Following that appeal decision I understand that there was correspondence between the parties as the Respondent invited the Claimants to withdraw their complaints under s. 146(1)(b) and s. 152(1)(b). I understand that the Claimants were reluctant to do so as

they wished to refer this matter to the European Court of Human Rights and were mindful about exhausting domestic remedies first.

17. On 6 November 2024 the Respondent made a written application for a strike out of the s. 146(1)(b) and s. 152(1)(b) complaints under Rule 37 Employment Tribunal Rules of Procedure 2013 which I summarise below:

    i. The Claimants' claims under section 146 TULRCA cannot succeed in light of the Supreme Court's conclusive ruling in Mercer that section 146 does not provide the protection sought. The Supreme Court's ruling in Mercer that section 146 does not provide protection against detriment short of dismissal for workers taking part in industrial action is based on its finding that participation in industrial action does not amount to participation in trade union activities under TULRCA.

    ii. Section 152(1)(b) of TULRCA provides that a dismissal will be unfair where the reason or principal reason for dismissal was that the employee had taken part, or proposed to take part, "in the activities of an independent trade union at an appropriate time". The Supreme Court's finding in Mercer that industrial action cannot constitute participation in trade union activities for the purposes of TULRCA applies equally to claims under section 152. Therefore, the Claimants' claims under section 152 of TULRCA can no longer stand.

    ***iii.** Accordingly, the Claimants have no reasonable prospect of success in pursuing their claims under sections 146 and 152 of TULRCA.*

18. By the time of today's private preliminary hearing for case management earlier today progress had been made between the parties and I should record that both parties in this matter have been cooperative and pragmatic in trying to move this issue forward. Ms Barsam restated the Respondent's application and Mr Birrell for the Claimants confirmed that they neither consented nor objected to the application. Both parties agreed that this should be dealt with on the papers and that no further written submissions were necessary.

Law

19. The Trade Union and Labour Relations (Consolidation) Act 1992 provides:

146 Detriment on grounds related to union membership or activities.

(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—

…

(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 or (as the case may be) make use of trade union services;

and for this purpose "working hours", in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work.

…

152 Dismissal of employee on grounds related to union membership or activities.

(1) For 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 —

…

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

(2) In subsection (1) "an appropriate time" means—

(a) a time outside the employee'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 or (as the case may be) make use of trade union services;

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

20. I have already summarised the judgment in ***Mercer*** above which is not repeated here.

Strike out

21. Rule 37 of the Employment Tribunals Rules of Procedure 2013 provides:

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

...

22. A two stage test must be followed under Rule 37. A tribunal must consider whether any of the grounds under Rule 37 have been established before then deciding whether to exercise its discretion to strike out given the permissive nature of the rule – ***Hasan v Tesco Stores Ltd*** **UKEAT/0098/16**.

23. It is an established principle that the threshold for striking out a claim or a response for having no reasonable prospect of success is a high one – ***Ezsias v North Glamorgan NHS Trust*** **[2007] EWCA Civ 300**. Where facts are in dispute it would be very exceptional for a case to be struck out without the evidence first having been tested by the tribunal – the facts must disclose no arguable case in law. A strike out has been referred to as a draconian power which should not be used lightly – ***Blockbuster Entertainment Ltd v James*** **[2006] EWCA Civ 684**.

24. In ***Balls v Downham Market High School and College*** **UKEAT/0343/10** the EAT held that the power should only be exercised after careful consideration of all the available material, including the evidence put forward by the parties and the documentation on the tribunal file. No reasonable prospects of success does not mean likely to fail or a possibility that it may fail, and it is not a test which can be decided by considering whether the other party's version of events is more likely to be believed. The test is essentially as described in the Rule – that there is no reasonable prospect of success.

25. The Court of Session in ***Tayside Public Transport Company Ltd (t/a Travel Dundee) v Reilly*** **[2012] IRLR 755** (CS) held that *"… where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the*

crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts."

26. In ***Romanowska v Aspirations Care Ltd*** **UKEAT/0015/14** Langstaff P held:

"Sometimes it may be obvious that, taking the facts at their highest in favour of the claimant, as they would have to be if no evidence were to be heard, the claim simply could not succeed on the legal basis on which it has been put forward. Where, however, there is a dispute of fact, then unless there are good reasons, indeed powerful ones, for supposing that the claimant's view of the facts is simply unsustainable, it is difficult to see how justice can be done between the parties without hearing the evidence in order to resolve the conflict of fact which has arisen." (paragraph 1)

27. Most recently in ***HHJ Kalyany Kaul KC v (1) Ministry of Justice; (2) The Lord Chancellor; and (3) the Lord Chief Justice*** **[2023] EAT 41** the EAT has confirmed *"that the need for caution when considering a strike-out application does not prohibit realistic assessment where the circumstances of the case permit."*

Conclusion

28. The Respondent has referred me to the recent first instance judgment dated 31 July 2024 of the Bristol Employment Tribunal in the matter of Rodrigues and others v Royal Mail Group Limited Case Number 1404078/2022 dated 31 July 2024. In that case the s. 146 complaints were struck out on the basis of the Supreme Court judgment in ***Mercer***.

29. It is entirely appropriate of the Respondent to draw such matters to my attention, and whilst I have been mindful of how other tribunals in similar cases have approached similar questions, I make it clear that in reaching my decision today I have not rubber stamped a judgment from another tribunal. Nevertheless, I was grateful that judgment was brought to my attention and I note that claim concerned only s. 146(1)(b) TULR(C)A whereas this claim also involves s. 152(1)(b) as well.

30. I note that within ***Mercer*** the Supreme Court held that the reference to "activities of an independent trade union" in section 146(1) does not include taking part in industrial action. Given the manner in which the Claimants have set out their complaints as recorded in the list of issues, it appears to me that the judgment in ***Mercer*** is directly applicable to their complaints.

31. I also note that the Supreme Court held that sections 146 and 152 of TULR(C)A are sibling provisions which should be interpreted consistently with each other.

32. I am mindful that the Claimants appear to have accepted the applicability of the judgment in ***Mercer*** to their claims although they have neither consented nor objected to the Respondent's strike out application. The Claimants have not advanced any arguments before me why the claims under s. 146(1)(b) and s. 152(1)(b) should not be struck out and they have not sought to distinguish their claims from the ***Mercer*** judgment. I have looked to identify any obvious distinguishing features in this case, however I have not identified any and moreover the judgment in ***Mercer*** is very clear about the lack of protection for detriments short of dismissal for having taken part in industrial action.

33. I therefore find that given the judgment in ***Mercer*** the Claimants have no reasonable prospects of successfully arguing that the detriments they claim to have suffered (if found to have occurred) were due to having taken part in industrial action given that it falls outside of the protection afforded by s. 146(1)(b). I am bound to find the same with respect to s. 152(1)(b) given that I am required to give them a consistent interpretation.

34. In the circumstances I find that those two claims exceed the Employment Tribunal's statutory jurisdiction and therefore have no reasonable prospects of success and I therefore exercise my discretion to strike them out on that basis.

35. The Claimants' other remaining complaints are not struck out and they will proceed to a final hearing to commence on 13 October 2025.

_____

Employment Judge **Graham**
19 November 2024

JUDGMENT SENT TO THE PARTIES ON

.....13/12/2024.

.....
FOR THE TRIBUNAL OFFICE

ANNEX A
EXTRACT FROM THE AGREED LIST OF ISSUES

1. Automatic Unfair Dismissal s.152(1)(b) TULR(C)A (on grounds related to union activities)

   1.1 Was the reason (or, if more than one, the principal reason) for dismissal of the Named Sochon Claimants that they had taken part in the activities of an independent trade union at an appropriate time?

   1.2 The "activities of an independent trade union" relied upon by the Named Sochon Claimants is participation in industrial action by not attending work on a strike day and by being present outside the Respondent's premises in support of the industrial action. In addition, Mr Stead relies on filming of the picket line between 6am and 7am.

2. Detriment in breach of s.146 (1)(b) TULR(C)A (on grounds related to union activities)

   2.2 Did the Named Sochon Claimants take part in the activities of an independent trade union at an appropriate time? The "activities of an independent trade union" relied upon by the Named Sochon Claimants is participation in industrial action by not attending work on a strike day and by being present outside the Respondent's premises in support of the industrial action. In addition, Mr Stead relies on filming of the picket line between 6am and 7am.

   2.3 Were any of the Named Sochon Claimants subjected to a detriment as an individual for the sole or main purpose of preventing or deterring them from taking part in the activities of an independent trade union at an appropriate time, or penalising them for doing so contrary to section 146(1)(b) TULRCA?

   2.4 The alleged detriments relied on are as follows:

      2.4.1 On 21 August 2022, Mr Parsley and Mr Stead were video-recorded by Mr Mullett, asked what their names were by Mr Cheng, and a list was compiled in relation to their attendance at the demonstration.

      2.4.2 On 30 August 2022, the Respondent suspended the Named Sochon Claimants.

      2.4.3 On 3 October 2022, Mr Stead was told by Ms Lewis he would not be paid the £500 lump sum.

      2.4.4 Mr Wright did not receive the £1,250 in electronic vouchers, a certificate, an engraved photo frame and commemorative

Hutchison Ports tie or neck scarf offered to him as a result of his long service with the Respondent.

2.4.5 On 12 December 2022, the Respondent refused to uphold the appeals of the Named Sochon Claimants.

2.4.6 On 15 December 2022, the Named Sochon Claimants were not paid the EBITDA bonus.

2.4.7 On 9 January 2023, Mr Sochon was not appointed to a role via an agency company because the Respondent had denied access to its property.