



**E COURT OF APPEAL OF THE CAYMAN ISLANDS  
'PEAL FROM THE GRAND COURT  
DIVISION**

**CICA (Civil) Appeal No. 0007 of 2023  
(Grand Court Cause No. G 155 of 2022)  
(LACV 75 OF 2022)**

**BETWEEN:**

**(1) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS**

**(2) THE DEPARTMENT OF LABOUR & PENSIONS**

**APPELLANTS**

**AND:**

**SHELLIANN BUSH**

**RESPONDENT**

**Before:**

**The Rt. Hon. Sir John Goldring, President  
The Rt. Hon. Sir Alan Moses, Justice of Appeal  
The Rt. Hon. Sir Jack Beatson, Justice of Appeal**

**Appearances:**

**Mr. Michael Smith and Ms. Heather Walker, of the  
Attorney General's Chambers for the Appellants  
Mr. Rupert Wheeler of KSG for the Respondent**

**Heard:**

**30 August 2023**

**Draft circulated:**

**3 January 2024**

**Judgment delivered:**

**18 January 2024**

**JUDGMENT**

**Goldring JA (President):**

**Introduction**

1. By section 3 of the Labour Act (2021 Revision):

*“This Act does not apply to-*

*(a) the public service:*

*Provided that the Personnel Regulations...from time to time applying to the public service shall not prescribe or permit conditions of service which are less favourable to the employee than those required by this Act;*

*(b) charitable organisations; or*

*(c) churches.”*

2. Section 2 states that a “*charitable organisation*” means one accepted and registered as such by the Director.... [The] “*Director*” means the Director of Labour appointed under section 71(1).
3. It is agreed that the Pines Retirement Home (“the Pines”), at which for some ten years the Respondent was an employee, is a “*charitable organisation*” accepted and registered as such by the Director. The Respondent, who claimed she had been unfairly dismissed by the Pines, sought compensation through the Second Appellant. The first issue in this appeal is whether, when in response to her claim for unfair dismissal, the Second Appellant, stated (through a Senior Labour and Pensions Inspector), that it “*only has jurisdiction to address matters and entities covered under...[the Labour] Act...and [was] not able to investigate...[the Respondent’s] complaint [and]...this matter is now closed with the [Second Appellant]...*,” it had deprived of the Respondent of her “*right to a fair and public hearing in the determination of...her legal rights...by an independent and impartial court...*” as provided for by section 7 of the Bill of Rights, Freedoms and Responsibilities (the “BoR”) under Part 1 of the Cayman Islands Constitution Order 2009 (“the Constitution”). Walters J (Acting), having found a violation of the Respondent’s section 7 rights, held that she had been treated “*...in a discriminatory manner in respect of...[her] rights under...the Constitution,*” contrary to section 16 of the BoR, and that sections 3(b) (and (c)) of the Act are incompatible with the BoR. The first issue in this appeal is whether the judge was correct.
4. There is a second issue. In the light of his assessment of the facts, in findings that are accepted for the purposes of this appeal, the judge rejected the Respondent’s submissions that there had been substantive breaches of her rights to respect for her private and family life, and to freedom of conscience and religion contrary to sections 9 and 10 respectively of the BoR. By a Respondent’s Notice, which proceeded on the basis of submissions, firstly, that the Respondent was nevertheless treated in a discriminatory manner contrary to section 16 of the BoR in that

her treatment fell within the ambit of section 9, thereby engaging section 16 of the BoR and, secondly, that if the judge was wrong to find a breach of the Respondent's section 7 rights, there was a breach of her right to non-discrimination in that her treatment nevertheless fell within the ambit of section 7 of the BoR.

## The background

### *The agreement*

5. The Respondent began working as a receptionist for the Pines in October 2011. On 17 August 2017 her role changed to that of assistant day care co-ordinator. There was a written agreement of that date. It stated that her period of employment in that role was to be temporary until 10 December 2017, when her performance was to be reviewed. Paragraph 8 of the agreement, entitled "*Rules*," stated that:

*"The nature of the Pines' operations are such that it has made and will (acting through its Manager) make rules from time to time applicable to some or all of the employees... including...[the Respondent]. Such rules are designed to facilitate the efficient operation of The Pines as a nursing home and residential community for the elderly. Breach by the Employee of any rule may be considered by The Manager to constitute serious misconduct on the part of the Employee justifying immediate termination of this agreement."*

6. Paragraph 9.3 stated:

*"The Employee understand [sic] and accepts that as The Pines is a charitable organization, the Employee's entitlement hereunder is not subject to, and does not have the statutory protection afforded by the Labour Law."*

7. Although it was argued below that paragraph 9.3 constituted a waiver by the Respondent of any rights she might have under the BoR, the judge's rejection of that argument is not the subject of any appeal and I shall say no more about it.
8. By paragraph 7.1, the agreement was to terminate at the end of the specified period (that is on 10 December 2017), unless the Respondent was "*advised otherwise*." As I understand it, she

never was, but continued to work at the Pines until her employment was terminated on 22 November 2021.

*The dismissal*

9. Because of the COVID epidemic, the board of directors of the Pines required staff who had not received a COVID vaccination to have weekly (PCR) tests for COVID as from 19 July 2021. Failure to comply would result in suspension without pay. The Respondent, who was not vaccinated, states she complied with the requirement.

10. On 20 October 2021, the chief operating officer of the Pines issued a memo entitled “Mandatory COVID -19 Vaccination for Staff.” The memo stated:

*“As you are aware...COVID-19 is deadliest among older populations aged 55 or older, accounting for 93 per cent of COVID-19 deaths nationwide...The population that we serve is aged 55 to 90+.*

*The...Board of Directors has approved and implemented a COVID-19 Mitigation Plan, which include a mandate that all current and future employees must be vaccinated for COVID-19. All employees will receive new contracts commencing 20<sup>th</sup> November 2021 reflecting this mandate.*

*While we value the service that you provide to our residents, unfortunately your contract will not be renewed effective 21 November 2021 without confirmation of your having received the vaccination for COVID-19.*

*I trust that you appreciate our position in preserving a safe environment for our residents and staff.”*

11. In her first affidavit for the present proceedings, the Respondent stated (at §§11 and 12):

*“11. I felt this requirement was very unfair. I felt I was being pressured to get a vaccine that I was not sure I wanted to take. I was not clear about the effects and side effects of the vaccine. The Pines did nothing to explain these to me, but instead just insisted that it had to be taken. I expected at the very least that one of my superiors would speak to me about taking the vaccine, and give me alternative options. For instance, there were certain roles within the organisation that did not require frequent or close contact with*

*elderly residents...I felt I was being forced to choose between keeping the job I had been doing for 10 years, or taking a vaccine that I was unsure of.*

*12. The whole matter was made worse because I had serious religious reservations about taking the vaccine. I believe I should have had a freedom of choice about what goes into my body...I felt I was being discriminated against because the Pines didn't seem to care about whether I had religious reasons for not wanting to take the vaccine..."*

12. At paragraph 15 she stated that she feels she was discriminated against because of her religious reservations about taking the vaccine.
13. In her second affidavit, in response to a question from the First Appellant, the Respondent enlarged upon her religious beliefs. I shall summarise. She stated she is a born-again Christian. Her belief is central to her life. Her body is "*the temple of the Lord.*" It is "*common knowledge*" that a "*large number of Christians in the Cayman Islands objected to taking the COVID-19 vaccination.*" As a Christian, it is her firm belief that the vaccine was not properly tested and receipt of it into her body would put it at risk.
14. On 16 November 2021 the Respondent tested positive for COVID-19. She states she self-isolated. On 25 November 2021 she received by email a letter dated 22 November 2021. It stated:

*"Reference: Termination Effective 22<sup>nd</sup> November 2021*

*In view of your noncompliance [sic] and no regards [sic] under the provision of the Labor [sic] Law, your employment is hereby terminated effective today, 22<sup>nd</sup> November 2021. The Board of Directors agreed a severance package for you and once prepared I will contact you directly."*

15. In subsequent correspondence, the Pines alleged that the Respondent was dismissed for serious misconduct, having, as it was said, come into work on 16 November 2021 when feeling unwell, not having taken a PCR test. That resulted in other members of staff and residents being infected with one resident dying. The Respondent disputes that account.

16. Ultimately, the Respondent sought to bring proceedings under the Labour Act alleging unfair dismissal and claiming severance pay and compensation.

### **The Labour Act (2021 Revision)**

17. The Labour Act provides a comprehensive statutory scheme for compensation for, among other things, unfair dismissal. It is wide-ranging in its effect. Part V deals with severance pay, Part VII unfair dismissal. It is agreed that the remedies available to an employee under the provisions of the Labour Act are not available to an employee in a common law action for wrongful dismissal. The procedure under the Act is also simpler, speedier and cheaper.
18. The Act was first enacted in 1987. There were amendments or revisions in 1989, 1993, 1995, 1996, 2002 and 2001. Section 3(b) remained unaltered throughout. The Appellants have not sought to explain or justify the exclusion under section 3(b) (or, for that matter, under sections 3(a) and (c)), although I do note that both charities and churches are non-profit making bodies, as, broadly speaking, is the public service.
19. Sections 49-55 provide the framework for unfair dismissal.

#### *“Unfair dismissal: general*

49. (1) *This Part shall only apply to an employee who has —*

- (a) completed that person’s probation period; or*
- (b) in the case of an employee not employed on probationary terms, completed three months of continuous employment with that person’s employer...*

#### *Dismissal for good cause*

51 (1) *Subject to subsections (2) and (3), a dismissal shall not be unfair if the reason assigned by the employer for it is-*

- (a) misconduct of the employee within section 52(1);*
- (b) that it is under section 52(3), namely misconduct following receipt of a written warning;*
- (c) that it is under section 53(2), namely failure of the employee to perform that person’s duties in a satisfactory manner following receipt of a written warning;*
- (d) that the employee was redundant;*

- (e) *that the employee could not continue to work in the position that the person held without contravention...of a requirement of this or any other law;*
- (f) *some other substantial reason of a kind which would enable a reasonable employer to dismiss an employee holding the position which the employee held, and under the circumstances the employer acted reasonably.*
- (2) *Where the reason for the dismissal of the employee was that the person redundant...*
- ...*(3) The question whether an employer has acted reasonably for the purposes of this Part shall be determined in accordance with equity and the substantial merits of the case having regard to all the circumstances...*

*Initiation of proceedings*

54. (1) *Should any questions arise as to whether an employee has been unfairly dismissed, the employee may seek a resolution of the question by filing a complaint of unfair dismissal with the Director...*

*Remedies for unfair dismissal*

55. (1) *Where, upon a complaint of unfair dismissal, a Labour Tribunal has determined that the dismissal was unfair it may order the payment by the employer to the person dismissed of a sum of money by way of compensation for unfair dismissal.*
- (2) *In making an award of compensation under subsection (1), a Labour Tribunal shall have regard to —*
- (a) *the length of the continuous employment of the person dismissed immediately preceding the dismissal;*
- (b) *the likelihood of the person dismissed finding other comparable employment...*
- (4) *In the case of any action before any court in respect of a dismissal for which an award has been made under subsection (1), the court shall, in making any award of damages, take into account and deduct from the award of damages any sum awarded by a Labour Tribunal under subsection (1)."*

20. Part IX deals with administration. As I have said, section 71 provides for the appointment of a Director of Labour, among other appointments, who, by section 72 is "*charged with securing proper observance of the Act.*"

21. By section 74(1):

*“There are established Labour Tribunals for the purpose of hearing complaints from employers and employees.”*

22. Section 75 sets out the procedure to be followed when a complaint is made.

23. Sections 77 and 78 establish an Appeals Tribunal which may hear appeals by anyone “aggrieved” by a decision of the Labour Tribunal that a dismissal was fair. By section 79 there may be an appeal on a point of law to the Grand Court.

### **The Bill of Rights**

24. The proceedings were brought by the Respondent pursuant to section 26(1) of the BoR, by which:

*“Any person may apply to the Grand Court to claim that government has breached or threatened his or her rights and freedoms under the Bill of Rights and the Grand Court shall determine such an application fairly and within a reasonable time.”*

25. By section 23 of the BoR:

*“(1) If in any legal proceedings primary legislation is found to be incompatible with this Part, the court must make a declaration recording that the legislation is incompatible with the relevant section or sections of the Bill of Rights and the nature of the incompatibility.*

*(2) A declaration of incompatibility made under sub-section (1) shall not constitute repugnancy to this Order and shall not affect the continuation in force and operation of the legislation or section or sections in question.*

*(3) In the event of a declaration of incompatibility made under sub-section (1), the Legislature shall decide how to remedy the incompatibility.”*

26. The BoR is in similar, but not identical terms, to the European Convention on Human Rights (ECHR), which it is agreed applies to the Cayman Islands. By section 7(1) of the BoR, which reflects article 6 of the ECHR:

*“7(1) Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time...”*

Article 6 states that:

*“In the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”*

27. No point has been taken by the parties as between “*an independent and impartial court*” and “*an independent and impartial tribunal*.” (my emphasis)

28. As presently material, section 16 of the BoR, which reflects article 14 of the ECHR, provides:

*“(1) Subject to subsections (3), (4) and (6), government shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution.*

*(2) In this section, “discriminatory” means affording different and unjustifiable treatment to different persons on any ground such as sex, race, colour language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, property, birth or other status.*

*(3) No law or decision of any public official shall contravene this section if it has an objective and reasonable justification and is reasonably proportionate to its aim in the interests of defence, public safety, public order, public morality or public health.*

*(4) Subsection (1) shall not apply to any law so far as that law makes provision...*

*...(d) whereby persons of any such description of grounds as is mentioned in subsection (2) may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is objectively and reasonably justifiable in a democratic*

*society and there is reasonable proportionality between the means employed and the purpose sought to be realised.”*

Article 14 states that:

*“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as race, sex...or other status.”*

### **The decision below**

*The judge’s findings in respect of section 7(1)*

29. The first issue before the judge was whether the Act conferred upon the Respondent any substantive right to bring proceedings under the Act. In the leading authority of *Regina (Kehoe) v Secretary of State for Work and Pensions* [2006] AC 42 the House of Lords considered the scope of article 6 in the context of a mother’s complaint that the Child Support Act 1991 had deprived her of access to the courts to enforce her civil right to seek child maintenance directly from her husband. In a speech, with which Lord Hope, Lord Walker and Lord Brown agreed, Lord Bingham said (§7 and following):

*“7. The 1991 Act cannot in my opinion be interpreted as conferring any right on a parent in the position of Mrs Kehoe...the right which she previously had enjoyed under the former legislation was removed, and the right has been vested in [the Child Support Agency]...*

*8. This conclusion is not fatal to Mrs Kehoe’s argument, but is very damaging. For while the Strasbourg authorities are not bound by the classifications of national law, it is clear that the function of article 6 of the Convention is to guarantee certain important procedural safeguards in the exercise of rights accorded by national law and not ordinarily to require that particular substantive rights be accorded by national law...Thus, if national law conferred on Mrs Kehoe a right to recover child maintenance from her former husband, article 6 would guarantee her access to an impartial and independent court where her claim would be fairly determined. But article 6 does not require that she have such a right...*

*...10 Sympathetic though one must be with Mrs Kehoe...one cannot in my opinion ignore the wider principle raised by this case. That is that the deliberate decisions of representative assemblies should be respected and given effect so long as they do not*

*infringe rights guaranteed by the Convention. As they have made clear, it is not for Strasbourg institutions, under the guise of applying procedural guarantees in article 6, to impose legislative models on member states. Whether the scheme established by the 1991 Act is on balance beneficial to those whom it is intended to benefit may well be open to question, but it is a question for Parliament to resolve and not for the courts, since I do not consider that article 6 is engaged.”*

30. Lord Hope said (at §28):

*“...an accurate analysis of a claimant’s substantive rights in domestic law is an essential first step towards deciding whether he has, for the purposes of the autonomous meaning given to the expression “civil rights” by the Convention, a “civil right” such as will engage the guarantees in article 6.”*

31. The judge, while, as I understand it, accepting *Kehoe* correctly sets out the law he should follow in applying section 7, found that in the present case (unlike in *Kehoe*) the Labour Act did confer a substantive right upon the Respondent: in other words, that what Lord Hope described in terms of the essential first step, was surmounted. That being so, it was but a short step to finding that section 3(b) amounted to a procedural bar which prevented the Respondent from enforcing that right in breach of section 7. The judge’s reasoning as to how the Labour Act conferred such a substantive right appears to have been as follows.

32. The Labour Act conferred on all employees in the Cayman Islands distinctive rights not otherwise available under common law. Section 3(b) only referred to employers. It did not refer to employees. When a reference to an employee was intended (such as in section 49), that was in terms stated. The rights conferred by the Act on all employees were not intended to be extinguished. The Respondent was entitled to bring proceedings under the Act to enforce those right. The Second Appellant’s response did not suggest otherwise.

33. The judge concluded that the present case was analogous to that considered by the House of Lords in *Regina (Wright and others) v Secretary of State for Health and another* [2009] AC 739. In that case the court held that the provisional listing of a care worker under section 82 of the Care Standards Act 2000 as someone considered unsuitable to work with vulnerable adults, without giving a right to make representations, was incompatible with article 6. Baroness Hale, at paragraphs 19B and C of her speech, said:

*“[Article 6]...raises two questions. First, are we here concerned with a civil right at all? This is uncontroversial. As Lord Hoffmann explained in Runa Begum v Tower Hamlets London Borough Council (First Secretary of State intervening) [2003] 2AC 430, paras 28-31, the scope of the concept of civil rights has been greatly expanded from the sorts of disputes the framers of the Convention had in mind. But since 1981 it has been held to include the right to practice one’s profession...The right to remain in employment one currently holds must be a civil right, as too must the right to engage in a wide variety of jobs in the care sector even if one currently does not have one.”*

34. The judge said (§§53 and 54):

*“53 It seems to me that the provisional listing of care workers in Wright is not too dissimilar to the nature of the allegations made against the Petitioner in this case who was also working in the health care industry. In my view the allegations are serious, ultimately it was said that her conduct had led to the death of a resident. There is no evidence of the consequences of circumstances of the Petitioner’s dismissal in terms of her future employability and in my view to approach the matter on that basis would be wrong. In Wright Baroness Hale commented as follows:*

*“The main answer to this point, however, is that the scheme cannot assume that article 6(1) will never apply to provisional listing. There will undoubtedly be some cases, perhaps the majority, where it does apply. While the Strasbourg court has the luxury of looking back at the particular circumstances of a concrete case, and deciding whether there has been a breach of article 6 in that case, our national law has to devise a scheme which will be generally applicable before the particular impact of the decision is known. As Dyson LJ put it in the Court of Appeal, at para 88, “\_the question whether article 6 is engaged should not be decided by examining on a case-by-case basis the actual effect of provisional listing on an individual worker”.”*

*54 What is clear is that the Petitioner was unable to challenge the fairness of the reasons for her dismissal before the only body empowered to determine them, which was the Labour Tribunal. As Baroness Hale explained:*

*“28 However, in my view, Dyson LJ was entirely correct in his conclusion that the scheme as enacted in the Care Standards Act 2000 does not comply with article 6(1), for the reasons he gave. The process does not begin fairly, by offering the care worker an opportunity to answer the allegations made against her, before imposing upon her possibly irreparable damage to her employment or prospects of employment.”*

35. The judge, having found a breach of the Respondent’s section 7 rights, went on to consider whether she had been treated in a discriminatory manner contrary to section 16 of the BoR.

36. He concluded that (§95):

*“On that basis, I am of the view that it is appropriate to treat the Petitioner’s employment with the Pines as status for the purposes of §.16 and that such a finding falls well within the authorities on this point. As an employee, the Petitioner is within the category of persons who are also employees for the purpose of the Labour Act and are in a relevantly similar situation, albeit working for different types of employer. However, as already discussed, the Petitioner worked for an employer within §. 3(b) of the Labour Act which without any apparent legitimate aim or reasonable relationship of proportionality means that she has had her rights under §.7 infringed. In my view that treatment falls within the four propositions as set out in...[Carson v United Kingdom (2010 51 EHRR 13)] means that the Petitioner has been discriminated against for the purposes of §. 16 of the Bill of Rights.”*

### **Was the judge right?**

#### *The Respondent’s argument*

37. Mr Wheeler on behalf of the Respondent submitted the judge was right for the reasons he gave. He submitted that it is at least arguable that there is a substantive civil right to claim for unfair dismissal under Cayman law which is sufficient to bring section 7(1) into play. The legislature could have provided for the unfair dismissal provisions to apply to employees, if that had been the intention. It could have excluded charity employees from the provisions. The present is unlike a case such as *Kehoe*. The observation of Baroness Hale in *Wright* to the greatly

extended scope of the concept of civil rights and the right to remain in employment, submitted Mr Wheeler, was in point.

38. Although in his skeleton argument Mr Wheeler referred to several unincorporated international provisions as supporting his contention that there is in the Cayman Islands a clear basis for a right to protection from unfair dismissal, he accepted in argument that those provisions cannot create a substantive right. He did, however, rely upon the provision in the preamble to the Constitution, which speaks in terms of the Cayman Islands being “*a country with a vibrant diversified economy which provides full employment,*” as supporting his submission of the existence of a right to protection from unfair dismissal.
39. Mr Wheeler also referred to a number of ECtHR cases which, for present purposes, I need not refer to.

### **Discussion and conclusion**

40. It seems to me the issue on this aspect of the appeal is a straightforward matter of statutory interpretation. Does the Labour Act confer on the Respondent a substantive civil right vindication of which is procedurally barred by section 3(b) as the judge found, or, when excluding application of the Act to charitable organisations, must the legislature have intended to include those employed by the organisations?
41. The Labour Act creates rights for employees which did not previously exist. Section 3 excludes, among other bodies, charitable organisations from the provisions of the Act. I find it difficult to accept the legislature could have intended to exclude such bodies from the application of the Act, while at the same time conferring on employees of those same bodies the rights which the legislation was creating. I cannot, in other words, accept, as the judge found, that it was Parliament’s intention to exclude employers from the provisions of the Act but at the same time create rights for their employees. That would not seem to me to be logical. The inexorable consequence of excluding specific employers from the application of the Act must, it seems to me, be to exclude employees of those employers. Moreover, it is implicit in the wording of the proviso to s.3(a) that that is so. The proviso requires that the conditions of service of those employed in the public service must not be less favourable than those required by the Act. That assumes that the non-application of the Act to the public service includes its non-application to employees of the public service.

42. In short, I do not accept, as the judge found, that section 3 is a procedural measure the effect of which is to bar those employed by the bodies named from accessing remedies otherwise available to them under the Labour Act. In my view, the effect of section 3 is that employees of the organisations named have no such right. That inevitably means that there is no substantive civil right upon which section 7 can bite and the appeal in that respect must be allowed.

#### **The judge's decision in respect of the claims under sections 9 and 10 of the Bill of Rights**

43. As I have said, in findings which the Respondent does not seek to challenge in this appeal, the judge rejected her submissions that there had been violations of her substantive rights with respect to her private and family life and freedom of conscience and religion contrary to sections 9 and 10 respectively of the BoR. Those sections reflect, and are not materially different, from articles 8 and 9 of the ECHR. Before turning to the argument advanced by the Respondent's Notice, I should briefly refer to the judge's findings in respect of those submissions.

44. By section 9:

*“Government shall respect every person's private and family life...”*

45. By section 10:

*“(1) No person shall be hindered by government in the enjoyment of his or her freedom of conscience.*

*(2) Freedom of conscience includes freedom of thought and of religion or religious denomination or belief...”*

46. Having referred to the case of *Royal Cayman Islands Police Association v Commissioner of the Royal Cayman Islands Police Service and Attorney General* [2019 1 CILR 107], to which I shall shortly come, the judge concluded there was no basis satisfactorily to assess the context within which the Respondent was dismissed. As he put it at §§77-8 of his judgment:

*“The Petitioner's First and Second Affidavits (upon which she was not cross-examined) whilst providing helpful background do not in my view provide sufficient reliable*

*evidence upon which the court can draw the conclusion that the primary issues relating to her private life; religious beliefs in relation to vaccines, damage to her personal and professional reputation. The First Affidavit mentioned religious beliefs briefly. The Second Affidavit deals with them in more detail but in what seems to me to be a very generic and impersonal way. There is no evidence of any weight in relation to any damage to the Petitioner's personal or professional reputation.*

*Therefore, although I set out the parties' arguments in some detail above, I did so in order to illustrate what seems to be the evidential threshold which I do not find that the Petition has crossed. The Petitioner's claim in relation to a breach of Article 8/§.9 is therefore dismissed. For the same reasons, her claim that her dismissal engaged Article 9/§.10 (conscience and religion) is also dismissed."*

### **The Respondent's Notice**

47. By her notice of 5 June 2023, the Respondent gave notice under Rule 13(1) of the Court of Appeal Rules (2014 Revision), that she would contend "*in the alternative*" that the court's order should be upheld or varied for the following reasons:

*"1. The Respondent's section 16 Bill of Rights (BOR) right to non-discrimination was breached regardless of whether or not her section 7 right to a fair trial was breached or engaged...*

*...the grounds on which the Respondent seeks to rely are as follows:*

*1. The...judge held that the Respondent's section 16 BOR right to non-discrimination had been breached because her section 7 BOR right to a fair trial had been breached...*

*2. Even if, contrary to the Respondent's case, the Court holds that there has been no breach of the Respondent's section 7 BOR right to a fair trial, the Court should nevertheless hold that there was a breach of the Respondent's section 16 BOR right to non-discrimination.*

*3. This is because the subject matter of the disadvantage (i.e. the ability for most other employees to challenge a dismissal from employment and claim damages for unfair dismissal) comprises one of the ways that the state gives effect to rights, including, but not limited to the rights assured by section [sic] 7, 9, and 10 BOR..."*

48. No issue has been taken by the Appellants regarding the Notice.

*An outline of the Respondent's argument*

49. Although the Respondent's Notice referred to sections 7, 9 and 10 of the BoR, both in his skeleton argument and oral submissions, Mr Wheeler (understandably) restricted his argument to sections 7 and 9. The Appellants responded accordingly. I shall approach the issues in a similar way.
50. Mr Wheeler accepted, that section 16 (like article 14) did not provide a freestanding right to non-discrimination. He accepted that if the judge was wrong in respect of his finding regarding a civil right and consequential breach of section 7, and given the judge's unchallenged findings in respect of section 9, there was no infringement of the Respondent's substantive rights under those sections and therefore of section 16. In broad terms, Mr Wheeler's submission was that the State, although not obliged to do so, chose to legislate to provide citizens of the Cayman Islands generally with the right to compensation for unfair dismissal under the Labour Act, and did so in such a way as unjustifiably to exclude by section 3(b) those, such as the Respondent, who were employed by a charitable organisation. That exclusionary provision under section 3(b) fell within the ambit or scope of the protection provided by sections 7 and/or 9 of the BoR and discriminated against her contrary to section 16.

**The authorities**

51. There have been a number of cases, both before the United Kingdom and the Strasbourg courts regarding the test in relation to ambit.
52. As Lord Stephens said when giving the judgment of the Judicial Committee of the Privy Council in an appeal from this court in *Royal Cayman Islands Police Association and others v Commissioners of the Royal Cayman Islands Police Service and another* [2021] UKPC 21, ("RCIPS"), the leading United Kingdom authority in relation to the test as to what is within the ambit of a substantive provision of the ECHR or its protocols is *M v Secretary of State for Work and Pensions* [2006] 2 AC 91. At §4 of *M*, Lord Bingham said that:

*"It is not difficult when considering any provision of the Convention, including Article 8...to identify the core values which the provision is intended to protect. But the further a situation is removed from one infringing those core values, the weaker the connection becomes until a point is reached when there is no meaningful connection at all. At the*

*inner extremity a situation may properly be said to be within the ambit or scope of the right, nebulous though those expressions necessarily are. At the outer extremity, it may not. There is no sharp line of demarcation between the two. An exercise of judgment is called for.*

53. Lord Walker said that (§60):

*“Though there is no simple bright-line test, general guidance can be derived from the Strasbourg case law, and it does not in my opinion lead to the conclusion that even a tenuous link is sufficient. Nor does it lead to the conclusion that precisely the same sort of approach is appropriate, whatever the substantive article is in point. That is particularly important, I think, in considering the ambit of article 8.”*

54. *In re McLaughlin* [2018] UKSC 48 concerned the rejection of a mother’s claim for a widowed parent’s allowance on the grounds that the mother was unmarried. In a judgment with which the majority of court agreed, Baroness Hale referred to the judgment of Sir Terence Etherton MR in *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2018] 2 WLR 1063 in which he said that:

*“The claim is capable of falling within article 14 even though there has been no infringement of article 8. If the state has brought into existence a positive measure which, even though not required by article 8, is a modality of the exercise of the rights guaranteed by article 8, the state will be in breach of article 14 if the measure has more than a tenuous connection with the core values protected by article 8 and is discriminatory and not justified. It is not necessary that the measure has any adverse impact on the complainant in a positive modality case other than the fact that the complainant is not entitled to the benefit of the positive measure in question.”*

55. Having observed that the core values test “*may turn out*” to be too restrictive, Baroness Hale said that (§22):

*“Widowed parent’s allowance is a positive measure which, though not required by article 8, is a modality of the exercise of the rights guaranteed by article 8. It has a more than tenuous connection with the core value protected by article 8: securing the*

*life of children within their families is among the principal values contained in respect for family life.”*

56. The issue in *A & B (Appellants) v Criminal Injuries Compensation Authority and another (Respondents)* [2021] UKSC 27, a case upon which Mr Wheeler placed considerable reliance, was whether the exclusionary rule by which all those with previous convictions were automatically disqualified from receiving an award under the Criminal Injuries Compensation Scheme (“CICS”) amounted to a breach of article 14 when read in conjunction with article 4 of the ECHR (the prohibition of slavery and forced labour) in the cases of two brothers who were trafficked from Lithuania to the United Kingdom and subjected to labour exploitation and abuse.
57. In his judgment, with which the other members of the court agreed, Lord Lloyd-Jones set out the position in the following way (at §23):

*“Article 14 ECHR is not a freestanding prohibition of discriminatory treatment. It prohibits discrimination only in the context of the rights and freedoms set out in the ECHR. As a result, it is necessary to determine whether the subject matter of the complaint is sufficiently closely connected with one of the substantive ECHR rights so as to fall within its ambit or scope. In the present case the appellants maintain that the exclusionary rule...of the CICS constitutes unjustified discrimination against them contrary to article 14 when read in conjunction with article 4 ECHR. In order to satisfy this requirement, they do not need to establish that the measure violates or interferes with their rights under article 4. They need only to establish that it is sufficiently closely linked to article 4 to bring article 14 into play...”*

58. Lord Lloyd-Jones referred (§38) to the “*particularly illuminating*” judgment of the President of the ECtHR, Judge Sir Nicholas Bratza in *Zarb Adami v Malta* 2006, in which, at O-17, he said:

*“The central question which arises is what constitutes ‘the ambit’ of one of the substantive articles...It has been argued that ‘even the most tenuous links with another provision in the Convention will suffice’ for article 14 to be engaged...Even if this may be seen to be going too far, it is indisputable that a wide interpretation has consistently been given by the Court to the term ‘within the ambit’. Thus, according to the constant case law of the Court, the application of article 14 it only does not presuppose the*

*violation of one of the substantive Convention rights or a direct interference with the exercise of such a right, but not does not even require that the discriminatory treatment of which complaint is made falls within the four corners of the individual rights guaranteed by the article. This is best illustrated by the fact that article 14 has been held to cover not only the enjoyment of the rights that states are obliged to safeguard under the Convention but also those rights and freedoms which the state has chosen to guarantee, even if in doing so it goes beyond the requirements of the Convention... This would indicate in my view that the ‘ambit’ of an article for this purpose must be given a significantly wider meaning than the ‘scope’ of the particular rights defined in the article itself...”*

59. Lord Lloyd-Jones concluded (§39):

*“In the present case, while the CICS is not limited to victims of trafficking, it extends its benefits to them. In the preparation of the scheme specific attention was paid to its application to victims of trafficking and provisions included in order to accommodate them... The United Kingdom, in applying the scheme to victims of trafficking, has chosen to confer a degree of protection to promote their interests. I consider that in doing so it is applying a measure which has more than a tenuous connection with the core value of the protection of victims of trafficking under article 4. The rights voluntarily conferred in this way under the scheme on victims of trafficking fall within the general scope of article 4 and must, therefore, be made available without discrimination.”*

60. Lord Reed PSC, with whom all the other members of the Supreme Court agreed, summarised the position in *R (SC) v Secretary of State for Work and Pensions* [2022] A.C.233 (at §37 and 39) in the following way:

*“37. The general approach adopted to article 14 by the European court has been stated in similar terms on many occasions, and was summarized by the Grand Chamber in the case of Carson v United Kingdom (2010) 51 EHRR 13, para 61... For the sake of clarity, it is worth breaking down that paragraph into four propositions:*

*(1) "The court has established in its case law that only differences in*

*treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of article 14."*

*(2) "Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations."*

*(3) "Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."*

*(4) "The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background."...*

*39...according to the case law...the alleged discrimination must relate to a matter which falls within the "ambit" of one of the substantive articles. This is a wider concept than that of interference with the rights guaranteed by those articles, as Judge Bratza explained in his concurring judgment in Adami v Malta (2006) 44 EHRR 3, para 17."*

61. Finally, as I have already touched upon, the question of ambit was recently considered in an employment related dispute by the Judicial Committee of the Privy Council in *RCIPS* on appeal from this court. Other than stating the case was employment-related and was between an individual and the State, no more need be said about the facts.
62. Lord Stephens, having said that the approach of Lord Bingham in *M* was appropriate, said that (§58-9):

*"58...The closer the facts come to the protection of the core values of the substantive article, the more likely it is that they fall within its ambit..."*

*59...the Board considers that ambit should be considered by reference to a value judgment as to the proximity between the facts at issue to the core values which are engaged in respect of an employment-related dispute between an individual and the*

*State, as protected by section 9 of the Constitution (and by its equivalent, article 8 ECHR). The linkage must be more than tenuous for the facts at issue to be within the ambit of the substantive provision.”*

63. Having referred to Sir Nicholas Bratza’s judgment in *Adami*, Lord Stephens said that (§64):

*“...a wide interpretation has consistently been given by the ECtHR to the term “within the ambit” which interpretation does not even require the discriminatory treatment of which complaint is made to fall within the four corners of the individual rights guaranteed by the article. Furthermore, ambit must be given a significantly wider meaning than scope. However, though a wide interpretation is appropriate it is still necessary to consider the phrase “within the ambit” in the specific context of the article in question. In *Adami* the specific context was article 4 ECHR whereas in this appeal the specific context is an employment-related dispute between an individual and a State involving section 9 of the Constitution informed by the equivalent provision of the ECHR, namely article 8. Accordingly, an analysis as to what is protected by article 8 in relation to an employment-related dispute between an individual and a State enables identification of the relevant core values in relation to which there should be a value judgment as to whether a personal interest close to that core is infringed or undermined.”*

64. In seeking to identify the relevant core values regarding article 8 in the context of an employment dispute between the State and an individual, Lord Stephens considered three decisions of the ECtHR (*Denisov v Ukraine* (Application 76639/11), *JB and others v Hungary* (Application no. 45434/12) and *Novakovic v Croatia* (Application no. 73544/14)). Although none of the cases concerned the ambit of article 8 as opposed to its applicability, Lord Stephens said that (§65):

*“...consideration of ambit must be informed by the content of the substantive right under article 8, which in this appeal is confined to employment-related disputes between an individual and the State.”*

65. In *Denisov* the ECtHR considered the scope of private life in the context of employment related disputes. Lord Stephens summarised the court’s conclusions in the following way (at §70):

“70. The court held (at para 115) that employment-related disputes are not per se excluded from the scope of “private life” within the meaning of article 8 ECHR. However, “there are two ways in which a private-life issue would usually arise in such a dispute: either because the underlying reasons for the impugned measure (...the reason-based approach) or- in certain cases- because the consequences for private life (...the consequence-based approach)”. So, for an employment-related dispute between an individual and a State to come within article 8, ordinarily the facts at issue have to fall within either the reason-based approach or the consequence-based approach.

71 At paras 103-6 the ECtHR considered the reason-based approach citing examples from its case law. In *Smith and Grady v the United Kingdom*, (Application nos. 33985/96...27 September 1999), the reason for the measure was the applicant’s sexual orientation. In *Ozpinar v Turkey* (Application no. 2099904, 19 October 2010) the reason for the measure targeted aspects of the applicant’s private life, in particular her close private relationships, the clothes and make-up she wore and the fact she lived separately from her mother. In *Sodan v Turkey* (Application no. 18650/05, 2 February 2016) the measure amounted to a disguised penalty and had been prompted by reasons relating to the applicant’s beliefs and his wife’s clothing...”

66. Having referred to other authority, Lord Stephens said (§72):

“The ECtHR held (para 116) that “If the consequence-based approach is at stake, the threshold of severity...assumes crucial importance. It is for the applicant to show convincingly that the threshold was attained in his or her case”. The ECtHR stated that “it will only accept that Article 8 is applicable where these consequences are very serious and affect his or her private life to a very significant degree.”

67. At §81 Lord Stephens set out the core values in relation to an employment-related dispute between an individual and the State which are protected under article 8 in the following terms:

“The overriding core value in the Convention is respect for human dignity and human freedom: see *Pretty v United Kingdom* (2002) 35 EHRR1, para 65. In addition to the overriding core value of human dignity and human freedom the core values in relation to an employment-related dispute between an individual and a State which are protected under article 8 can be discerned from *Denisov* and from *JB and others v Hungary*. In *Denisov* the core values are protection from measures whose reasons are

*primarily, though not exclusively, connected with a suspect ground, see the cases referred to at para 71 above or from measures whose consequences are “very serious” affecting private life to “a very significant degree”...In the context of an employment-related dispute between an individual and the State the reasons under the reason-based approach are limited and severity is a necessary component of a consequence-based approach. Those limitations must affect the assessment of whether the material facts are within the ambit of that aspect of article 9 ECHR.”*

## Discussion

68. There was no requirement under either section 7 or section 9 of the BoR for the State to set up a mechanism through which a dismissal could be challenged as not being “*for good cause.*” It chose to do so by means of the Labour Act. In consequence of section 3(b) of the Act, the Respondent has not been able to access that mechanism and has been treated differently from others in the same position on the basis of her status as the employee or former employee of a charitable organisation. That was the sole reason why she was not able to bring a claim for unfair dismissal. No justification has been advanced to support that difference in treatment. The issue therefore is whether in setting up that mechanism the State infringed section 16 of the BoR when read in conjunction with either section 7 or section 9 or both.
69. As Lord Stephens said in *RCIPS* (at §§ 59 and 60), ambit involves a value judgment as to the proximity between the facts at issue to the core values which are engaged. The linkage must be more than tenuous for the facts at issue to be within the ambit of the provision. In the present context, that requires, as Ms Walker on behalf of the Appellants submitted, examination of the unfair dismissal provisions of the Labour Act and their proximity to the core values which sections 7 and 9 of the BoR were respectively designed to protect.

## Section 7 of the BoR

### *The Respondent’s argument*

70. Mr Wheeler submitted it is a core value of section 7 that in a dispute in which the State is involved, respect must be given to the need for a fair and independent determination of the rights provided for. By its provisions in the Labour Act, the State recognised that. However, without legitimate reason it prevented certain employees, such as the Respondent, from having the benefit of a fair and independent determination of any claim. There is a sufficient

connection between the State's denial to the Respondent of the means of accessing a fair and independent determination of her claim for unfair dismissal, and the core value of section 7, as bring her within its ambit, submitted Mr Wheeler. He drew an analogy between the present case and *A & B*.

### *The Appellants' argument*

71. While Ms Walker agreed with the Respondent that the ability of certain employees to bring a claim for unfair dismissal before the Labour Tribunal constitutes one of the ways in which the State demonstrates its respect for the right to a fair hearing, she submitted it does so where the employee has an underlying right not to be dismissed otherwise than for good cause. However, where, as here, the Respondent has no such right, section 7 cannot create one. Section 7 is not there to confer an unlimited right to a fair hearing in all contexts. It is a procedural guarantee of a fair hearing in the determination of such rights which exist in the domestic legal order. The reliance upon *A & B*, submitted Ms Walker, is misplaced. The ECtHR having found that people trafficking fell within the scope of the prohibition on forced labour, it was unsurprising that the Supreme Court made the connection between a compensation scheme which extended to victims of trafficking and the core values that article 4 is designed to support, namely the protection of victims of trafficking. That is far from the present case. The core value that section 7 is intended to protect is the procedural right of access to an independent and impartial tribunal to enforce an underlying right found elsewhere. That is a long way from the rights created by the Labour Act, which is about protection of employees in the workplace. The Respondent's situation does not fall within the ambit of section 7.

### **My conclusion in respect of section 7**

72. In my view Ms Walker is right.
73. Section 51 of the Labour Act requires that dismissal be "*for good cause*." If it is not, section 55 sets out the remedies available to the Labour Tribunal to enforce the employee's right not otherwise to be dismissed. While as Mr Wheeler submitted, these provisions constitute one of the ways in which the State demonstrates respect for a fair and independent hearing, they only do so where the employee has an underlying right not to be dismissed other than for good cause. The Respondent does not have such an underlying right. Section 7 cannot create one. The protection afforded by the section does not confer an unlimited right to a fair hearing in all

contexts. It is a procedural guarantee of a fair hearing in the determination of whatever substantive right exists in the domestic legal order, as Ms Walker submitted. That is the core value that section 7 seeks to protect. There is in my view little connection between that core value and a statutory scheme designed to protect employees from being dismissed without good reason. That is very different from the situation in *A & B*.

74. Accordingly, it cannot be said there is a sufficient connection between the core value of section 7 and legislative provisions concerning the protection of employees so as to bring the Respondent within the ambit of section 7.

### **Section 9 of the BoR**

#### *The Respondent's argument*

75. As I understand Mr Wheeler's submissions, they can be summarised in the following way. Just as in *McLaughlin* a widowed parent's allowance was a positive measure with a more than tenuous connection with the core values protected by article 8, the unfair dismissal provisions were a positive measure with a more than tenuous connection with the core values of section 9. The protection of a person's private life and family life under section 9 includes as a core value the protection of his or her right not unfairly to be dismissed in the sort of circumstances set out by the Board in *RCIPS*. The State, by its introduction of the statutory remedies for unfair dismissal under the Labour Act, is showing respect for that section 9 right. Although in the light of the judge's findings the Respondent cannot argue her dismissal fell directly within the ambit of section 9, to deny her the benefit of the remedies provided for by the Labour Act was sufficient to bring her within the ambit of section 9.

#### *The Appellant's argument*

76. While Ms Walker accepted that employment-related disputes are not of themselves excluded from the scope of 'private life,' she submitted that there is too tenuous a connection between the existence of a statutory remedy for unfair dismissal and the core values section 9 is designed to protect. Ms Walker emphasised that the circumstances in which a private-life issue is engaged in an employment related dispute are limited, as the Board's judgment in *RCIPS* makes clear. She submitted that whilst a statutory remedy for unfair dismissal may ultimately protect employees from dismissal on suspect grounds or with certain consequences, so as to engage section 9, the statutory remedy is principally there to protect employees in their relationships

with their employer, not to further employees' enjoyment of a private life. The Labour Act is not expressly designed to protect employees from dismissal for reasons intrinsically connected with their private life.

### **My conclusion in respect of section 9**

77. Again, I agree with Ms Walker.

78. There are significant differences between the present case and those such as *A & B* and *McLaughlin* upon which Mr Wheeler placed such reliance. In *A & B*, the context of the exclusionary provision was domestic legislation seeking specifically to benefit the victims of human trafficking in circumstances where such trafficking was, in effect, prohibited by article 4 of the ECHR. In *McLaughlin*, the context was an exclusionary provision in domestic legislation seeking directly to benefit “*the life of children within their families*,” a “*principal value*” of article 8. The relationship between the provisions of the Labour Act and section 9 of the BoR is, it seems to me, of a different order.

79. As the judgment of the Board in *RCIPS* makes clear, the circumstances in which a private-life issue may arise under section 9 of the BoR in an employment context in which the State is involved is limited. As Lord Stephens said (§81 of *RCIPS*):

*“...In the context of an employment-related dispute between an individual and the State the reasons under the reason-based approach are limited and severity is a necessary component of a consequence-based approach. Those limitations must affect the assessment of whether the material facts are within the ambit of that aspect of article 9 ECHR.”*

80. As Ms Walker submitted, the Labour Act is primarily a provision intended to protect the relationship between employer and employee. While a statutory remedy for unfair dismissal may, in the final analysis, protect employees from dismissal on suspect grounds or with certain consequences, so as to engage section 9, the Labour Act is principally intended to protect the relationship between employer and employee, not to protect employees' enjoyment of a private life. It is not designed to protect employees from dismissal for reasons intrinsically connected with their private life. While the State's obligation of respect for private life under section 9 of the BoR does encompass the employment relationship in the limited way set out in the authorities, it goes too far to say (in the words of Sir Nicholas Bratza in *Zarb Adani*) that the

State has, by enacting the Labour Act, chosen to “*safeguard those rights and freedoms [which, under section 9 of the BoR] it had chosen to guarantee...*” or, in the words of Baroness Hale in *McLaughlin*, that the Labour Act is “*a positive measure which, though not required by [section 9 of the BoR] ..., is a modality of the exercise of the rights guaranteed by [section 9].*” The link between the core value protected by section 9 of the BoR and the general protection afforded by the Labour Act is in my view but tenuous and insufficient to engage section 9. The mere fact that the Labour Act may, in some cases be a means whereby rights under section 9 are vindicated does not lead to the conclusion that the Act is sufficiently closely connected with section 9 as to fall within its ambit. Accordingly, there has been no infringement of section 16 of the BoR.

81. In the result, I would allow the Appellants’ appeal and refuse the Respondent’s application under her Notice to make a further order. If not agreed, any submissions on costs should be made in writing within 21 days of the judgement being handed down.

**Beatson JA**

82. I agree.

**Moses JA**

83. I also agree.