Case Number: 3300081/2023 & 7 Others (See attached schedule)

EMPLOYMENT TRIBUNALS

Claimant: Mr O Adebiyi & 7 Others (See attached schedule)

Respondent: Royal Mail Group Ltd (International Distribution Services)

JUDGMENT

The claims in the schedule attached to this judgment, being claims solely for detrimental treatment under s.146 TULRCA 1992, are struck out and dismissed.

REASONS

1. Commencing in around August 2022, the Communication Workers Union (CWU) and Royal Mail were engaged in a dispute over pay and terms and conditions. This resulted in a number of days of industrial action and strike days between August and December 2023. The strikes days were on the following days and for the following periods:
   i. 26 August – 27 August 2022 04.00-04.00 (24 hours)
   ii. 31 August – 1 September 2022 04.00-04.00 (24 hours)
   iii. 8 September 2022 04.00 – 04.00 (24 hours reduced from 48 due to death of the Queen)
   iv. 30 September- 2 October 2022 04.00-04.00 (48 hours)
   v. 13-14 October 2022 04.00-04.00 (24 hours)
   vi. 20-21 October 2022 04.00-04.00 (24 hours)
   vii. 25-26 October 2022 04.00-04.00 (24 hours)
   viii. 24-26 November 2022 04.00-04.00 (48 hours)
   ix. 30 November – 2 December 2023 04.00 – 04.00 (48 hours)
   x. 09-10 December 2022 04.00-04.00 (24 hours)
   xi. 11 December 2022 00.01 -20.00
   xii. 14 -15 December 2022 04.00 -04.00 (24 hours)
   xiii. 15-16 December 2022 04.00-04.00 (24 hours)
   xiv. 23 -24 December 2022 04.00-19.00

2. Individual employees, some via the CWU, issued various non dismissal detriment claims in 2022 and 2023 arising out of the industrial dispute / industrial action which commenced in the Summer of 2022. These fell broadly into five categories:

i. Unlawful deductions of wages relating to the stoppage of sick pay;
ii. Unlawful deductions of wages relating to the non-payment of overtime
iii. Trade union detriment in relation to the stoppage of sick pay
iv. Trade union detriment in relation to the non-payment of overtime
v. Other pay/detriment related claims arising out of the said dispute

3. A Presidential Case Management Order (PCMO) was issued on 13 March 2023 which provided that having regard to, among other things, the overriding objective under Rule 2 of the First Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, all such claims be transferred to the Employment Tribunal at Bristol.

4. Claims (iii) – (v), above, were brought pursuant to section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) which provides that workers have a right not to be subjected to a detriment for taking part in trade union activities. The Court of Appeal had reversed a decision of the EAT in the case of **Mercer** and held that TULRCA does not protect employees from action short of dismissal. This decision had, at the time the of the PCMO, been appealed to the Supreme Court.

5. As such, it was determined that directions would be put into place whereby further information pertaining to the details of the various claims would be gathered and responded to pending the outcome of the further appeal to the Supreme Court. These directions included the identification of a maximum of 10 lead cases each within each of the 5 categories.

6. In the event, by judgment handed down on 17 April 2024, after a hearing on 12 and 13 December 2023, the Supreme Court affirmed the view of the Court of Appeal and the Employment Tribunal that a convention compliant interpretation of section 146 would amount to an impermissible judicial legislation and exceeded the proper confines of section 3 Human Rights Act 1998 (HRA). The Supreme Court found that section 146 TULCA was incompatible with Article 11, insofar as it fails to provide any protection against sanctions short of dismissal.

7. Section 3 of the HRA requires the courts to interpret primary legislation compatibly with the Convention unless the legislation itself makes it impossible to do so. However, it does not enable the court to change the substance of a provision from one where it says one thing into one that says the opposite. In this case, the Supreme Court determined that there is no reading of section 146 that would avoid having to make a series of policy choices with potentially far reaching practical ramifications. This, they found, would amount to impermissible judicial legislation rather than interpretation. Therefore, it was held that section 146 cannot be interpreted as providing the protection sought.

8. On 23 April 2024 the respondent wrote to CWU and the other claimants in this case requesting that they withdraw the detriment claims following the Supreme Court decision in **Mercer**.

9. Because claims remained, on 13 May 2024 the respondent wrote to the Tribunal requesting that the claims for trade union detriment be struck out on the basis

that the Tribunal had no jurisdiction following the **Mercer** decision in the Supreme Court.

10. The matter then came before me at a further case management preliminary hearing on 5 June 2024. At that hearing, I determined that an open preliminary hearing would be listed on 31 July 2024 consider the respondent's application to strike out the detriment claims as having no reasonable prospect of success. Notice of the hearing was also sent to unrepresented claimants in this multiple. They were also asked to let the tribunal know if they were unable to attend the hearing today. Directions were provided which included clarification of the strike out application.

11. The Respondent has since clarified that, in light of **Mercer**, it pursues its application under Rule 37(1)(a) ET Rules 2013 for all section 146 detriment claims. This rule provides that 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 on specific grounds including that it "has no reasonable prospect of success." In short, it is argued that in the face of **Mercer** the Claimants have no reasonable prospect of success in pursuing claims which have been found by the Supreme Court to exceed the Employment Tribunal's statutory jurisdiction.

12. In reply, it was clarified on behalf of the CWU claimants do not suggest, and have not suggested, that any remedying legislation introduced by the UK Government is likely to have retrospective effect. Although the CWU claimants do not dispute the substance of the respondent's application, and do not oppose it, they nonetheless seek a reasoned judgment striking out the claims because the claimants are considering an application to the European Court of Human Rights (ECHR) against the UK Government, which would include a claim for a breach of Article 11 and 6 of the European Convention of Human Rights (the Convention). In particular, the claimants note that a claim which is the subject of an application to the ECHR must first have been brought in the domestic forum. Moreover, article 35 of the Convention requires all domestic remedies to have been exhausted prior to an application to the ECHR.

13. Accordingly, because the section 146 detriment claims exceed the Employment Tribunal's statutory jurisdiction they have no reasonable prospect of success and are therefore struck out.

Regional Employment Judge Pirani
14 October 2024

Sent to the parties on:

17 October 2024

For the Tribunal:

	Case Number	Claimant Name
1.	3300081/2023	Mr Olushola Adebiyi
2.	3300131/2023	Mr Nandkishore Arora
3.	3300136/2023	Mr Manoj Panicker
4.	3300287/2023	Mr Aziz-Ur Rehman
5.	3300289/2023	Mr Lamin Touray
6.	3300309/2023	Mr Ihsan Ulhaq
7.	3300362/2023	Mr Omavuayen Omi Ogbiru
8.	3304876/2023	Ms Sukhwinder Jaswal