Neutral Citation Number: [2022] EWCA Civ 379

Case No: CA-2021-000672 (formerly A2/2021/1193)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Mr Justice Choudhury
UKEAT/0196/20/JOJ

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 March 2022

Before:

THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE BEAN
and
LORD JUSTICE SINGH

- -

Between:

FIONA MERCER	**Claimant/ Respondent**
- and -	
(1) ALTERNATIVE FUTURE GROUP LIMITED **(2) IAN PRITCHARD**	**Respondents**
- and –	
SECRETARY OF STATE FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY	**Intervener/ Appellant**

- -
- -

Daniel Stilitz QC and Hannah Slarks (instructed by **The Treasury Solicitor**) for the **Intervener/Appellant**
Michael Ford QC and Stuart Brittenden (instructed by **Unison Legal Services**) for the **Claimant/Respondent**

Hearing date: 27 January 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:00am on 24 March 2022.

Lord Burnett of Maldon CJ:

1. This is the judgment of the court to which all of us have contributed. This appeal from a decision of Mr Justice Choudhury, President of the Employment Appeal Tribunal ("the EAT"), raises the issue whether taking part in industrial action is an activity protected by section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). It follows the determination of a preliminary issue in the Employment Tribunal which was refined to this:

> "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."

2. This required the tribunals below to construe section 146 in accordance with ordinary canons of statutory construction; determine whether detriments falling short of dismissal imposed by private employers on employees can give rise to breaches of article 11 on the basis that the state has failed in its positive obligations to provide for appropriate protection; and if so whether section 146 can be interpreted in a way that provides that protection using section 3 of the Human Rights Act 1998 ("the 1998 Act").

TULRCA

3. Part III of TULRCA concerns rights in relation to union membership and activities. Section 146 is headed "Detriment on grounds related to union membership or activities". It provides:

> "(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."

4. The remedy for a breach of section 146 is a complaint to an Employment Tribunal under section 147 which if established may lead to a declaration and an award of compensation.

5. Section 152 of TULRCA provides corresponding protection against dismissal (as opposed to detriment short of dismissal):

> "(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…"

6. Section 152(2) defines "an appropriate time" in a similar way to section 146(2) but as this section is concerned with employees, rather than the wider concept of "workers", the wording of the definition of working hours is different. The parties have not suggested that these minor differences have a bearing on the issues in this appeal. 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).

7. Part III also contains provisions dealing with time off for trade union duties and activities. Section 170 provides:

> "(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."

8. Part V of TULRCA is entitled "Industrial Action". It sets out the conditions that a trade union must satisfy before calling industrial action to secure immunity 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 a trade dispute, requirements about balloting the membership, the requirements for notice to be given to the employer of an intention to ballot and the result of the ballot and of proposed industrial action. An employer may seek injunctive relief in default of compliance with the statutory requirements.

9. Part V also contains provisions about unfair dismissal complaints where industrial action is taken. We adopt, with gratitude the "broad summary" of sections 237, 238 and 238A of TULRCA found in the judgment of EJ Franey:

> 35. … 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".
>
> 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 reengaged). 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.
>
> 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."

The facts

10. Alternative Future Group Ltd ("the company") is a health and social care charity providing a range of care services across the northwest of England. It employs over 2,500 staff. The claimant, Fiona Mercer, has been employed as a support worker by the company since 2009. At the relevant time she was a workplace representative for her trade union, UNISON.

11. 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 V of

TULRCA, UNISON called a series of strikes which ran intermittently between 2 March and 14 May 2019. The company did not seek an injunction to prevent that industrial action taking place.

12. 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 press material appeared in the *Liverpool Echo* in late March 2019. She also intended to participate in the strikes herself.

13. On 26 March 2019 the claimant was suspended. She was told this 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 a way which conveyed confidential information and was considered likely to bring the organisation into disrepute. According to her claim form in the employment tribunal, during her suspension she received normal pay, but was unable to work or receive pay for the overtime which she would normally have worked. The effect, if not the purpose, of the suspension was to remove her from the premises while the industrial action was in progress.

14. The suspension was lifted on 11 April 2019, but the disciplinary matter continued. On 26 April 2019 the claimant was given a first written warning for leaving her shift. That sanction was overturned on appeal. A grievance which she filed in June 2019 was rejected, and an appeal against that decision was also unsuccessful.

15. The claim form was presented on 23 August 2019. It contained two complaints. The first was a complaint of detriment on the grounds of a protected disclosure contrary to section 47B of the Employment Rights Act 1996, generally known as a whistleblowing case. That is not at issue on this appeal.

16. The second was a complaint under section 146 of TULRCA that she had been subjected to a detriment by the company when it suspended her. She alleged the decision 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 "an 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.

17. 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.

18. At a telephone case management hearing before Employment Judge ("EJ") 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 a preliminary hearing. Her 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."

19. The hearing came before EJ Franey. He raised some reservations about whether this was the appropriate way to proceed. On a strike out application the tribunal does no more than assess whether the claim has a reasonable prospect of success. The section 146 claim could not on any view be struck out in its entirety since counsel for the company, Mr Peter Edwards, accepted that planning or organising industrial action could fall within the scope of "activities" within section 146 if it was done at "an appropriate time". EJ Franey observed that there might be practical benefits in leaving the dispute about participation in industrial action to be determined at the final hearing, saying (presciently, we think) that he 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."

20. Both sides indicated that despite those reservations they wished the hearing to proceed, but it was agreed that the EJ should treat this preliminary hearing as though it had been convened to determine a preliminary issue under rule 53(1)(b) of the Employment Tribunal Rules. As we have already noted, 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."

21. In a judgment handed down on 4 May 2020, EJ Franey held that, as a matter of domestic law, section 146 does not extend protection to participation in industrial action. Nonetheless, he held that the jurisprudence of the Strasbourg Court demonstrates that article 11 offered robust protection to those subjected to a detriment, no matter how minor, for the purposes of penalising or deterring them from engaging in lawful industrial action. The EJ then considered whether through the interpretative obligation found in section 3 of the 1998 Act, section 146 of TULCRA could be interpreted in a way which made it compliant with article 11 but found that this would go against the grain of the legislation. The statutory scheme in TULCRA drew a clear distinction between trade union activities governed by Part III, and industrial action, governed by Part V. To interpret section 146 as including industrial action would be inconsistent with a fundamental feature of the legislation. Accordingly, EJ Franey held that the "activities of an independent trade union" protected by section 146(1)(b) do not include participation in lawful industrial action. He dismissed that part of the claimant's complaint.

22. The claimant lodged a notice of appeal to the EAT. On 23 April 2021, the EAT granted the Secretary of State for Business, Energy and Industrial Strategy permission to intervene. On 6 May 2021, a full hearing was held.

23. Judgment was handed down on 2 June 2021. Choudhury J allowed the claimant's appeal. We will do no more than summarise the principal points made in his learned and comprehensive judgment:

i) As a matter of ordinary construction section 146 does not provide protection to workers engaged in industrial action;

ii) However, in the light of the Strasbourg jurisprudence, any restriction, however minimal, on the right to participate in a trade union-sanctioned protest or strike action amounts to an interference with article 11 rights (*Ezelin v France* [1991] 14 EHRR 184, *Karacay v Turkey* (2007) App No 6615/03, *Kaya v Turkey* [2009] App No. 30946-04, *Danilenkov v Russia* (2014) 58 EHRR 19, *Ognevenko v Russia* [2019] IRLR 195);

iii) The state's margin of appreciation in cases of lack of protection for direct (as opposed to secondary) industrial action was a narrow one (*National Union of Rail, Maritime and Transport Workers v United Kingdom* [2014] IRLR 467*)* ("*RMT*");

iv) The mere fact that this case concerned the state's positive obligations (as opposed to its negative obligations not to interfere with enjoyment of the right) does not impact on the breadth of the margin of appreciation (*Sindicatul Pastoral Cel Bun* [2014] 58 EHRR 10, *Danilenkov v Russia* at [120], *Tek Gida v Turkey (*No.35009/05*)*);

v) The fact that employers should be allowed to deduct pay from striking workers provides no justification for excluding protection under section 146 because such deductions do not amount to a detriment where it could be established the common law entitlement to pay is lost under the circumstances;

vi) No other objective had been identified to justify the *prima facie* infringement of article 11 rights;

vii) Section 146 as currently construed thus violated article 11;

viii) The fact that construing section 146 so as to provide protection in respect of industrial action would lead to an inconsistent interpretation to the identically-worded section 152 does not provide a basis for declining to interpret it in that way under section 3 of the 1998 Act (*R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, *Wandsworth London Borough Council v Vining* [2018] ICR 499);

ix) The wider interpretation of section 146 does not go against the grain of TULRCA. There is nothing to suggest the grain of the legislation is to exclude protection against detriment for those participating in industrial action. The very fact that dismissal for participation in industrial action is protected militates against any argument that it is a crucial feature of TULRCA that protection against detriment for such participation should not be protected. Indeed, it is anomalous that those taking part in official strikes are protected against unfair dismissal by section 238 but have no equivalent protection short of dismissal;

x) It was accordingly possible to construe section 146 compatibly with article 11 by adding an additional limb to the definition of "appropriate time" in section 146(2), namely "(c) a time within working hours when he is taking part in industrial action".

24. The company did not seek to appeal against the EAT decision; but, in view of the finding that section 146 had to be read down to be compatible with article 11 of the ECHR the Secretary of State, as intervener, applied for permission to appeal.

25. Permission to appeal was granted by Bean LJ on 23 August 2021 on the terms that the Secretary of State shall not be entitled to recover costs against any other party whatever the outcome of the appeal.

26. The grounds of appeal are:

i) Ground 1, article 11 – the limited protection granted by section 146, read with the other protections provided to striking workers, is compatible with article 11 and strikes a fair balance between the rights of employers and those of workers. The EAT erred in finding that section 146, as interpreted in domestic law, infringes article 11;

ii) Ground 2, section 3 HRA – in any event it was impermissible for the EAT to redraft section 146 more widely as it did, thereby going beyond the interpretative obligation contained in section 3 of the 1998 Act and engaging in judicial legislation.

Secretary of State's Submissions (Appellant/Intervener)

27. Mr Stilitz QC argues that the EAT was incorrect to hold that section 146 as interpreted in domestic law breaches article 11.

28. Mr Stilitz submits that the Strasbourg authorities do not justify the conclusion that article 11 requires the state to prohibit all detrimental action by an employer against workers for strike action. The cases relied on by the claimant are ones in which the state itself took direct detrimental action against workers who were striking. They were not concerned with the ambit of the state's positive obligation to provide protection to workers participating in industrial action from being subjected to a detriment by private employers.

29. The EAT relied on *Danilenkov v Russia* (2014) 58 EHRR 19 in support of the proposition that article 11 protects workers participating in industrial action from any detriment. However, *Danilenkov* is not a case about the right to strike at all, nor is it authority for the proposition that the state is bound to prohibit any detrimental action by an employer against workers who take industrial action. The key feature of *Danilenkov* was a sustained attack on union membership, amounting to a campaign of harassment aimed at ousting the union altogether, the effect of which was all but to eliminate union membership. The presence of industrial action was not the central feature of the case. The employer's actions went to the heart of the protection afforded by article 11, that is the right to join and remain a member of the union. Although anti-union discrimination laws existed in Russia, the union and its members were left without any legal recourse because Russian courts had held that only the

criminal courts could make the necessary findings. In practice it was not possible to hold the employer criminally liable. The violation found was accordingly of discrimination under article 14, taken together with article 11. The domestic Russian courts discriminated against trade union members by failing to provide them with an effective remedy for their employer's unlawful attempts to wipe out union membership.

30. The only other case relied upon by the claimant involving a private employer was *Tek Gida v Turkey* (2017 App No 35009/05). However, that case also had nothing to do with the right to strike. *Tek Gida* was concerned with whether the union had gained sufficient membership to achieve representative status as the employer had dismissed workers who were union members *en masse* to ensure that the union did not attain the requisite membership.

31. Mr Stilitz submits that the EAT thus relied on two types of cases: cases where the state was the employer, and its negative obligations not to penalise striking workers were thus directly engaged; and cases involving private employers which had nothing to do with limitations on the right to strike but were concerned with union membership. The EAT ought to have approached the article 11 question in line with *RMT*, recognizing that the state should be afforded a wide margin of appreciation on this issue of social and political sensitivity, requiring a delicate balance between the competing interests of labour and management.

32. Parliament has provided finely calibrated protections for workers against being dismissed for participating in industrial action, balanced against the contractual and property rights of employers. The balance struck by section 146 and other statutory protections is necessary in a democratic society and proportionate. This case raises sensitive social and political issues in relation to which Parliament is the appropriate body to determine the correct balance.

33. The EAT thus erred in holding that section 146 breaches article 11. The absence of a universal prohibition of detrimental action by employers against striking workers does not breach article 11. Any potential infringement is proportionate and justified in striking a fair balance between the rights of employers and workers.

34. It was impermissible for the EAT to read down section 146 pursuant to section 3 of the 1998 Act. Even if it is accepted that article 11 requires greater protection against detriment to workers than is currently afforded by TULRCA, it is not self-evident precisely how wide that protection should be. The introduction of legislation in this area would require Parliament to address complicated questions that do not have immediate answers.

35. The EAT thus went beyond the interpretative obligation in section 3 and engaged in judicial legislation. To read down section 146 as the EAT did is to fundamentally alter the nature, scope and structure of rights conferred under TULRCA, thereby redrawing the balance between workers' and employers' rights.

36. Not only does the EAT's reading down of section 146 create internal inconsistency but it also confers on workers much broader protection against detriment for taking part in industrial action than in relation to dismissal following industrial action. On any view this is a complex area that is best left to Parliament.

Claimant's submissions

37. Mr Ford QC argues that the EAT was correct to conclude that article 11 protects workers against any disciplinary action and detriment which deters or penalises their participation in lawful industrial action and that the lack of protection in domestic law is not justified for the purposes of article 11. He submits that the EAT was also right to conclude that section 146 of TULRCA is incompatible with article 11 and should be read down using section 3 of the 1998 Act.

38. The EAT's amended section 146 (see para 22(x) above) adopted the claimant's formulation advanced below in argument. Mr Ford now recognises that formulation went too far because it does not qualify the type of industrial action it covers. He accepts the criticism of the Secretary of State that the reformulated section 146 found in the order of the EAT goes wider than any protection recognised by the Strasbourg Court which has been concerned with lawful industrial action. The mirror principle in *Ullah v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, and *R (on the application of Elan-Cane) v Secretary of State for the Home Department)* [2021] UKSC 56; [2022] 2 WLR 133 requires the domestic courts to keep pace with Strasbourg, no more but no less. The claimant now accepts that the reading down of Section 146 should only be applicable to industrial action which is lawful under domestic law. Mr Ford proposes reformulating the amendment to section 146 accepted by the EAT; the new sub-paragraph (c) added to the definition of "an appropriate time" in section 146(2) would state:

> "(c) in respect of a detriment short of dismissal, a time within working hours when he is taking part in protected industrial action within the meaning of section 238A(1)".

39. Mr Ford submits that with regard to article 11 the EAT traced the development of Strasbourg jurisprudence from *Ezelin.* That concerned the imposition of a disciplinary reprimand on a barrister for participation in a public demonstration. It could not be justified even though it did not affect his ability to practise law. All the cases on this issue speak with one voice. *Ezelin* was followed in *Karacay* where the applicant was issued with a warning for his participation in a one-day strike organised by his union which was not prohibited under Turkish law. While the Strasbourg Court accepted that prevention of disorder was a legitimate aim under article 11(2), the imposition of a sanction, no matter how minimal, was disproportionate to that aim because it was likely to deter participation in lawful union activity.

40. Mr Ford submits that the EAT's analysis is reinforced by the views of the International Labour Organisation which considers that proportionate salary deductions for days on strike give rise to no infringement of freedom of association but takes the view that additional sanctions are not permissible. The same, he submits is true of, article 6(4) of the European Social Charter ("the Charter"), ratified by the United Kingdom, which protects the rights of "workers and employers to take collective action in cases of conflict of interest". This provision also permits the deduction of salary in proportion to the duration of the strike, but the European Committee of Social Rights considers any sanctions going beyond proportionate salary deduction to be impermissible.

41. There is no support in the authorities for the submission that the claimant's case is different if viewed through the prism of the state's positive obligations. The Strasbourg Court has consistently held that the same standard applies, whether the matter is analysed in terms of the state's positive duty or as a direct interference by the state itself. The Strasbourg cases all point in the same direction. They show that in the context of sanctions imposed on individuals for exercising trade union rights guaranteed by article 11, it makes no difference whether the state itself is the employer or its positive obligations are engaged.

42. Mr Ford submits that the Secretary of State is wrong to assume the existence of a wide margin of appreciation in this context. While the court in *RMT* held that the UK's ban on secondary action was justified, it also observed that the width of the margin of appreciation depended on whether a restriction struck at a "core" or "secondary" aspect of the right to strike. The Strasbourg Court explicitly drew a contrast with cases such as *Karacay,* which it said concerned restrictions on primary or direct industrial action where a narrower margin applied. In *Tek Gida* it repeated that the width of margin depended on whether a restriction struck at the core or a peripheral aspect of trade union activity.

43. The correct legal premise is that a narrower margin applies in these proceedings. The claimant's case is that the restrictions allegedly imposed were an attempt to stop the activities of an organiser of the strike while the strike was taking place and struck more directly at the "core" than the *ex post facto* warnings in cases such as *Ezelin* and *Karacay*.

44. The burden is on the Secretary of State to show that the interference with article 11 rights is justified. No "pressing social need" or sufficiently important objective has been identified for restricting these fundamental rights. It is incorrect to assert that Parliament has "chosen" to strike a balance between the rights of workers and employers when the Secretary of State has not disclosed a single document to demonstrate that this issue has ever been considered by Parliament.

45. There is no case in which the Strasbourg Court has held that such disciplinary action was justified under article 11(2), no matter how minor the sanction. This is because such sanctions inevitably have a "chilling effect" on industrial action and freedom of association.

46. Mr Ford makes five points relevant to the "grain" of TULRCA:

    i) Nowhere in section 146 TULRCA has Parliament set out a clear limitation on Convention rights. Nothing in the wording or legislative history of section 146 indicates that Parliament intended to legislate contrary to article 11;

    ii) Nothing in the legislative history supports the argument that the definition of "appropriate time" was introduced to signal the exclusion of any protection at all to those who participate in industrial action. If Parliament had intended to exclude all industrial action from protection, it would have said so explicitly in a similar fashion to the exclusionary provisions of unfair dismissal;

    iii) As the EAT found, the provisions in section 146 and section 152 do not necessarily have the same underlying thrust or grain. The legislation continues

to draw important distinctions between protection from dismissal and other forms of detriment;

iv) The Secretary of State does not challenge the EAT's conclusion that since 2004 the Parliamentary intention was that section 146 should comply with article 11;

v) As a matter of ordinary language "activities of an independent trade union" in section 146 can include industrial action.

47. Mr Ford submits that the Secretary of State's grain submission devolves to the single argument about inconsistency of meaning between identical words in section 152 and section 146. This argument operates to elevate domestic rules of construction over the duty in section 3 of the 1998 Act in respect of the grain of the legislation. It may not be possible to construe section 152 TULRCA to protect against dismissal due to participation in industrial action because this would inevitably conflict with fundamental features of the dismissal regime in sections 237-238A. But, following *Hurst,* it is possible for the purposes of section 3 to interpret the words "at an appropriate time" differently in section 146 from section 152 of TULRCA.

48. In response to the Secretary of State's argument that the EAT's judgment creates the perverse result of affording greater protection to striking workers from detriment than from dismissal Mr Ford submits as follows. First, the EAT was only considering a complaint about action short of dismissal. Secondly, this point has been partly addressed because the claimant accepts that the protection in section 146 should only extend to lawful industrial action in accordance with section 238A. Thirdly, the claimant's case does not involve dismissal and such a hypothetical case would give rise to different issues that are not within the scope of this case. They also have no bearing on the issue of whether section 146 can be interpreted in accordance with article 11 to protect workers from action short of dismissal.

49. Alternatively, the claimant seeks a declaration of incompatibility under section 4 of the 1998 Act. This is because on the Secretary of State's argument, section 146 can never protect workers from disciplinary action short of dismissal for taking part in *any* industrial action. Mr Ford submits that would make section 146 intrinsically incompatible with article 11.

Discussion

50. Mr Stilitz for the Secretary of State and Mr Ford for the claimant agreed that the issue on this appeal is as set out in Mr Ford's skeleton argument, namely:

> "Whether a worker such as the Claimant, who [is] suspended and subject to disciplinary action for the purpose of preventing or deterring her participation in union-organised industrial action can, as a matter of law, potentially bring a claim under section 146(2)(b) of [TULRCA]."

51. The phrase "activities of an independent trade union" used in section 146 of TULRCA would, if read in isolation, include participation in or the organisation of official strike action. But the phrase cannot be read in isolation. In *Drew v St*

Edmundsbury Borough Council [1980] ICR 513 Slynn J, giving the judgment of the EAT of which he was then President, said:

> "..it seems to us quite clear that there is intended by Parliament [in the predecessor legislation to what is now in the 1992 Act] 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. These observations were *obiter*, and the editors of *Harvey on Industrial Relations and Employment Law* criticise them as being erroneous; but, as Choudhury J noted, there has been no suggestion by any party to this case that the analysis in *Drew* was wrong as a matter of domestic law. When section 146 is viewed as part of TULRCA as a whole, we consider that industrial action is not included within the phrase "activities of an independent trade union". Industrial action is dealt with in Part V of the Act, whereas all other trade union activities are covered in Part III. Sections 237, 238, and 238A in Part V deal in detail with dismissal for taking part in industrial action, whereas dismissal for participation in the activities of an independent trade union is the subject matter of section 152 in Part III.

53. There is also a difficulty in the concept of industrial action taking place "at an appropriate time" as defined by section 146. To be effective, industrial action normally takes place during working hours although one form of industrial action is a refusal to work voluntary overtime beyond contracted working hours. As Choudhury J noted at [30]:

> "[To] construe s. 146 as including that type of industrial action would mean (applying the normal rules of statutory construction) that the same must apply to s.152. If that were correct, then an employee dismissed for engaging in industrial action at an appropriate time could bring his claim for unfair dismissal under s.152 and thereby avoid the carefully constructed regime in respect of dismissals for industrial action under Part V of TULRCA. For the reasons set out in *Drew*, that cannot be right: the employee dismissed for taking part in industrial action cannot fall within both s.152 and ss.238-238A of TULCRA at the same time. If that were not the case, then the same employee would be entitled to a finding of automatic unfair dismissal under the former provision but would be subject to the limited protections against unfair dismissal under the latter. The only logical way to avoid that difficulty is to treat s.152 as not encompassing dismissal for industrial action."

54. We agree. On ordinary principles of statutory interpretation, section 146 does not provide protection against detriment short of dismissal for taking part in or organising industrial action. It is for that reason that a question for us, if the claimant's arguments on article 11 prevail, is whether the legislation can and should be read down to comply with those rights or declared incompatible if such reading down is impossible. Before considering those questions, the starting point must be to consider what the gap in protection of which the claimant complains amounts to.

55. Where industrial action follows a ballot, notice to the employer and the other procedural requirements laid down by Parliament, TULRCA, on conventional principles of interpretation:

    i) Gives immunity both to the trade union and to the individual strikers from liability in tort;

    ii) Gives protection to the strikers from dismissal (with some limited exceptions which are not relevant in this case) until they have been on strike for 12 weeks – this being the effect of section 238A, introduced by the Employment Rights Act 1999; but

    iii) Gives no protection to the strikers against disciplinary measures short of dismissal, nor (it seems) against being sued for damages for breach of contract.

56. This is not to say that English law provides no protection at all against measures short of dismissal. It may be that if, for example, an employer were to say to a striker "you are hereby suspended without pay indefinitely until and unless you sign an undertaking never to take industrial action again", the employee would be able to treat that as a repudiation of the contract amounting to unfair constructive dismissal. The law of contract might also have a part to play in a suspension case, particularly if an employer has no power under the contract to suspend. Any such claim would have to be brought in the High Court or County Court: as the law stands employment tribunals have no jurisdiction over claims for breach of contract (other than deductions from wages) so long as the employee has not been dismissed. However, Mr Stilitz did not seek to rely on possible common law contract claims by employees as an adequate means of filling any lacuna which might be identified in TULRCA in providing sufficient protection to comply with the United Kingdom's obligations under article 11.

57. It is convenient to record one point which is common ground: the "no work, no pay" rule. It is agreed by all parties to this case that if an employee is on strike he or she does not have to be paid for the time whilst on strike. It is not suggested that this approach, accepted by various international organisations as Mr Ford reminded us, would fall foul of article 11.

58. With that exception, the positions taken by the parties to this appeal are polar opposites. The claimant contends that *each and every* detriment apart from "no work, no pay" imposed in response to industrial action is incompatible with article 11 and must be prohibited by the State even in the case of private sector employment. Conversely, the Secretary of State argues that *no* detriment in a private sector case can ever be incompatible with article 11.

59. Mr Ford relied on *Ezelin v France*, in which an *avocat* was subjected to a minor reprimand by the relevant Bar Council for participating in a protest against the judiciary. The Strasbourg Court held:

> "53. Admittedly, the penalty imposed on Mr. Ezelin was at the lower end of the scale of disciplinary penalties given in Article 107 of the Decree of 9 June 1972; it had mainly moral force, since it did not entail any ban, even a temporary one, on

> practising the profession or on sitting as a member of the Bar Council. The Court considers, however, that the freedom to take part in a peaceful assembly—in this instance a demonstration that had not been prohibited—is of such importance that it cannot be restricted in any way, even for an *avocat*, so long as the person concerned does not himself commit any reprehensible act on such an occasion.
>
> In short, the sanction complained of, however minimal, does not appear to have been 'necessary in a democratic society.' It accordingly contravened Article 11."

60. In *Karaçay v Turkey* a civil servant was issued with a warning on the grounds that he took part in a national one-day strike to protest against declining salary levels. The Strasbourg Court said:

> "36. The Court highlights that the national one-day strike in question was previously announced to the national authorities and was not prohibited. In joining it, the applicant uses his freedom of peaceful association (*Ezelin v. France*, judgment of 26 April 1991, series A No. 202, p. 21, § 41).
>
> 37. The Court examined the contested disciplinary sanction in light of all the facts, to determine, in particular, if it was proportionate to the legitimate purpose allegedly pursued, given the prominent place of freedom of peaceful assembly. The Court notes that the applicant was given a warning as a disciplinary sanction because of his participation in the national one-day strike organised by the Kesk, of which he was a member, to protest against the bill relating to the purchasing power of civil servants (paragraphs 7 and 9 above). Yet the sanction in question, as minimum as it was, is intended to dissuade members of trade unions from legitimately taking part in such a strike day or from taking actions to defend the interests of their members (*Ezelin*, cited above, § 53).
>
> 38. The Court concludes that the warning given to the applicants was not "necessary in a democratic society".
>
> 39. Therefore, there was a breach of Article 11 of the Convention."

61. In *Kaya v Turkey*, as in *Karaçay*, two employees of the Civil Service in Turkey received "warnings" for their participation in a one-day strike organised by their trade union. The Court found that the sanction of a warning, "as minimum as it was", was intended to dissuade union members from taking part in the strike, and concluded:

> "31. The Court finds that the disciplinary sanctions given to the applicants did not correspond to a "pressing social need" and it concludes, thus, that they were not "necessary in a democratic society". It follows that in this case, there was a

> disproportionate interference with the applicants' effective enjoyment of the right to protest under Article 11 of the Convention.
>
> 32. Therefore, there was a breach of this provision."

62. We do not accept, however, that these cases support the submission of Mr Ford that any detriment other than "no work, no pay" necessarily contravenes article 11. Mr Ford accepted at least two respects in which the apparently broad principle set out in them must be qualified. First, only direct (as opposed to secondary) industrial action must be protected. Secondly, only industrial action sanctioned by an independent trade union has to be protected. These concessions follow inevitably from the important decision in the *RMT* case in which the Strasbourg Court said:

> "83. It remains to be determined whether the statutory ban on secondary industrial action, as it affected the ability of the applicant to protect the interests of its Hydrex members, can be regarded as being "necessary in a democratic society". To be so considered, it must be shown that the interference complained of corresponds to a "pressing social need", that the reasons given by the national authorities to justify it are relevant and sufficient and that it is proportionate to the legitimate aim pursued.
>
> 84. The Court will consider first the applicant's argument that the right to take strike action must be regarded as an essential element of trade union freedom under Article 11, so that to restrict it would be to impair the very essence of freedom of association. It recalls that it has already decided a number of cases in which restrictions on industrial action were found to have given rise to violations of Article 11 [reference was made to four cases against Turkey: *Karaçay, Dilek, Urcan* and *Enerji*]. The applicant placed great emphasis on the last of these judgments, in which the term "indispensable corollary" was used in relation to the right to strike, linking it to the right to organise (*Enerji*, at §24). It should however be noted that the judgment was here adverting to the position adopted by the supervisory bodies of the ILO rather than evolving the interpretation of Article 11 by conferring a privileged status on the right to strike. More generally, what the above-mentioned cases illustrate is that strike action is clearly protected by Article 11. The Court therefore does not discern any need in the present case to determine whether the taking of industrial action should now be accorded the status of an essential element of the Article 11 guarantee.
>
> 85. What the circumstances of this case show is that the applicant in fact exercised two of the elements of freedom of association that have been identified as essential, namely the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members, and the right to

engage in collective bargaining. The strike by its Hydrex members was part of that exercise, and while it did not achieve its aim, it was not in vain either since it led the company to revise its offer, which the applicant then commended to its members. …. Nor does the right to strike imply a right to prevail. As the Court has often stated, what the Convention requires is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests (*Demir and Baykara*, §141; more recently *Sindicatul "Păstorul cel Bun" v. Romania* [GC]….. §34, 9 July 2013). This the applicant and its members involved in the dispute were largely able to do in the present case.

86. In previous trade union cases, the Court has stated that regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole. Since achieving a proper balance between the interests of labour and management involves sensitive social and political issues, the Contracting States must be afforded a margin of appreciation as to how trade-union freedom and protection of the occupational interests of union members may be secured. In its most recent restatement of this point, and referring to the high degree of divergence it observed between the domestic systems in this field, the Grand Chamber, considered that the margin should be a wide one (*Sindicatul "Păstorul cel Bun"*, cited above, §133). The applicant relied heavily on the *Demir and Baykara* judgment, in which the Court considered that the respondent State should be allowed only a limited margin (see §119 of the judgment). The Court would point out, however, that the passage in question appears in the part of the judgment examining a very far-reaching interference with freedom of association, one that intruded into its inner core, namely the dissolution of a trade union. It is not to be understood as narrowing decisively and definitively the domestic authorities' margin of appreciation in relation to regulating, through normal democratic processes, the exercise of trade union freedom within the social and economic framework of the country concerned. The breadth of margin will still depend on the factors that the Court in its case-law has identified as relevant, including the nature and extent of the restriction on the trade union right at issue, the object pursued by the contested restriction, and the competing rights and interests of other individuals in society who are liable to suffer as a result of the unrestricted exercise of that right. The degree of common ground between the member States of the Council of Europe in relation to the issue arising in the case may also be relevant, as may any international consensus reflected in the apposite international instruments (*Demir and Baykara*, §85).

87. If a legislative restriction strikes at the core of trade union activity, a lesser margin of appreciation is to be recognised to the national legislature and more is required to justify the proportionality of the resultant interference, in the general interest, with the exercise of trade union freedom. Conversely, if it is not the core but a secondary or accessory aspect of trade union activity that is affected, the margin is wider and the interference is, by its nature, more likely to be proportionate as far as its consequences for the exercise of trade union freedom are concerned.

88. As to the nature and extent of the interference suffered in the present case by the applicant in the exercise of its trade union freedom, the Court considers that it was not as invasive as the applicant would have it. What the facts of the case reveal is that the applicant led a strike, albeit on a limited scale and with limited results. …. It cannot be said that the effect of the ban on secondary action struck at the very substance of the applicant's freedom of association. On this ground the case is to be distinguished from those referred to in paragraph 84 above*, which all concerned restrictions on "primary" or direct industrial action by public-sector employees;* and the margin of appreciation to be recognised to the national authorities is the wider one available in relation to the regulation, in the public interest, of the secondary aspects of trade union activity. [emphasis added]

89. As for the object of the interference in issue in the present case, the extracts from the debates in Parliament preceding the passage of the Employment Act 1980 make clear the legislative intention to strike a new balance in industrial relations, in the interests of the broader economy, by curbing what was a very broad right to take secondary action. A decade later, the Government of the day considered that even in its more limited form secondary action posed a risk to the economy and to inward investment in the country's economic activity. As a matter of policy it considered that restricting industrial action to primary strikes would achieve a more acceptable balance within the British economy. The Government have reiterated that position in the present proceedings. That assessment was sharply contested at the time by the opposition in Parliament, and is rejected by the applicant as grounded in animus towards trade unions rather than any clear evidence of direct damage to the economy. Yet the subject-matter in this case is certainly related to the social and economic strategy of the respondent State. In this regard the Court has usually allowed a wide margin of appreciation since, by virtue of their direct knowledge of their society and its needs, the national authorities, and in particular the democratically elected parliaments, are in principle better placed than the international

> judge to appreciate what is in the public interest on social or economic grounds and what are the legislative measures best suited for the conditions in their country in order to implement the chosen social, economic or industrial policy….."

63. It is instructive to note the grounds on which the Strasbourg court distinguished the *Ezelin* line of authorities, namely that they all concerned restrictions on primary or direct industrial action by public sector employees. Mr Ford naturally lays emphasis on the first of these elements, Mr Stilitz on the second. The court was being careful in its choice of language, saying that if the State is the employer and the industrial action is directed against the employer, even a minimal sanction is likely to involve a breach of article 11. Where the action is secondary or the employer is in the private sector, the position is less clear-cut. But this does not mean that in a private sector case the margin of appreciation is so wide that that a State party has no positive obligations at all.

64. The *RMT* judgment refers back to the decision of the Grand Chamber in the *Good Shepherd* case (*Sindicatul Pastoral Cel Bun* [2014] 58 EHRR 10). There the court said:

> "132. The boundaries between the State's positive and negative obligations under Article 11 of the Convention do not lend themselves to precise definition. The applicable principles are nonetheless similar. Whether the case is analysed in terms of a positive duty on the State or in terms of interference by the public authorities which needs to be justified, the criteria to be applied do not differ in substance. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole.
>
> 133. In view of the sensitive character of the social and political issues involved in achieving a proper balance between the respective interests of labour and management, and given the high degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how trade union freedom and protection of the occupational interests of union members may be secured (see *Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, § 58, ECHR 2006-I)."

65. In *Danilenkov* the employees of the Kaliningrad port authority, a private company, had participated in a strike. The employers penalised them by giving them less lucrative work and moving them to part time work with a view to persuading them to relinquish their trade union membership. There was no effective remedy available to them under Russian law. Their complaint was of a violation of article 14 of the Convention taken together with article 11:

> "120. The Court notes that the parties disagree as to whether the circumstances of the present case involved direct intervention by the state, given the status of the Kaliningrad Seaport Company. It considers that it is not necessary to rule on

> this issue, since the responsibility of the Russian Federation would, in any case, be engaged if the matters complained of resulted from a failure on its part to secure to the applicants under domestic law the rights set forth in art.11 of the Convention."

66. Mr Stilitz reminds us that the measures under scrutiny in *Danilenkov* amounted to an all-out attack on the trade union and that the finding was of a violation of article 14 taken together with article 11 rather than a free-standing claim under article 11. Whilst that is correct, we agree with Choudhury J that para. 120 of the judgment establishes that the positive obligation of the State is engaged in any case if the matters complained of result from a failure to secure article 11 rights.

67. In *Tek Gida v Turkey* a private sector employer had dismissed several employees who were union members in order to prevent the number of such employees in the workforce from reaching the threshold for collective bargaining recognition. The employees obtained compensation for wrongful dismissal against the employer; but the Strasbourg Court held that the state's failure to safeguard the right to organise infringed their article 11 rights. The case is not, however, about industrial action.

68. Mr Stilitz is right to contend that Strasbourg case law does not establish that the state's positive obligations under article 11 require that private employers should be unconditionally prohibited from treating workers detrimentally on the ground of having participated in industrial action. Otherwise, all the strike ballot requirements for protection from dismissal under Part V of the 1992 Act would be incompatible with the UK's obligations, and the *RMT* case would have gone the other way. But it also cannot be right that in a private sector case there is *no* positive obligation on the state. Suppose a state had no legal protection for industrial action at all and therefore no protection for the trade union against being sued for inducing breach of contract (as was the position in English law before 1906) and no protection for the employees against dismissal in any circumstances. That would, as we see it, place the state concerned in breach of its obligations under article 11.

69. Mr Stilitz emphasises the choice of words by the court in the *RMT* case in saying that if a "legislative restriction" strikes at the core of trade union activity a lesser margin of appreciation is granted to the state. In the present case we are considering an alleged failure to give legislative protection rather than an express legislative restriction, but we are not persuaded that, when concerned with rights under article 11 in the context of industrial action, the distinction is a material one.

70. TULRCA provides (limited) legislative protection against dismissal for employees taking part in official or lawful industrial action (see para. 8 above). There is no protection for those taking unofficial industrial action nor for detriments to those taking official industrial action short of dismissal. It is not difficult to envisage types of case in which English law provides no or limited protection against sanctions on employees taking industrial action which might well amount to potential breaches of article 11. One would be if an employer sued strikers for loss of profits caused by their breach of contract in going on strike (see *National Coal Board v Galley* [1958] 1 WLR 16). Another, at least arguably, would be if employees returning to work were suspended without pay as a disciplinary measure.

71. We conclude that the failure to give legislative protection against any sanction short of dismissal for official industrial action against the employees who take it may put the United Kingdom in breach of article 11 even in the case of a private sector employer, if the sanction is one which strikes at the core of trade union activity. We emphasise, however, that this is an issue which is divorced from the underlying facts of this case. There have been no findings of fact including with respect to the employer's motives in acting as it did, nor about the reasonableness or proportionality of its actions.

The Human Rights Act

72. The next question is whether the lacuna in protection which we have identified can be resolved by reading down section 146 under section 3 of the 1998 Act. We put it that way because the complaint is not that there is something in section 146 which positively offends article 11 but rather that it, and the legislation taken as a whole, fails to accord adequate protection.

73. It is well-established, for example by *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, that legislation should be read down to give a Convention-compliant meaning wherever possible, subject only to the modified meaning being consistent with the fundamental features of the relevant legislation. Leaving aside, for the moment, that we are dealing with a legislative gap rather than a provision that requires an outcome incompatible with the Convention, a substantial obstacle in the claimant's way is that there is more than one possible solution to the problem, and a number of policy questions are engaged.

74. The first question is whether protection against detriment should be given to *all* industrial action (as the EAT's formulation would do) or only to official industrial action called by the trade union following the requirements of Part V of the Act. We have explained that Choudhury J opted for the first alternative, accepting the submissions made by Mr Ford. He now realistically submits that the second alternative is more consistent not only with the grain of the legislation (which repeatedly draws a distinction between lawful and unlawful industrial action) but also with Strasbourg authority.

75. The next question is whether the protection against detriment short of dismissal should extend to long-running official industrial action. The protection against dismissal given by section 238A expires after the industrial action has been going on for 12 weeks. It would be very odd if at that point the employer could dismiss strikers with impunity but could not lawfully impose any lesser detriment.

76. Thirdly, it is far from obvious that article 11 requires protection to be given against every form of detriment, at any rate in a private sector case, in response to industrial action. For example, does it require the law of each State to provide that the employer will be acting unlawfully if the employees concerned were refused a discretionary bonus; or were not considered the next time that a vacancy occurred for an internal promotion? The Strasbourg case law cited to us does not give a clear answer to those questions.

77. All these are issues of policy which, especially in this highly sensitive area, are best left to Parliament. As Lord Woolf said in *Poplar Housing and Regeneration*

Community Association Ltd v O'Donoghue [2002] QB 48, "section 3 [of the 1998 Act] does not entitle the court to legislate".

78. In *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10; [2002] 2 AC 291 the House of Lords had to consider the boundary between legitimate interpretation in accordance with the duty in section 3 and impermissible judicial legislation. In that case the Court of Appeal had purported to re-interpret the Children Act 1989 in order to render it compatible with the Convention rights by creating a new system of "starred" care plans. This was held by the House of Lords to be going too far.

79. In the main speech, Lord Nicholls of Birkenhead made the constitutional boundary clear, at para. 39:

> "… Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament."

80. At para. 43, Lord Nicholls said that the Court of Appeal's

> "……..judicial innovation passes well beyond the boundary of interpretation. I can see no provision in the Children Act which lends itself to the interpretation that Parliament was thereby conferring this supervisory function on the Court. No such provision was identified by the Court of Appeal. On the contrary, the starring system is inconsistent in an important respect with the scheme of the Children Act. It would constitute amendment of the Children Act, not its interpretation. It would have far-reaching practical ramifications for local authorities and their care of children. …"

81. The effect of the attempt to interpret section 146 by adding an additional sub-clause (whether as originally drafted or now refined by Mr Ford) would result in impermissible judicial legislation and not interpretation as sanctioned by section 3 of the 1998 Act. The EJ was correct to decline to do so.

82. Finally, we turn to the question whether there should be a declaration of incompatibility under section 4 of the 1998 Act. This is a remedy not available to either of the tribunals who have considered this case. It would be directed not so much at section 146 as at TULRCA as a whole.

83. Sections 3 and 4 of the 1998 provide complementary tools to the courts. In the case of section 3 the tool allows the court to remedy an incompatibility between a provision of primary legislation, applying ordinary canons of construction, and the Convention using a robust interpretative tool; and in the case of section 4 to draw to the attention of the executive and Parliament an incompatibility which cannot be remedied.

84. In *In re S (Minors)* Lord Nicholls considered the question of whether, in the alternative to section 3 of the 1998 Act, a declaration of incompatibility should be made pursuant to section 4. He concluded that it should not. The "short and conclusive" reason for this was set out at para. 59:

> "… Failure by the state to provide an effective remedy for a violation of article 8 is not itself a violation of article 8. This is self-evident. So, even if the Children Act does fail to provide an adequate remedy, the Act is not for that reason incompatible with article 8."

85. That, as it seems to us, is similar to the present case where the real complaint is that TULRCA does not provide the range of protections that article 11 requires.

86. We acknowledge that, in *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467, the House of Lords made a declaration of incompatibility that "insofar as section 11(c) of the Matrimonial Causes Act 1973 makes no provision for the recognition of gender reassignment it is incompatible with articles 8 and 12 of the Convention": see paras. 50 and 56 in the speech of Lord Nicholls. At first blush, that might be said to be an example of a declaration of incompatibility made in respect of an *omission* by Parliament but, on analysis, we do not think it is. We do not read the decision of the House of Lords in respect of a narrow statutory provision which was, on its face, incompatible with the Convention rights of a transgender person (section 11(c) of the 1973 Act) as implying that the court has a wider power to grant a declaration of incompatibility in respect of a lacuna in domestic law generally.

87. Section 11(c) provided:

> "A marriage … shall be void on the following grounds only, that is to say … that the parties are not respectively male and female …"

In *Bellinger* the House of Lords confirmed the long-standing view which had been held by English law that the concepts of "male" and "female" were fixed at birth and could not alter even if a person had undergone gender reassignment treatment: *Corbett v Corbett* [1971] P 83. The House of Lords was not able to use section 3 of the 1998 Act in order to re-interpret the ordinary meaning of section 11(c): see para. 49. This was essentially because this would represent:

> "a major change in the law, having far-reaching ramifications. It raises issues whose solution calls for extensive enquiry and the widest public consultation and discussion. Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balanced. The issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament, …": see para. 37.

Although those remarks were made in the context of section 3 and not section 4, nevertheless they have considerable force in that context too. It was the use of the words "male" and "female" in the section which gave rise to the incompatibility in circumstances where the meaning of the words was clear and could not be reinterpreted using section 3.

88. It would not be appropriate to grant a declaration of incompatibility in this case where there is a lacuna in the law rather than a specific statutory provision which is

incompatible (see per Lord Nicholls of Birkenhead in *Re S* [2002] 2 AC 291 at 319), the extent of the incompatibility is unclear and the legislative choices are far from being binary questions.

89. We allow the Secretary of State's appeal and restore the decision of the Employment Tribunal. In accordance with the terms on which permission to appeal was granted there will be no order as to costs.