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Focus on Trade Union Rights

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Rachel Halliday examines the legal protection available to trade unionists against being victimised – for instance, being dismissed – under UK law

Protection against victimisation

THE KEY rights that are available to trade unionists in the UK are set out in the Trade Union and Labour Relations (Consolidation) Act 1992 as follows:

- Section 137 states that it is unlawful to refuse to employ a person because they are a trade union member
- Section 146 provides workers with the right not to be subjected to a "detriment" if the employer's main purpose is an "unlawful purpose"
- Under section 152, it is automatically unfair to dismiss someone if the principal reason for the dismissal is an "unlawful reason"
- It is automatically unfair under section 153 to dismiss someone by reason of redundancy if the principal reason for selecting them for redundancy was an "unlawful reason".

Meaning of "detriment"

A detriment simply means a disadvantage, provided that the disadvantage is not so minor as to be "de minimis" (too minor to merit consideration).

Examples of detriments to which workers might be subjected by their employers include:

- demoting them
- requiring them to work extra or unsociable hours
- taking disciplinary action against them
- denying them a benefit that has been made available to other, comparable workers.

In fact, a threat to subject a worker to a detriment can itself be a detriment. For instance, in **Carter -v- Wiltshire County Council**, a fire officer threatened to report firefighters to a disciplinary tribunal for holding a union meeting on the premises without permission. The threat itself was held to be a detriment, even though it had not been carried out.

Meaning of "unlawful purpose"

Subjecting a worker to a detriment is, however, only unlawful if the employer's main purpose is an unlawful purpose. For instance, if it were to prevent or deter the worker from doing, or punish them for doing, any of the following:

- being or becoming a member of a trade union
- taking part in the activities of a trade union at an appropriate time
- making use of trade union services at an appropriate time.

Meaning of an "unlawful reason"

Dismissing an employee for an unlawful reason means that the employer's main reason for the dismissal was that the employee had done one of the following:

- proposed to become a member of a union

- taken part in the activities of a trade union at an appropriate time
- proposed to take part in the activities of a trade union at an appropriate time
- made use of trade union services at an appropriate time
- proposed to make use of trade union services at an appropriate time.

Meaning of the term "trade union activities"

Trade union activities must take place at "an appropriate time" in order to be protected. The question of what constitutes a trade union activity is a question of fact to be determined by the tribunal using its "industrial common sense".

Workplace representatives carrying out the following activities (at an appropriate time) are likely to be protected:

- participating in bargaining, consultation, grievance handling and disputes procedures
- having discussions with full-time officers
- representing members and having discussions with them
- engaging in the recruitment of new members
- undergoing approved training
- putting up union notices and distributing union literature.

For ordinary union members, the following activities (at an appropriate time) are likely to be protected:

- voting in a union election
- engaging in the recruitment of new members
- distributing union literature
- having discussions with or making complaints to an appropriate union official (provided that they are in line with approved union practices and procedures)
- attending branch meetings, national conferences or other union committees.

Actions that are "wholly unreasonable, extraneous or malicious" will not, however, be protected according to the decision in **Lyon and anor -v- St James Press Ltd**.

As a result, the EAT held in **Azam -v- Ofqual** that the actions of a union representative who knowingly sent confidential information to members, in breach of the union's confidentiality agreement with the employer, were not protected trade union activities.

However, not every lapse from the highest standards will lead to a loss of legal protection. In the recent case of **Morris -v- Metrolink Ratpdev Ltd** (weekly LELR 585) a union representative was given confidential information belonging to the employer that had been obtained without permission.

He informed human resources that he had received the information, but did not circulate it and only used it to proceed with an existing collective grievance on behalf of the members. The Court of Appeal concluded that his actions were protected trade union activities.

Trade union activities in previous jobs

While there is no specific legal protection on this issue, there are examples of the courts interpreting the legislation in such a way as to protect trade unionists against disadvantage because of their trade union activities in previous jobs.

For instance, in **Fitzpatrick -v- British Railways Board**, the Court of Appeal held that an employee was protected, having been dismissed because their current employer assumed that they proposed to carry out trade union activities in their current job, based on knowledge of their trade union activities in a previous job.

Likewise, in **Jet2.com Ltd -v- Denby** (weekly LELR 552), a pilot was refused employment by Jet2 because he had previously been active in advocating for the pilot's union.

As he was neither an employee of nor a worker for Jet2, he had to rely on section 137 and argue that the refusal was because of trade union membership. ➲

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➲ The EAT agreed that, in these circumstances, trade union membership was not limited to the simple fact of membership but could also cover its outward and visible manifestation.

Industrial action

Industrial action is not protected because it does not take place at an appropriate time (see below). A possible exception would be industrial action in the form of a voluntary overtime ban. However, according to the decision in **Britool -v- Roberts**, planning and organising industrial action (if done at an appropriate time) can be a trade union activity.

Meaning of "trade union services"

This term means services that are made available to an employee by their union because they are a member. For example, a member who asks the union to raise a matter with the employer on their behalf is making use of trade union services.

However, section 145B(4) says that the fact that an employee's terms and conditions are negotiated through collective bargaining does not count as making use of union services.

Meaning of "an appropriate time"

An appropriate time means:

- a time outside the worker's working hours, or
- a time within working hours when the employer has consented to the employee taking part in trade union activities.

The employer's consent can be inferred from custom and practice at the workplace but mere silence on the part of the employer does not necessarily demonstrate consent.

Meaning of an "improper purpose"

Courts will only find that a detriment or dismissal is unlawful if the employer has an improper purpose. In assessing this, tribunals do not look just at the effect of their actions, but also at the objective they were aiming to achieve.

In **Department of Transport -v- Gallacher**, the claimant's union duties took up 80 to 100 per cent of his time. He applied for promotion but was rejected because he had insufficient management experience. The promotions board commented that he could not get the necessary experience without reducing his trade union activities. However, the tribunal concluded that the employer's purpose was to promote a candidate with appropriate experience for the job and not to deter the claimant from his trade union activities.

Factors that might support a claim that an employer has an improper purpose include: evidence of anti-union bias; a short space of time between the detriment/dismissal and the trade union grounds relied on; failure by an employer to follow the normal procedural steps; and the inability of the employer to give a credible explanation for their actions.

Claims trade unionists can bring

A trade unionist, who is subjected to a detriment for an unlawful purpose or who is dismissed for an unlawful reason, can bring an employment tribunal claim.

In dismissal cases, claimants can apply to the tribunal for interim relief. In other words, they can ask the tribunal to preserve the status quo until the full hearing. An application for interim relief must be made within seven days of the effective date of termination and must be accompanied by a written certificate, signed by an authorised official of the union.

At the hearing of the interim relief application, the claimant must persuade the tribunal that they have a "pretty good chance of success". If the application is successful, the tribunal will either make an order for re-instatement, re-engagement or continuation of the employee's contract (effectively paid suspension).

If a claim for dismissal is successful at the full hearing, tribunals have the power to award a minimum basic award and compensation for financial loss caused by the dismissal, subject to the statutory maximum. In detriment cases, the tribunal can award compensation for injury to feelings, injury to health and for any financial loss caused by the detriment.

Neil Todd explains the current law governing blacklisting and sets out some of the remedies available to trade unionists

Blacklisting practices of employers

BLACKLISTING IS the practice whereby employers and/or employment agencies compile information on individuals about their trade union membership or activities with a view to discriminating against them in relation to recruitment or their treatment at work.

The rise and fall of the Economic League

The practice of blacklisting dates back to at least 1919 and the formation of the Economic League, an organisation dedicated to opposing what it saw as subversion and action against free enterprise. As part of this, it maintained a list of alleged left-wing troublemakers that corporate members of the League used to vet job applicants, often denying workers a role because their name appeared on it.

In the early 1990s, the activities of the League became widely known as a result of a media investigation by campaigning journalists and the television programme "World in Action". As a result of its activities being exposed and a subsequent parliamentary enquiry, the League closed down its operation in 1992 and its entire database was supposedly destroyed at the same time.

The rise and fall of The Consulting Association

Sadly, however, this was not the end of the matter as The Consulting Association (TCA) was established in 1993 as a successor to the League by construction company McAlpine Ltd. It also bought the League's blacklist database and hired one of its former employees, Ian Kerr, to manage it.

From 1993 until its closure in 2009, TCA operated a secret blacklisting operation on behalf of 44 of the UK's largest building contractors.

An investigation by the Information Commissioner's Office (ICO) into the TCA uncovered a centralised database holding personal information on 3,213 individuals, which was covertly shared among building firms to prevent trade union members from obtaining work on big projects being overseen by the subscribing firms who paid an annual fee for the service.

Not surprisingly, perhaps, this practice had a devastating impact on those who were denied work and forced into prolonged periods of unemployment. Indeed, many were forced to leave the industry altogether. ➲

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"The regulations made it unlawful to compile, use, sell or supply "prohibited lists" containing details of trade union members"

The introduction of the Blacklisting Regulations

The Employment Relations Act 1999 (Blacklists) Regulations 2010 were introduced in direct response to the discovery by the ICO of the secret blacklist held by the TCA and the evidence it subsequently published.

Broadly, the regulations made it unlawful to compile, use, sell or supply "prohibited lists" containing details of trade union members or activists, past or present, for employment vetting purposes.

They also created rights for employees and workers not to be:

- refused employment
- refused the services of an employment agency
- dismissed or subject to detriment by their employer for a reason connected to a prohibited list.

The concept of a "prohibited list"

There are two parts to the definition of a prohibited list in Regulation 3:

- It must contain details of persons who are or have been members of trade unions or persons who are taking part or have taken part in trade union activities.
- It must be compiled with a view to being used by employers or employment agencies for the purposes of discrimination.

In the first instance, it is necessary to establish there is "a list". The Employment Rights Act 1999 (ERA) defines this as "any index or other set of items whether recorded electronically or by any other means".

The guidance produced by the Department for Business, Energy and Industrial Strategy makes clear that "haphazard or unstructured collections of information" could qualify as a list, if the information is connected in some way and used for the same (prohibited) purpose.

On this basis, it seems reasonable to conclude that a list may either be a single entity or divided into separate parts with scattered units of information provided they are connected in some way. In **Miller and**

ors -v- Interserve Industrial Services Ltd, the tribunal held that a purely "mental" list, that is one which was compiled only in the mind of an employer, could be within the scope of the regulations.

A list may also contain both the names of trade unionists and non-trade unionists. Provided it can then be established it has been compiled with a view to being used by employers or employment agencies for the purposes of discrimination, everyone on the list is protected by the provisions – even non-trade union members.

For instance, in the case of **Maunders -v- Proteus Well Services Ltd and ors**, neither party took issue with this interpretation and although the tribunal expressed some reservations about the sort of situations that could arise as a consequence of this, it did not expressly disagree.

Discriminatory purpose of the list

The list must have been compiled for the purposes of discrimination in relation to recruitment or the treatment of workers by employers or employment agencies. For these purposes, discrimination means "treating a person less favourably than another on grounds of trade union membership or trade union activities".

In **Maunders**, the list was controlled by the company operating Lindsey oil refinery and was used to record the security status of individuals employed by separate contractors to determine whether they would be admitted to the site. The tribunal held that it could not be a blacklist if its purpose was to enable a company to discriminate against a contractor's employees (rather than their own) on union grounds, thereby highlighting a clear shortcoming in the regulations.

"Everyone on the list is protected by the provisions – even non-trade union members"

Trade union activities

The Blacklisting Regulations do not define what amounts to a union activity. Unlike the provisions in the Trade Union and Labour Relations (Consolidation) Act 1992 there ➲

"It is unlawful for an employer to subject one of their workers to a detriment for a reason that relates to a prohibited list"

➲ is no stipulation that the activities must take place at an "appropriate time" (as Rachel Halliday explains on page 4) and therefore all forms of industrial action would be covered.

Indeed, one tribunal has even held that unofficial action could constitute a "trade union activity" for the purpose of these provisions. It therefore follows that activities should be given a broad interpretation.

Exceptions

There are five exceptions to the general prohibition established under Regulation 3 where it is not unlawful to deal in a specified manner with a prohibited list, as follows:

- A person supplied a prohibited list but does not know and could not reasonably be expected to know they are supplying a prohibited list
- The list is compiled, used or supplied in the public interest to bring to light a contravention of the regulations, provided no individual's details are published without their consent
- The list is compiled, used, supplied or sold in relation to consideration of a person's appointment to an office for which trade union experience or membership is required
- The list is required or authorised by an enactment, any rule of law or an order of the court
- The list is used or supplied in relation to legal proceedings, or legal advice, where observance of the regulations is at issue.

Remedies for refusal of employment or employment agency services

To establish that there has been a breach of Regulation 3, workers have to show that the employer or employment agency had its own prohibited list or relied on information provided in breach of the regulation.

In respect of the latter, the employer or employment agency must have known, or ought reasonably to have known, that the information was supplied in contravention of it.

Regulation 8 provides that, if the tribunal finds the complaint is well-founded, it may make an order for compensation of not less than £5,000 and not more than £65,300, and/or make recommendations to carry out action "for the purpose of obviating or reducing the adverse effect on the complainant of any conduct to which the complaint relates".

Remedies for detriment and dismissal

It is unlawful for an employer to subject one of their workers to a detriment for a reason that relates to a prohibited list under Regulation 9. It is also automatically unfair for an employer to dismiss an employee if the reason or principal reason for the dismissal relates to a prohibited list under section 104F of the Employment Rights Act 1996.

Again, the employer is only liable for detriment or automatically unfair dismissal if they have also breached the general prohibition in Regulation 3 or if they have relied on information supplied by another person in breach of the regulation, where the employer knew or ought reasonably to have known that this was the case.

Where an employee is subjected to a detriment in relation to a prohibited list, Regulation 11 enables a tribunal to award compensation of not less than £5,000.

The remedies in respect of automatic unfair dismissal for a reason related to a prohibited list are a basic award of not less than £5,000 and a compensatory award currently capped at £83,682 or one year's salary, whichever is lower and £65,300 for a worker (as opposed to an employee) who complains that the detriment they have suffered is a dismissal.

Finally, Regulation 13 provides that a breach of the prohibition of blacklisting is actionable as a breach of statutory duty, which can be brought by an individual or other party who has suffered loss. However, it must be brought in a civil court rather than an employment tribunal.

Richard Arthur considers the right of freedom of association under the European Convention on Human Rights

Freedom of association

ARTICLE 11 OF the Convention gives everyone the right of freedom of association, including the right to form or join a trade union.

Restrictions may only be placed on that right if they are "prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others".

States may, however, impose lawful restrictions on the exercise of these rights "by members of the armed forces, of the police or the administration of the State".

The European Convention

The Convention is an instrument of the Council of Europe, set up as an international organisation after World War II to promote democracy, the rule of law and human rights.

The Council of Europe is totally distinct from the European Union and should not be confused with the European Council. The EU has its own Charter of Fundamental Rights, which replicates and adds to rights under the European Convention. The European Convention is supervised by the European Court of Human Rights (ECtHR) in Strasbourg and is implemented in the UK by the Human Rights Act 1998.

Scope of freedom of association

An individual's right to join a trade union implies a right to join a union that is effective. In other words, the union is able to organise and have its voice heard for the protection of members' interests.

It also includes a right to be active in their union, meaning that Article 11 protects trade union activists exercising their normal trade union rights.

Indeed, the ECtHR held in the case of **Danilenkov -v- Russia** that the victimisation of trade unionists is "one of the most serious violations of freedom of association" because it is capable of jeopardising the very existence of a trade union.

Article 11 has an arguably even more significant collective dimension. That is, the right for the union to protect its members' interests in an effective manner. It is becoming increasingly clear that the ➲

➲ freedom to form an effective union now includes a right for the union to enter into collective bargaining and, more tentatively, a right to strike.

Demir and the right to collective bargaining

Things changed with the ECtHR's decision in **Demir and Baykara -v-Turkey** in 2009. In this case the Turkish courts annulled a collective agreement entered into between a trade union and a local authority on the ground that the state's constitution did not authorise public sector unions to undertake collective bargaining. The employers demanded that the workers repay the pay rises the union had won through collective bargaining.

The case is important not just for the result, but also for the court's reasoning. It referred to an "evolution of the case law" as to the content of the freedom of association, the need to interpret limitations to rights restrictively and to interpret both the substance of the right and the extent of permissible restrictions by reference to contemporary standards in international law.

"This edition is written as the government gives renewed notice of its intention to repeal the Human Rights Act and withdraw from the European Convention"

The court observed that the right to bargain collectively was protected in numerous international labour law instruments such as ILO Convention No. 98 (Right to organise and to bargain collectively), ILO Convention No. 151 (Right to organise in the public service), the European Social Charter and the EU Charter of Fundamental Rights.

It therefore concluded that its previous approach to the content of Article 11 should not only be "reconsidered", but it also acknowledged that "the right to bargain collectively with the employer has, in principle, become one of the essential elements of the right to form and join trade unions for the protection of one's interests".

It is worth noting that the court in **Demir** found that the right to collective bargaining had "in principle" become part of the rights protected by Article 11. As will be seen in relation to the right to strike, states have still been found to maintain a wide margin of appreciation in terms of imposing limitations on the exercise of the freedom of association.

States can also impose restrictions for specific purposes such as in the interests of national safety and for the protection of freedoms of others.

For instance, after four months of collective bargaining and industrial action by health unions, the Icelandic Parliament adopted legislation banning further industrial action.

The ECtHR held that the imposition of such legislation was within the wide margin of appreciation afforded to a state to determine whether there was a serious risk to public safety.

In another example, Unite the Union argued that the removal of the statutory Agricultural Wages Board amounted to a breach of the right to collective bargaining. In rejecting Unite's claim, the court drew a distinction between the ban on voluntary collective bargaining in **Demir** and the fact that there is no such ban in the agricultural sector in the UK (although, in practice, voluntary collective bargaining is not practicable),

However, this is not necessarily the end of the story as the Court of Appeal subsequently held in **Pharmacists' Defence Association Union -v- Boots Management Services Limited** (weekly LELR 513) that the Unite decision meant that the absence of a statutory mechanism for compulsory collective bargaining might in particular circumstances give rise to a breach of Article 11.

The right to strike

The ECtHR in **Demir** did not decide whether the right to strike was an essential component of Article 11. However, shortly afterwards, it suggested in the case of **Enerji Yapi-Yol Sen -v- Turkey** that it was.

Although this was not followed by the Court of Appeal in **Metrobus -v- Unite the Union** (weekly LELR 134), it ruled in **National Union of Rail, Maritime & Transport Workers -v- Serco Ltd t/a Serco Docklands** (weekly LELR 213) that the ECtHR "has in a number of cases confirmed that the right to strike is conferred as an element of freedom of association conferred by Article 11(1)", while simultaneously noting that the right to strike was capable of restriction.

But then, in the highly controversial judgment of **National Union of Rail, Maritime & Transport Workers -v- United Kingdom** (weekly LELR 370), the ECtHR had to consider whether Article 11 was infringed by (i) the requirement to notify the employer of the numbers of members to be balloted broken down by categories of jobs; and (ii) the outright ban on secondary action in the UK.

The Court ruled that the first complaint was inadmissible on the surprising ground that, after the grant of the injunction, the union was able to organise industrial action by means of a re-ballot.

With regard to the second complaint, it noted that it had on occasion found that restrictions on industrial action amounted to infringements of Article 11, and went on to rule that it did not need to confirm whether the right to strike was an essential element of Article 11, that the union had anyway been able to organise some limited industrial action and that the state's margin of appreciation was very wide where the restriction on the right was less intrusive.

At the end of last year, the ECtHR gave its latest judgment concerning the protection of the right to strike under Article 11 in the case of **Ognevenko -v- Russia**. In this case, the Court had to consider whether the imposition of restrictions on the right to strike for certain categories of Russian railway workers was a permissible interference with their rights under Article 11.

The Court sidestepped its controversial judgment in **RMT -v- UK** and seemed to continue where it left off with **Demir** by looking at whether the interference with the Article 11 right was justified because it corresponded with a "pressing social need" judged by reference to the "international consensus".

That consensus, expressed by the supervisory bodies of the International Labour Organisation (ILO) and the European Committee on Social Rights, was that restrictions on the exercise of Article 11 rights could be imposed on "essential" services such as the armed forces, the police or the state administration, but that, for this purpose, the railway sector was not to be treated as an essential service.

Because of this international consensus, the Court found that the imposition of restrictions on the Russian railway workers' rights under Article 11 could not be justified.

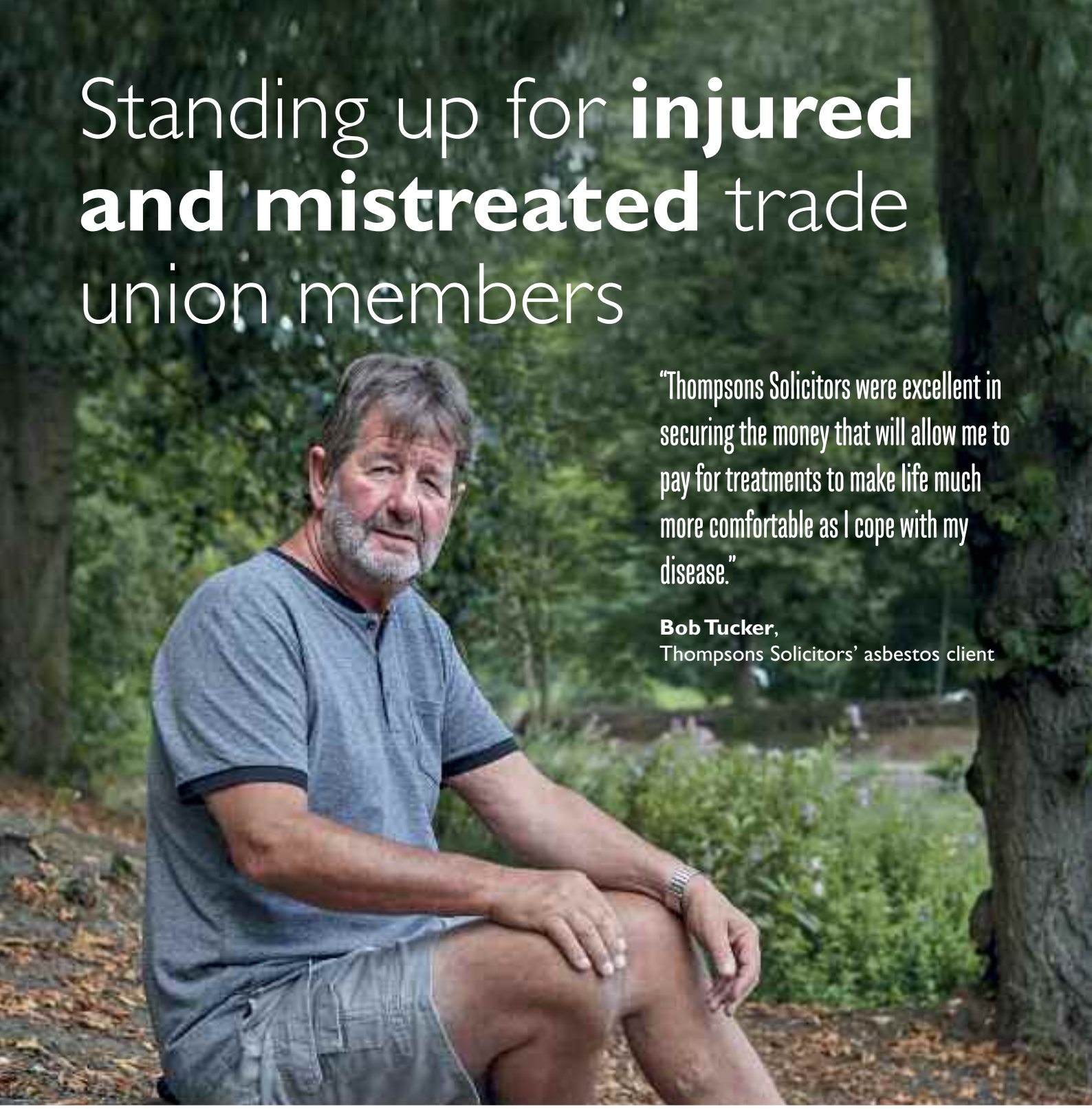
It's worth reminding ourselves that the ILO's Committee of Experts has already concluded that the application of section 3 of the Trade Union Act 2016, with its 40 per cent support threshold for industrial action in the rail and education sectors and their inclusion within the definition of "important public services", is inappropriate. In its view they "should not be regarded as 'essential' services".

Conclusion

The backdrop in the UK to these developments is of course the Trade Union Act 2016, with rights under Article 11 representing the most fundamental check by a Conservative government determined to dismantle the right to strike. Unions will no doubt continue to seek to expand upon the content of the right under Article 11, especially in relation to the right to strike.

However, this edition is written as the government gives renewed notice of its intention to repeal the Human Rights Act and withdraw from the European Convention, seen by many as a potential sop to the right of the Conservative party arising out of the Brexit negotiations.

Article 11 has come a long way as an effective means of protection of trade union rights in the UK. A threat to the Human Rights Act and the Convention is also a threat to trade union rights.



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Bob Tucker,
Thompsons Solicitors' asbestos client

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