IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No. G 155 of 2022
(LACV75 OF 2022)

IN THE MATTER OF SS. 23 & 26(1) OF THE CONSTITUTION AND IN THE MATTER OF O.77A GCR

BETWEEN

SHELLIANN BUSH

Petitioner

-and-

(1) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

First Respondent

(2) THE DEPARTMENT OF LABOUR AND PENSIONS

Second Respondent

IN CHAMBERS AS OPEN COURT

Appearances:	**Mr Rupert Wheeler of KSG Attorneys for the Plaintiff** **Mr Michael Smith, Senior Crown Counsel and Ms Heather Walker, Crown Counsel, Attorney General's Chambers for the Respondents.**
Before:	**Hon Mr Justice Alistair Walters (Actg.)**
Heard:	**1 March 2023**
Draft circulated:	**4 April 2023**
Judgment Delivered:	**25 April 2023**

HEADNOTE

Distinction between unfair dismissal (ss 49-55 Labour Act) and wrongful dismissal - Separate remedies. Jurisdiction of Grand Court limited to wrongful dismissal - Claim for unfair dismissal by

employee of a Cayman Islands charity not investigated by Labour Tribunal because lack of jurisdiction arising from s 3 Labour Act which provides that provisions of Labour Act do not apply to charities. Whether lack of access to the Labour Tribunal constituted a breach of the Petitioner's rights under ss 7, 9, 10 and 16 of the Cayman Islands Constitution Order 2009, Part 1, Bill of Rights, Freedoms and Responsibilities. Whether s3 Labour Act incompatible with Bill of Rights. Whether the Petitioner waived her right to bring proceedings by virtue of provision in her contract of employment.

JUDGMENT

1. The underlying facts of this case are relatively straightforward and are set out in the Petitioner's affidavit dated 12 July 2022 (the "First Affidavit")[1]. The Petitioner is a Caymanian who was employed by the Pines Retirement Home, a Cayman Islands non-profit charitable organization established to provide residential accommodation for the elderly (the "Pines").

2. Her employment with the Pines started on 3 October 2011 under the terms of a contract dated 10 October 2011 (the "2011 Contract"). The Petitioner's initial role was as receptionist. On 17 August 2017 her role changed to Assistant Day Care Coordinator, and she signed a new contract dated 17 August 2017 (the "2017 Contract"). On 22 November 2021 the Petitioner's employment with the Pines was terminated. The reasons for that are succinctly set out in the Petitioner's First Affidavit and I have set them out below[2]:

> *"8. On the 14th July 2021, I received a letter from The Pines, titled "Weekly PCR Test for Non-Vaccinated Staff" (SB1/1). The letter stated that the Pines' Board of Directors had implemented a weekly PCR COVID-19 test for staff that had not received a vaccination. It stated that from Monday the 19th July 2021, all staff in that position had to submit a weekly test starting on Tuesday the 20th July 2021. Failure to comply would result in suspension without pay. If the staff member became vaccinated, the testing policy would no longer apply.*
>
> *9. I was not vaccinated at this time. In line with the policy, I began to take the weekly PCR tests on Tuesdays.*
>
> *10. On the 20th October 2021, The Pines issued a memo titled "Mandatory COVID-19 Vaccination for Staff" ("the 20th October 2021 Memo") (SB1/2). It stated*

[1] They are amplified in the Petitioner's second affidavit dated 24 February 2023 (the "Second Affidavit").
[2] From the First Affidavit.

that The Pines' Board of Directors had approved and implemented a COVID-19 Mitigation Plan, which "included a mandate that all current and future employees must be vaccinated for COVID 19". It stated further that all employees would receive new contracts starting the 20th November 2021 to reflect the mandate. The letter concluded by stating that "your contract will not be renewed effective 21st November 2021 without confirmation of your having received the vaccination for COVID-19".

11. *I felt that this requirement was very unfair. I felt that 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 the elderly residents. However, no one reached out to me to discuss this sensitive issue. I felt that I was being forced to choose between keeping the job that 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 that I should have had a freedom of choice about what goes into my body. The Pines didn't give any thought to these issues or my concerns. I felt that 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.*
13. *I also knew that there was no government requirement that I had to take the vaccine. There was nothing in my contract that required me to take it.*
14. *I found the whole issue very stressful. I was worried about my future and did not know what to do. I needed my job to support myself and my daughter. However, I realised that the policy as stated in the 20th October 2021 Memo gave me a month, until the 20th November 2021, to consider what I was going to do and whether I would take the vaccine. I wanted to use that time to reflect carefully over what I was going to do.*
15. *On Tuesday the 16th November 2021, I took my weekly PCR test as normal. Unfortunately, the result was positive. This meant that I had to follow the government rules and go into isolation at home. I immediately informed my supervisor Jusene Brown and emailed the positive result to her. I did this because I was expected to be at work the following day. At this time, my working hours were Monday to Friday, 0830 to 1730.*
16. *Since I had gone into isolation, I assumed that I would be given additional time to get the vaccination. After all, I could not receive it until I was released, and it could have been a number of weeks before I tested negative.*
17. *I was therefore very surprised when I received a further letter from the Pines by email on 25th November 2021. The letter, dated the 22nd November 2021, was titled "Termination Effective 22nd November 2021" (SB1/3). It said that:*

> *"[i]n view of [my] noncompliance and no (sic) regards under the provision of the Labor Law, your employment is hereby terminated*

> *effective today, 22nd November 2021. The Board of Directors agreed a severance package for you and once prepared I will contact you directly".*

3. It was also alleged by the Pines that the Petitioner had come into work on 16 November 2021 despite feeling unwell having not taken a PCR test and subsequently testing positive. It was further alleged that her conduct had resulted in other staff members and resident being infected, and caused the death of a resident[3].

4. The Petitioner did not receive what she regarded as a satisfactory justification from the Pines for her dismissal and instructed her attorneys, KSG to assist her in bringing a claim under the Labour Act (2021 Revision) (the "Labour Act") for severance pay, compensation for unfair dismissal and a claim for damages for wrongful dismissal. KSG wrote to the Pines on 17 February 2022 setting out her position. In response, the Pines alleged that the Petitioner had been dismissed for serious misconduct. The Petitioner is firmly of the view that she was unfairly dismissed and also discriminated against because of her religious beliefs about taking the vaccine[4].

Severance pay, unfair and wrongful dismissal

5. Severance pay is compensation payable to an employee when their employment is terminated. It is provided for in ss. 40-46 of the Labour Act. §§ 40 and 41 state:

> *"Right to severance pay generally*
> *40. (1) Every employee whose term of continuous employment with an employer and any predecessor-employer has in aggregate exceeded one year is entitled to receive, in addition to any other payments which may be due to that employee, upon termination of that person's employment by that person's employer for any reason, other than a dismissal which is within paragraph (a), (b) or (c) of section 51(1), severance pay, being payment in money calculated in accordance with this Part.*
> *(2) In the case of the bankruptcy or winding up of an employer any liability for severance pay shall be paid in priority to all other debts, secured or unsecured, and shall be paid in full unless the property available is insufficient to meet them.*

[3] Paragraph 22 of the First Affidavit dated 12 July 2022.
[4] Which were amplified considerably in the Second Affidavit sworn shortly before this hearing.

(3) Severance pay shall be payable to an employee for the full period of that person's employment, including any period of employment prior to the 1st March, 1988, if that employment is terminated on or after the 1st March, 1988.

Computation of severance pay

41. (1) Severance pay shall consist of one week's wages, at the employee's latest basic wage, for each completed twelve-month period of that person's employment with that person's employer and any predecessor-employer.

(2) In the case of part-time employees their entitlement to severance pay shall be calculated on the basis of the ratio that their actual hours of employment bear to the standard work week."

6. §§. 49-55 of the Labour Act provides 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.

(2) Any termination by an employer of an employee's employment shall be fair if it is within section 50 or 51. 50.

Termination after fixed term of employment

50. For the purposes of this Part, an employee is not unfairly dismissed if that person's employment is terminated at the expiration of a fixed term specified at the time of that person's employment.

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 the 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 the receipt of a written warning;

(d) that the employee was redundant;

(e) that the employee could not continue to work in the position that person held without contravention (on that person's or on the employer's part) of a requirement of this or any other law; or

(f) some other substantial reason of a kind which would entitle 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 an employee was that that person was redundant but it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking, who were employed to perform work of the kind that person was employed to do and who have not been dismissed by the employer, and —

(a) that those other employees do not hold the same status as the redundant employee for the purposes of Parts III to V of the repealed Immigration Law (2015 Revision) (Caymanian status, permanent residence and work permits); and

(b) that the redundant employee was selected for dismissal in contravention of a customary arrangement or agreed procedure relating to redundancy and there were no special reasons justifying a departure from that arrangement or procedure in that person's case, then, for the purposes of this Part, the dismissal shall be regarded as unfair.

(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.

Termination for misconduct

52. (1) An employer may terminate forthwith the employment of an employee where the employee has been guilty of misconduct in or in relation to that person's employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has —

(a) conducted themselves in such a manner as clearly to demonstrate that the employment relationship cannot reasonably be expected to continue;

(b) committed a criminal offence in the course of employment without the consent, express or implied, of the employer;

(c) behaved immorally in the course of that person's duties; or

(d) is under the influence of a controlled drug (other than one lawfully prescribed by a health practitioner) or alcohol during the hours of that person's employment.

(2) Where an employee commits misconduct in or in relation to that person's employment that is not sufficiently serious to justify that person's employer terminating that person's employment under subsection (1) but is such that the employer cannot reasonably be expected to tolerate a repetition, the employer may give the employee a written warning which shall describe the misconduct in respect of which the warning is given and state the action the employer intends to take in the event of any further misconduct.

(3) Where an employee has been given a written warning under subsection (2), if that person, within twelve months following the receipt of the written

warning, commits misconduct of any kind in relation to that person's work, the employer may terminate the employment of the employee, or take such other action as may have been specified in the written warning, without further notice.

(4) For the avoidance of doubt, misconduct includes, but is not limited to, absenteeism.

Termination for failure to perform duties in satisfactory manner

53. (1) Where an employee is no longer performing that person's duties in a satisfactory manner, the employer may give the employee a written warning which shall describe in what manner that person's performance is unsatisfactory and state the action the employer intends to take in the event of continuance.

(2) Where an employee has been given a written warning under subsection (1), if that person does not, during the period of one month following the receipt of the written warning, commence performing that person's duties in a satisfactory manner, the employer may terminate that person's employment at the end of that one month period, or after the end of that period take such other action as may have been specified in the written warning without further notice.

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.

(2) A complaint under subsection (1) must be filed within ninety days of the date of dismissal.

(3) Should the complaint involve a group of employees under similar circumstances they may file a joint complaint.

(4) Should there be filed at or about the same time a number of complaints raising the same or substantially similar issues, the Director may direct that they be consolidated into a single proceeding.

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;

(c) the salary of the person dismissed immediately preceding the dismissal;

> *(d) the period up to the likely retirement age of the person dismissed and any entitlement to a pension which that person may then have;*
> *(e) the degree of unfairness of the dismissal; and*
> *(f) such other matters as may be prescribed.*
> *(3) The amount of an award of compensation under subsection (1) shall not exceed one week's wages for each completed year of service.*
> *(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)."*

7. The procedure to be followed by the Director of Labour when receiving a complaint under the Labour Act is set out in s.75 of the Act. An appeal from a decision of the Labour Tribunal can be made to the Appeals Tribunal in accordance with s.78 of the Labour Act and under s.79 of the Labour Act there is a right of appeal from a decision of the Appeals Tribunal to the Grand Court upon a point of law only.

8. In an email dated 22 November 2021 from the Pines to the Petitioner, the Pines advised that the Board of Directors had approved a "*severance package*" for the Petitioner. In an email dated 15 December 2021, the Pines clarified that *"Your severance pay is as per the Cayman Islands Labour Law for dismissal".* As at the date of her dismissal the Petitioner had completed just over 10 years of service with the Pines. On that basis, her entitlement to severance pay calculated on the same basis as under the Labour Act would have been to one week's wages (CI$612.01) x 10 years of service = CI$6,120.05.

9. In their letter dated 17 February 2022 KSG claimed the same amount pursuant to s.55 of the Labour Act as compensation for unfair dismissal. KSG also claimed damages for wrongful dismissal. This was calculated based on what appears to have been the 3 months' notice provision in the Petitioner's 2011 Contract although that agreement was not in evidence. The Petitioner's monthly wage as at the date of termination was CI$2,448.02 amounting to a claim of CI$7,344.06.

10. Overall, therefore, the Petitioner had the following claims:

10.1 severance pay – CI$6,120.05

10.2	compensation for unfair dismissal –	CI$6,120.05
10.3	damages for wrongful dismissal –	CI$7,344.06
	Total:	CI$19,584.16.

11. At this stage it is important to note the difference between severance pay and compensation for unfair dismissal and damages for wrongful dismissal. The first two are creatures of statute and the latter is claim at common law for damages for breach of contract. The distinction was helpfully considered by Williams J in *Hemmings v PMC Limited (trading as Chrissie Tomlinson Hospital)*[5]:

> ***"The law***
>
> *10 The general principle in contract law is that the purpose of damages is to put the innocent party in the position in which he would have been but for the breach of contract. Thus, if an employer terminates a contract without notice, and does so in breach of contract, the employee may have a claim for breach of contract. This would be a claim for wrongful dismissal. Damages for wrongful dismissal, even in a fixed contract case, would amount to compensation for the number of weeks that the employee should have served in notice but was denied. Although not pleaded in this case, if the employer fails to follow a contractual disciplinary procedure, then damages for wrongful dismissal may possibly include losses incurred during the period of time it would have taken for the employer to put the contractual procedure into effect and be concluded (Gunton v. Richmond-upon-Thames London Borough Council (7)). However, the applicability of this proposition is not entirely clear, following the views expressed in the Supreme Court case of Edwards v. Chesterfield Royal Hospital NHS Foundation Trust (6) by Lord Dyson ([2012] 2 A.C. 22, at para. 60), Lord Phillips (ibid., at para. 87) and Lord Mance (ibid., at paras. 106–108).*
>
> *11 In a complaint of unfair dismissal, the reason for which the employer actually chose to dismiss the employee is of central importance. In an action for wrongful dismissal, it is possible to justify the dismissal on information acquired after the dismissal.*
>
> *...*
>
> *25 Part VII of the Labour Law (2011 Revision) sets out the law of unfair dismissal in the Cayman Islands. Section 51 provides for instances when a dismissal would be fair. If it is contended that a dismissal has been unfair,*

[5] [2013] (1) CILR 254].

> *the complaint must be filed with the Director of Labour and can be determined by the Labour Tribunal. The regime established in the Cayman Islands is very similar to that set up in England and Wales under the Employment Rights Act 1996. It is evident that the legislature intended the Labour Tribunal to be the forum in which employees would be entitled to bring their unfair dismissal complaints. Therefore, the procedure includes a specialist tribunal, strict time limits (s.54(2)) and limits on the amount of compensation that can be claimed (s.55(3)). On the face of the legislation, it appears that the intention of the legislators in both England and Wales and the Cayman Islands was similar—an intention to set up a specialized tribunal, governed by legislation, to deal with unfair dismissal complaints.*
>
> *...*
>
> *27 Although I accept that there may be greater resources and more sophistication and maturity in the tribunals sitting in England and Wales when compared with the Labour Tribunal in the Cayman Islands—and I note the view expressed by Lady Hale in her dissenting judgment in Edwards (6) ([2012] 2 A.C. 22., at para. 111) that the unfair dismissal legislation was intended to provide a supplemental, and not exhaustive, remedy—I do not agree that this means that there should be unfair dismissal cases being heard in parallel courts. This would be inconsistent with the clear intention of the legislators in the Cayman Islands.*
>
> *28 My view is fortified by the Grand Court decision of Schofield, J. in Roulstone (11). Schofield, J. commented (1992–93 CILR at 260–261) that—*
>
> > *"this court does not recognize unfair dismissal as a cause of action. An employee who is wrongfully dismissed has his remedies before this court at common law. But the common law does not provide a remedy for unfair dismissal. Unfair dismissal is recognized by the Labour Law and the remedy open to an employee under that Law is a complaint to the Director of Labour, and thereafter, by a party aggrieved by the Director's decision to an Appeals Tribunal. A final appeal lies to this court from the Tribunal's decision . . . No cause of action in the first instance lies with the court. Accordingly, I strike out the prayer in the statement of claim for damages for unfair dismissal."*

12. It is quite clear that the remedy of a claim for wrongful dismissal in the Summary or Grand Court is separate and distinct from a claim that a dismissal was unfair which has to be made under §.54 of the Labour Act. The separate and distinct claims approach the question of compensation and damages on different bases and with differing results. When considering making an award of compensation under §.55 (2) the Labour Tribunal has power to consider a wide variety of factors. However, as set out above, the award cannot exceed one week's wages for each completed year of

service (§.55 (3)). Pursuant to §.55 (4) of the Act when considering what damages to award in relation to a dismissal, a court must take into account any award made by the Labour Tribunal in relation to the same dismissal.

13. Returning to the Petitioner's situation, being dissatisfied with the position adopted by the Pines, on 19 February 2022 she filed a complaint with the Department of Labour and Pensions. On 24 February 2022 KSG received an email from a Senior Labour and Pensions Inspector (the "Decision") stating that:

> *"The Pines Retirement Home is registered as a charitable organization which is not covered in the Labour Act. The Department of Labour and Pensions (DLP) is empowered by the Labour Act and only has jurisdiction to address matters and entities covered under this Act. Unfortunately, we are not able investigate Ms. Bush's complaint as per section 3(b) of the Labour Act (2021 Revision).*
>
> *Based on the above information shared, this matter is now closed with the DLP; we suggest that Ms. Bush seek an alternate medium to address her complaint."*

14. §. 3(b) of the Labour Act provides as follows:

> *"3. This Act does not apply to –*
>
> *(a) the public service: Provided that the Personnel Regulations (2019 Revision) 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."*

15. As can be seen from what was said in *Hemmings,* the only avenue to pursue a claim for unfair dismissal is through the Labour Tribunal. As a result of §.3(b) of the Labour Act and the position in which the Labour Tribunal was left, the Petitioner was refused that remedy. Based on the claim asserted by KSG, that reduced the total available claim on the part of the Plaintiff from CI$19,584.16 to CI$7,344.06 and left the Petitioner unable to have the question of the fairness of the circumstances of her dismissal considered by the Labour Tribunal.

These proceedings

16. That is a relatively roundabout way to arrive at the Petitioner's present action which is brought by way of Petition dated 18 July 2022. The proceedings are brought pursuant to §. 26 (1)[6] of The Cayman Islands Constitution Order 2009, Part 1, Bill of Rights, Freedoms and Responsibilities (the "Bill of Rights") on the basis that the government has breached the Petitioner's rights and freedoms under the Bill of Rights.

17. The Petitioner asserts that the Respondents have breached her rights and freedoms as follows:

17.1 §.7 (fair trial)[7] on the basis that it is claimed that as a result of the Decision, the Petitioner was denied the right to a fair hearing in determination of her civil right to remain in employment, and as a result, that right was allowed to be extinguished.

17.2 §.9 (private life)[8] on the basis that the Decision failed to protect the Petitioner's right to private life by permitting the Pines to dismiss her on the grounds of her religious belief and/or on the basis of an unfounded, grave allegation that she had caused the death of a resident. This dismissal was permitted it is argued because there is no legislation in place to sanction or otherwise prevent the dismissal. It is claimed that the Cayman Islands failed to discharge its positive obligation to protect this right.

17.3 §.10 (conscience & religion)[9] on the basis that it is argued that the Decision failed to protect the Petitioner's right to enjoyment of freedom of conscience by similarly permitting her

[6] §.26.—(1) 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.
[7] §.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.
[8] §.9.—(1) Government shall respect every person's private and family life, his or her home and his or her correspondence.
[9] §.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; freedom to change his or her religion, religious denomination or belief; and freedom, either alone or in community with others, both in public and in private, to manifest and propagate his or her religion or belief in worship, teaching, practice, observance and day of worship.

dismissal on the grounds of her religious belief. This it is said was a breach of sections 10 of the Bill of Rights and 16 (nondiscrimination)[10] of the Bill of Rights.

17.4 Finally, it is argued that the Decision discriminated against the Petitioner in relation to her s.7, 9 and 10 rights by treating her differently to others in an analogous situation, i.e. other employees who are not employees of charitable organisations. It is said that this different treatment is entirely unjustified and therefore breaches section 16 of the Bill of Rights.

18. It is claimed that the breaches arise from the Second Respondent's application of section 3(b) of the Labour Act, which resulted in its refusal to investigate and determine the Petitioner's complaint that her employer, a charitable organisation, had unfairly dismissed her and had discriminated against her.

19. It is argued that the decision also amounts to a breach of the Petitioner's rights assured by the European Convention on Human Rights ("ECHR") (namely Articles 6 (fair trial), 8 (private and family life), 9 (freedom of thought, conscience and religion), 13 (right to an effective remedy), 14 (prohibition of discrimination) and Article 1 of Protocol No. 12 (general prohibition of discrimination)) which are broadly equivalent to similar rights in the Bill of Rights. It is generally accepted that the treaty obligations under the ECHR and decisions of the European Court of Human Rights ("ECtHR") serve as a guide to the interpretation of domestic legislation[11].

20. Pursuant to section 27 of the Bill of Rights, the Petitioner may seek such "relief or remedy or […] order" that the Court considers just and appropriate within the scope of its powers. The Petitioner seeks the following relief:

20.1 A declaration that section 3(b) of the Labour Act is incompatible with the Bill of Rights.

20.2 Alternatively, an order quashing the Decision and a direction that the Labour Act apply to charitable organisations.

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[10] §. 16.—(1) Subject to subsections (3), (4), (5) 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.

[11] See e.g. *Pinnock & Ors v AG unreported* (CICA 7 of 2018) para 17 and *Deputy Registrar and Attorney General v Day and Bush* [2020 (1) CILR 99], at para 41.

20.3 Damages for the loss sustained by the Petitioner as a result of the Labour Act denying her an effective remedy.[12]

21. It was agreed by counsel that the court's role in this case is not to consider whether the dismissal of the Petitioner might or might not have been unfair for the purposes of the Labour Act. The analysis is limited to the question of whether the Petitioner's rights have been breached and, if so, what relief might be appropriate.

22. During the course of the hearing I asked counsel if there was any explanation for the exceptions in §.3 of the Labour Act. The explanation in relation to the exclusion of the public service is that Parts VI and VII of the Public Service Management Act (2018 Revision) ("PSMA") provide the public service with a detailed mechanism for dealing with matters including performance, discipline, dismissal retirement and termination. Under §.53 of the PSMA civil servants have a right of appeal to a chief officer in relation to decisions taken under Part VII of the statute and there is a further right of appeal to the Civil Service Appeals Commission which is established under the PSMA. S.60 PSMA provides that on the appeal of any decision, the Civil Service Appeals Commission may make such determination as it considers appropriate and may, without limiting the generality of that power, grant monetary relief and make interim orders. The Personnel Regulations (2022 Revision) made under the PSMA provide for the policy and procedure to give effect to the relevant provisions of the PSMA.

23. I asked Mr Smith if there was any record in Hansard of what was discussed about §.3 when the Labour Act was originally debated. He indicated that there was nothing that he had seen that justifies the exceptions for charitable organisations and churches. He also indicated, somewhat surprisingly, that he had no instructions on the justification for the continued existence of §§. 3(b) and (c) in the Labour Act.

[12] 27.—(1) In relation to any decision or act of a public official which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. (2) No award of damages is to be made unless, taking account of all the circumstances of the case, including— (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court); and (b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

24. For reasons that I will explain below, after the hearing counsel were given 10 days to provide additional written submission on a discrete issue. Whilst waiting for those I did look back at Hansard[13] which records the debate during the second reading of what was then the Labour Bill 1987 (the "Bill"). The Bill was introduced by the late Sir Richard Ground, the then Attorney General. It appears that a Select Committee was appointed in 1985 and spent some time working on the Bill, basing it loosely on the Antigua Labour Code. The Bill was prepared after what seems to have been relatively lengthy consultation with local groups and interested parties. The Committee also received assistance from Mr Adrian Smith, a Labour Advisor to the Foreign and Commonwealth Office. Apparently Mr Smith raised with the Committee 6 main points in relation to the Bill:

> *"the exclusion of essential services:*
> *the exclusion of the public services;*
> *the exclusion of procedures for collective bargaining;*
> *the exclusion of procedures for industrial disputes;*
> *minimum wages; and*
> *the role of the Director of Labour."*

25. In relation to the public service exception the following was said by the Attorney General:

> *"The Public Service, Mr. [Adrian] Smith noted, was excluded, and thought that this might give rise to some difficulties. The reasons for that are that in this jurisdiction, unlike the United Kingdom from where Mr. Smith was coming, there is an elaborate set of laws which govern certain aspects of the Civil Service, the most important of which is the Public Service Commission Law and the Regulations thereunder which lay down very elaborate procedures for discipline in the Civil Service, and that would have conflicted with the simpler, more straightforward provisions in the Labour Law for dismissal. So those two were incompatible and it was felt preferable to retain the existing framework in that regard for the Civil Service. The Civil Service enjoy other legislation, one of which is the Pensions Law. So there were areas in which it was felt better not to drag the Civil Service into this Law but at the same time the Committee felt and embodied it in the final Bill, that the benefits in the Civil Service should not be less than in the private sector."*[14]

Nothing appears to have been said about the remainder of the exceptions in §.3 of the Labour Bill.

[13] 1987 starting at p.1342.
[14] Page 1343.

26. Interestingly the Attorney General did address the question of wrongful dismissal and unfair dismissal saying:

> *"Now the Committee, while liking the idea of setting up a system for the resolution of small disputes that avoided going to the Courts, did not feel able to accept one important aspect of the Chamber [of Commerce]'s suggestion, which was that the whole thing be taken completely outside the ambit of the Court's system. The scheme of the present Law, and I cannot stress this too much, is that it provides an alternative, and that an employee who claims to have been unfairly dismissed has two options open to him. He can ignore the framework of the Law and he can go to the Courts -this may be expensive, but in the case of people at managerial level, bank managers and so on, who earn large sums of money and may have long notice periods in their contracts, it may be worth their while to go to the Courts. The Committee has not sought to restrict, or take away that right."*[15]

27. This is in my view entirely consistent with the approaches of Schofield, J in *Roulstone* and Williams J in *Hemmings*. One can certainly see that in some cases a claim for damages for wrongful dismissal might exceed substantially a claim for severance pay and unfair dismissal and justify the engagement of attorneys and the commencement of court proceedings. But for employees who are not in that position and who may not be able to afford attorneys or wish to be exposed to the court system, a separate and distinct statutory remedy has been provided. Indeed as Sir Richard Ground said during the Second Reading of the Bill:

> "*The Committee has put forward, In the draft Bill, an alternative system, whereby in small cases, the little man can go to the Director of Labour and get a quick resolution of his disputes, hopefully without involving lawyers and without involving a formal procedure."*[16]

He went further when describing the proceedings that were to be established by the Bill:

> *"Now, the sort of proceedings that can be conducted under the Law in relation to dismissal or severance pay are proceedings before the Director of Labour. They are not proceedings before the Court. The Court, as I have said, constitutes a separate, and alternative means of proceeding but they are proceedings before the Director of Labour. This restriction on evidence is only restricted to proceedings under this Law and therefore is only restricted to proceedings before the Director of Labour. So this does nothing to alter the rules of evidence in Courts, or to trespass upon the domain of the Courts. Now, the reasons why, in proceedings before the Director of Labour, the section says that the statement or the certificate*

[15] Page 1345.
[16] Hansard 1987 page 1389.

> *should be final is part of that more general reason that lies behind the administrative provisions of the Law to give certainty and simplicity to the determination of disputes."*[17]

The issue is also not just about compensation or damages. As Mr Wheeler was at great pains to argue during the course of this hearing, he says that his client is entitled to a determination of whether or not she was unfairly dismissed. That, he contends, is only a finding that the Labour Tribunal can make under the Labour Act.

Right to a Fair Trial

Petitioner's submissions

28. The Petitioner relies on various decisions under Article 6 of the ECHR being the relating to §.7 of the Bill or Rights. That states:

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. […]"*

29. The Petitioner argues that Article 6/§.7[18] in its civil (non-criminal) context applies where:

29.1 There is a genuine and serious dispute as to a civil right or obligation that is arguably recognised in domestic law; and

29.2 The particular proceedings determine that right or obligation.

30. The Petitioner refers to *R (Lightfoot) v Lord Chancellor*[19] at page 629 in which the legal test was summarised by Simon Brown L.J. (as he then was) as follows:

> *"It appears to me plainly to establish that article 6(1) only applies if there is a dispute ("contestation") the outcome of which will decide rights and obligations. As was stated by the court in the most recent of the authorities put before us, Gustafson v. Sweden (1997) 25 E.H.R.R. 623, 634:*

[17] Hansard 1897 page 1392.
[18] ECHR/ Bill of Rights.
[19] [2000] QB 597.

> *"38. The court recalls that the applicability of article 6(1) under its 'civil head' requires the existence of a 'dispute' over a 'right' which can be said, at least on arguable grounds, to be recognised under domestic law.*
>
> *That dispute must be genuine and serious; it may relate not only to the existence of a right but also to its scope and to the manner of its exercise. Furthermore the outcome of the proceedings must be directly decisive for the right in question."*"

31. As the Guide on Article 6 of the European Convention on Human Rights[20] states:

> *"The judgment in Grzęda v. Poland [GC], 2022[21], recently summarised the applicable case-law principles (§§ 257-259). The applicability of Article 6 § 1 in civil matters firstly depends on the existence of a "dispute" (in French, "contestation"). Secondly, the dispute must relate to a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. Lastly, Guide on Article 6 of the Convention – Right to a fair trial (civil limb) the result of the proceedings must be directly decisive for the "civil" right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play …"*

32. It is argued that the right applies equally to private law and public law disputes[22] and that civil rights for the purposes of this section include the right to remain in employment. In *R (Wright) v SSH*[23]: Baroness Hale said "*The right to remain in the employment one currently holds must be a civil right*". They also include the right not to be discriminated on the grounds of religious belief in the job market[24].

33. Where Article 6/§.7 applies, the Petitioner contends that it requires access to a fair and impartial hearing for determination of the right.

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[20] Paragraph 3.
[21] Application no. 43572/18.
[22] *Lightfoot*, p.630.
[23] [2009] 2 All ER 129 at [19].
[24] See *Devlin* (below) at [23].

34. In *Devlin v United Kingdom*[25], on applying for a job with the Northern Ireland Civil Service the applicant had been rejected. The rejection was on national security grounds. He made an application to the Fair Employment Tribunal alleging discrimination. The Secretary of State relied on §.42 of the Fair Employment (Northern Ireland) Act 1976 and stated that the applicant could not make an application to the tribunal due to operation of this provision. §.42 removed "*entirely from the sphere of Fair Employment legislation acts done for the purpose of safeguarding national security* […]" (at [14]). The applicant complained that he had been deprived of his Article 6 right to have his claim determined.

35. The ECtHR held that Article 6 had been breached. At [29] it stated:

> *"29. The Court recalls that Article 6 § 1 embodies the "right to a court", of which the right of access, that is the right to institute proceedings before a court in civil matters, constitutes one aspect. Where the individual's access is limited either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right and in particular whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved […]"*

36. The Petitioner also refers to the ECtHR case of *Holy Monasteries v Greece*[26] at [80]:

> *"80. Article 6 para. 1 (art. 6-1) "may [thus] be relied on by anyone who considers that an interference with the exercise of one of his (civil) rights is unlawful and complains that he has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 para. 1 (art. 6-1)"".*

37. The Petitioner's counsel argues that applying the above principles to her case:

37.1 There is a genuine and serious dispute over the Petitioner's right to remain in her employment, namely whether she was dismissed unfairly and whether the reasons for her dismissal were lawful or justified.

37.2 It is argued that the right to remain in employment (and, consequently, not to be subject to arbitrary dismissal) is recognised in domestic law. The Petitioner's counsel says that it was

[25] Application no. 29545/95.
[26] Application no. 13092/87; 13984/88.

found plainly to exist in *Wright*. The right, it is argued, is protected by the mechanisms in the Labour Act. The Petitioner also refers to the Bill of Rights which states specifically in its preamble that the Cayman Islands is "*a country with a vibrant diversified economy, which provides full employment*". The concept of "full employment" she argues must include a right to remain in employment or to simply be employed, which implies protection from the unfair termination of employment.

37.3 The Petitioner claims that the Decision constitutes "proceedings" because reference to the Director of Labour is the first step of instituting proceedings in the Labour Tribunal (section 75 of the Labour Act). The Petitioner argues that comparison can be drawn with the *Devlin* and *Holy Monasteries* cases mentioned above.

37.4 It is contended that the Decision determined decisively the Petitioner's right to remain employed by the Pines, because it barred any further complaint regarding unfair dismissal, claim for compensation, severance pay or other. Equally, it is claimed, the decision of the Pines to terminate the Petitioner's employment determines her right by extinguishing her employment contract.

38. The Petitioner submits that §.7 therefore applies. It is submitted that it is plainly breached in her case, as she had no possibility of submitting that claim to a tribunal meeting the requirements of §.7. In being denied a hearing at all, in consequence the Petitioner has been denied the components of a fair hearing (e.g. the right to representation and equality of arms).

Respondents' submissions

39. The Respondents argue that the flaw in the Petitioner's argument is that, whilst there may be a right at common law for a person to continue to be employed pursuant to the terms of a contract of employment, there is no recognised right, whether at common law or in statute, for the Petitioner to claim damages with respect to the manner of her dismissal. The Petitioner it is said cannot rely on s. 7 of the Bill of Rights to found a new cause of action in the form of a statutory remedy which Parliament has determined it is not open to her to pursue.

40. It is argued that the relevant principles to be derived from the case law of the ECtHR on the application of Article 6(1) of the Convention are as follows:

40.1 Article 6(1) extends only to "*contestations*" (disputes) over (civil) "*rights and obligations*" which can be said, at least on arguable grounds, to be recognised under domestic law. However, the Respondents argue, it does not in itself guarantee any particular content for (civil) "*rights and obligations*" in the substantive law of the Contracting States[27];

40.2 The Respondents contend that the court may not create through the interpretation of Article 6(1) a substantive right which has no legal basis in the State concerned. They say that Article 6 is a procedural guarantee of a fair hearing in the determination of whatever substantive rights exist as a matter of national law[28]; where a person falls outside the scope of a statutory right, Article 6 will not be engaged[29].

41. The Respondents refer to the case of In *R (on the application of Kehoe) v Secretary of State for Work and Pensions*[30], in which the House of Lords considered the scheme of the Child Support Act 1991, which prevented the claimant from enforcing a child support maintenance assessment against her husband. The House of Lords dismissed the claimant's argument that the scheme was incompatible with Article 6(1) of the ECHR. The Child Support Act 1991 made clear on its face that it conferred no right of recovery or enforcement on a caring parent, such as the claimant, against the absent or non-resident parent. Thus, Article 6 of the ECHR was not engaged. In giving the leading judgment, Lord Bingham of Cornhill concluded as follows:

> *"I respectfully agree with Latham LJ that it seems unsatisfactory that she should not have that right, as the agency's priorities are inevitably different from those of the person with care of the child, who may disagree profoundly with the agency as to how the proceedings in which she has such an obvious interest should be conducted: [2004] QB 1378, 1414, para 102. But the fact is that the 1991 Act itself, which is the only source from which it could be derived, does not give her that right. The scheme of the 1991 Act is not designed to allow the person with care to play any part in the enforcement process at all. It is not possible to envisage how*

[27] See, e.g. *Lithgow and Others*, 8 July 1986, Series A no. 102 p.70, para 192.
[28] See e.g. *Roche v. the United Kingdom* [GC], 32555/96, ECHR 2005-X, para 117.
[29] See, to that effect, *Powell and Rayner v the United Kingdom*, 21 February 1990, Series A no. 172, pp.16-17, para 36, in which the ECtHR was called upon to consider the effect of section 76(1) of the Civil Aviation Act 1982. That provision excluded liability in nuisance with regard to the flight of aircraft in certain circumstances, with the result that the applicants were precluded from obtaining relief for exposure to aircraft noise in those circumstances. The ECtHR determined that the applicants' grievance did not bring Article 6 into play as there was no 'civil right' recognised under UK domestic law to attract the application of Article 6(1)).
[30] [2005] 4 All ER 905, at para 43.

that might be done without rewriting the scheme which the Act has laid down. In my opinion this is not even a case where it can be said that the existence of a right to participate in this process is arguable."

42. The Respondents go on to refer to the case of *Steer v Stormshore*[31] in which the Court of Appeal of England and Wales had cause to consider whether the UK Equality Act 2010 is incompatible with the Convention in so far as it fails to make interim relief available in cases where a person alleges that they have been actually or constructively dismissed on grounds tainted by sex discrimination. In considering the application of Article 6(1) of the Convention to the subject matter of the case, Lord Justice Bean found as follows:

> *"31. ...I do not agree that this case comes within the ambit of Article 6. Lord Walker of Gestingthorpe said in Matthews v Ministry of Defence [2003] 1 AC 1163 at [142] that it is "clear that Article 6 is in principle concerned with the procedural fairness and integrity of a state's judicial system, not with the substantive content of its national law".*
> *32. In Kehoe v UK [2008] 2 FLR 1014 the father had stopped making child support payments to the mother. She could not bring a court claim against him directly because the Child Support Act 1991 required her to use the Child Support Agency (CSA) as a "collection service"; and the CSA's backlog of cases meant that substantial arrears built up. She complained that the 1991 Act had deprived her of access to the courts to enforce her civil rights and to that extent was therefore incompatible with Article 6. The ECtHR rejected her claim. She had not been denied access to a court, as she could have brought judicial review proceedings against the CSA or the Secretary of State seeking an order directing them to take appropriate and expeditious action. The court repeated at [47] the familiar phrase that "Article 6 does not impose any requirements as to the contents of domestic law".*
> *33. I accept Mr Purchase's submission that the Appellant does not have any right to interim relief under domestic law, and that her complaint that the ET cannot make an order for interim relief is thus not within the ambit of Article 6."*

43. The Respondents submit that *Devlin* which is relied on by the Petitioner is capable of being distinguished from the present case on the basis that the measure which prevented the applicant in *Devlin* from pursuing his claim for unlawful discrimination was an act of the executive which operated as a defence to his statutory right. The Respondents say that is different in nature from §.3

[31] [2021] EWCA Civ 887.

of the Labour Act, which is a measure adopted by Parliament restricting the substantive right to claim for unfair dismissal.

44. The Respondents argue that the ECtHR has, in its case law, made a distinction between a restriction which delimits the substantive content of the relevant civil right, to which the guarantees of Article 6(1) do not apply, and a restriction which amounts to a procedural bar preventing the bringing of potential claims to court, to which Article 6 could have some application. The Respondents say that that is a distinction which, although it accepts may be a fine one, the ECtHR maintains is determinative of the applicability and, as appropriate, the scope of the guarantees of Article 6 of the Convention[32]. In *Tinnelly & Sons Ltd and Others,* the ECtHR refused to accept the UK Government's submission that the applicants did not enjoy a substantive right to bring a claim for unlawful discrimination under domestic law. Rather, it viewed section 42 of the Fair Employment (Northern Ireland) Act 1976 Act as providing a respondent with a defence to a claim for unlawful dismissal. In *Tinnelly*, that defence was asserted in the form of certificates issued by the Secretary of State for Northern Ireland under section 42(2) of the 1976 Act *after* proceedings were commenced by the applicants. That is rather different the Respondents say from section 3 of the Labour Act, which the Respondents submit constitutes a substantive bar to the Petitioner bringing a claim for unfair dismissal.

45. Further, the Respondents argue, the certificate issued in *Tinnelly* by the Secretary of State for Northern Ireland pursuant to section 42(2) of the 1976 Act is an act of the executive which, as the ECtHR put it in *Devlin* was "tantamount to removal of the courts' jurisdiction by executive *ipse dixit*". In other words, the Respondents say it involved an encroachment by the executive on the functions of the judicial branch of government. In this case, they argue, it is Parliament which has excluded employees of charitable organisations from the scope of the protections afforded by the Labour Act.

46. Applying the principles derived from the case law outlined above, the Respondents submit as follows:

[32] *Roche v. the United Kingdom* [GC], 32555/96, ECHR 2005-X, para 119.

46.1 §.7 of the Bill of Rights cannot be relied upon to create new rights or remedies which are not already recognised under Cayman Islands law;

46.2 there *is* a right at common law for a person to continue to be employed pursuant to the terms of a contract of employment and that *would* constitute a 'right' for the purposes of §.7 of the Bill of Rights, but there is no question of the Petitioner being denied a fair and public hearing before an independent and impartial tribunal in the assertion of her rights arising under contract; if there has been a breach of contract, the Petitioner has a cause of action in the form of a claim for wrongful dismissal before the Grand Court;

46.3 on the other hand there is no right at common law to claim damages for unfair dismissal[33];

46.4 Parliament has, through the Labour Act, created a statutory unfair dismissal regime but that regime does not provide a remedy to the Petitioner with respect to the manner of her dismissal because charitable organisations are, by virtue of §.3 of the Labour Act, expressly excluded from its scope;

46.5 §.3 of the Labour Act is not merely a procedural bar; it operates to define the substantive scope of the right to claim for unfair dismissal;

46.6 as such there is no 'right' for the Petitioner to claim damages with respect to the manner of her dismissal on which §.7 of the Bill of Rights could 'bite';

46.7 since §.7 is not engaged there can be no question of the Decision infringing §.7 of the Bill of Rights and no incompatibility between §.3 of the Labour Act and §.7 of the Bill of Rights.

Analysis and discussion

47. The first question to answer is whether the Petitioner has rights that are recognised under domestic law. It seems to me that the Labour Act was intended to and does give rights to employees in relation to matters such as severance pay and a right to initiate proceedings for unfair dismissal and to seek consequential compensation. Employees have a right under the Labour Act to initiate proceedings for unfair dismissal if they feel that that is an appropriate remedy for them to seek. The Act does not prohibit or restrict any employee or class of employee from bringing such proceedings. I have already considered the nature of the unfair dismissal remedy. As intended by the legislature,

[33] *Roulstone v Cayman Airways Ltd.,* [1992-93 CILR 259] at 260-261, and *Hemmings v PMC Limited (trading as Chrissie Tomlinson Hospital* [2013 (1) CILR 254] at para 33.

it can only be heard by the Labour Tribunal and is separate and distinct from a claim for wrongful dismissal. The procedure is separate and distinct as is the nature of the relief that can be granted.

48. I believe that it is instructive to look at the sequence of events in this case. The Petitioner did initiate proceedings for unfair dismissal[34] on 19 February 2022 by filing what appears to be a standard "*Labour Investigations Unit Confidential Complaint Form*" with the Department of Labour and Pensions. As has been mentioned earlier, the Department responded on 24 February 2022 by saying that it lacked jurisdiction to address the complaint and were unable to investigate. The Petitioner was advised to seek an alternative medium to address her complaint. The Department did not say that the Petitioner did not have a right to have made the complaint and I do not think that it was open to it to have done so.

49. The Respondents rely on *Kehoe* in support of their argument that no right arises in this case. *Kehoe*, however, dealt with what I think is a different issue. In that case the relevant law expressly gave no rights to parents to recover or enforce a claim to child maintenance against an absent or non-resident parent. Lord Bingham explained at paragraphs 6-7:

> *"6 That a caring parent in the position of Mrs Kehoe was given no right of recovering or enforcing a claim to child maintenance against an absent or non-resident parent was not a lacuna or inadvertent omission in the 1991 Act: it was the essence of the new scheme, a deliberate legislative departure from the regime which had previously obtained. The merits of that scheme are not for the House in its judicial capacity to evaluate. But plainly the scheme did not lack a coherent rationale. The state has an interest, most directly in cases where public funds are disbursed, but also more generally that children should be adequately supported. It might well be thought that a single professional agency, with the resources of the state behind it and an array of powers at its command, would be more consistent in assessing and more effective and economical in enforcing payment than individual parents acting in a random and uncoordinated way. It might also be thought that the interposition of an independent, neutral, official body would reduce the acrimony which had all too frequently characterised applications for child maintenance by caring against absent or non-resident parents in the past which, however understandable in the aftermath of a fractured relationship, rarely enured to the benefit of the children. For better or worse, the process was deliberately changed.*
>
> *7 The 1991 Act cannot in my opinion be interpreted as conferring any right on a parent in the position of Mrs Kehoe. She is of course the person to whom child maintenance will be paid, directly or indirectly and subject to any deduction of benefit, as the person who incurs the expense of bringing up the children. But the right which she had enjoyed under the former legislation was removed, and the right to recover the maintenance has been vested in the CSA."*

[34] §. 54 (2) of the Labour Act.

50. In this case, what the legislature did (deliberately, but without giving reasons for doing so) was exclude certain categories of employer from the application of the Labour Act. We have seen that public servants were provided for by reference to existing law and regulations provided that their conditions of service were not less favourable than as provided for in the Labour Act. Reference has been made to *Devlin.* Another case analogous to this is *Al-Adsani v. the United Kingdom*[35] which involved the applicant instituting civil proceedings in England for compensation against the Sheikh and the State of Kuwait in respect of injury to his physical and mental health caused by torture in Kuwait in May 1991 and threats against his life and well-being made after his return to the United Kingdom on 17 May 1991. He obtained a default judgment against the Sheikh and was subsequently granted leave to serve proceedings on two named individuals. However, he was refused leave to serve the writ on the Kuwaiti Government. On appeal, the Court of Appeal concluded that leave should be granted and the writ was served, but on the application of the Kuwaiti Government the High Court ordered that the proceedings be struck out on the ground that the Kuwaiti Government was entitled to state immunity. The applicant's appeal was dismissed by the Court of Appeal and leave to appeal to the House of Lords was refused. The applicant subsequent claimed that, amongst other things, his Article 6 rights had been breached. The ECtHR said in its judgment:

> *"46. The Court reiterates its constant case-law to the effect that Article 6 § 1 does not itself guarantee any particular content for "civil rights and obligations" in the substantive law of the Contracting States. It extends only to contestations (disputes) over "civil rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law (see Z and Others v. the United Kingdom [GC], no. 29392/95, § 87, ECHR 2001-V, and the authorities cited therein).*
> *47. Whether a person has an actionable domestic claim may depend not only on the substantive content, properly speaking, of the relevant civil right as defined under national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court. In the latter kind of case Article 6 § 1 may be applicable. Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6 § 1 a substantive civil right which has no legal basis in the State concerned. However, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer*

[35] Case summary (Application 35763/97) https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-6220%22]}.

immunities from civil liability on large groups or categories of persons (see Fayed v. the United Kingdom, judgment of 21 September 1994, Series A no. 294-B, pp. 49-50, § 65).

48. The proceedings which the applicant intended to pursue were for damages for personal injury, a cause of action well known to English law. The Court does not accept the Government's submission that the applicant's claim had no legal basis in domestic law since any substantive right which might have existed was extinguished by operation of the doctrine of State immunity. It notes that an action against a State is not barred in limine: if the defendant State waives immunity, the action will proceed to a hearing and judgment. The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right.

49. The Court is accordingly satisfied that there existed a serious and genuine dispute over civil rights. It follows that Article 6 § 1 was applicable to the proceedings in question.

...

52. In Golder v. the United Kingdom (judgment of 21 February 1975, Series A no. 18, pp. 13-18, §§ 28-36) the Court held that the procedural guarantees laid down in Article 6 concerning fairness, publicity and promptness would be meaningless in the absence of any protection for the pre-condition for the enjoyment of those guarantees, namely, access to a court. It established this as an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlie much of the Convention. Thus, Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court.

53. The right of access to a court is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see Waite and Kennedy v. Germany [GC], no. 26083/94, § 59, ECHR 1999-I).

54. The Court must first examine whether the limitation pursued a legitimate aim. It notes in this connection that sovereign immunity is a concept of international law, developed out of the principle par in parem non habet imperium, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

55. The Court must next assess whether the restriction was proportionate to the aim pursued."

51. As indicated, above, in my view, the Labour Act gave the Petitioner as an employee the substantive right to initiate proceedings for unfair dismissal whatever the nature of her employer. What it also did in my view is effectively impose a procedural bar (as opposed to delimiting the substantive right itself) on such proceedings where the employer was the public service, a charitable

organisation or a church. The response from the Department of Labour and Pensions to the complaint filed by the Petitioner was effectively: "*you have made a complaint but we can't deal with it*". The Petitioner's right of access to the Labour Tribunal was denied.

52. The Petitioner has raised the question of her right to remain employed as outlined by her counsel in reliance on what was said in *Wright.* The facts taken from the headnote are as follows:

> *"Each of the claimant care-workers was referred to the Secretary of State for Health under section 82(1) of the Care Standards Act 2000, which made provision for keeping a list of people considered unsuitable to work with vulnerable adults. Pending the determination of each reference, the Secretary of State provisionally included the claimants' names in the list pursuant to section 82(4)(b), which made no provision for first according them a hearing. By reason of that listing the Secretary of State for Education and Skills, pursuant to section 92 of the Act, also provisionally included the claimants' names on a list of persons unsuitable to work with children maintained under section 1 of the Protection of Children Act 1999. The claimants sought judicial review of the decisions and sought a declaration under section 4(2) of the Human Rights Act 1998 that section 82(4)(b) of the 2000 Act was incompatible with articles 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the 1998 Act."*

When considering whether the case concerned a civil right at all Baroness Hale said:

> *"The right to remain in the 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 does not currently have one."*[36]

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[37]:

[36] Paragraph 19.
[37] Paragraph 22.

> *"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."*

55. It seems to me that, as outlined in the *Devlin* and *Al-Adsani* case, the next question is whether the denial of the Petitioner's right of access to the Labour Tribunal pursued a legitimate aim and was proportionate? As I have already mentioned, when the Labour Bill was debated there was no explanation for the exclusions in §.3 (b) and (c). As I have indicated, surprisingly, the Respondents have made no attempt to explain or justify the existence and continued existence of these exceptions. There is therefore no basis upon which I can sensibly assess whether there is a legitimate aim and whether the procedural bar was proportionate.

56. Assessing the above against the elements of Article 6/§.7 and having considered fully Mr Smith's arguments on behalf of the Respondents and in particular that §.7 of the Bill of Rights cannot be relied upon to create new rights or remedies which are not already recognised under Cayman Islands law, my conclusions on this issue are as follows:

56.1 The Petitioner has a substantive right under the Labour Act to initiate proceedings for unfair dismissal.

56.2 There was a genuine and serious dispute as to whether she had been unfairly dismissed and she sought to exercise that right but by virtue of §.3 (b) of the Labour Act the proceedings that she had initiated were rejected by the Labour Tribunal on the grounds that it lacked jurisdiction to investigate the complaint.

56.3 It is only the Labour Tribunal that is able to determine proceedings for unfair dismissal. In my view, §.3 (b) amounted to a procedural bar to the exercise by the Petitioner of her right to pursue a remedy of unfair dismissal and to have that issue determined. There has been no attempt to justify that bar as a legitimate or proportionate measure.

57. In my view, based on the above, the Petitioner's rights under §.7 of the Bill of Rights have been infringed.

Right to Family Life

58. §.9(1) of the Bill of Rights states: "*Government shall respect every person's private and family life, his or her home and his or her correspondence*."

59. The equivalent Article 8(1) of the ECHR states: "*Everyone has the right to respect for his private and family life, his home and his correspondence*."

60. In *Pinnock & Ors v AG* (CICA 7 of 2018), the Court of Appeal of the Cayman Islands considered the application of Article 8/§.9 in the context of employment. Specifically, the CICA considered when §.9 is engaged in cases of dismissal from work. Moses JA said at [18]:

> *"18. The right to respect for private life and the protection of personal identity and dignity, enshrined in s.9 and art. 8 of the European Convention, can be invoked within the context of working life and working relationships. The European Court of Human Rights has often said that "the notion of 'private life' does not exclude in principle activities of a professional or business nature" (see e.g. Volkov v. Ukraine (17) (57 E.H.R.R. 1, at para. 165) and Denisov v. Ukraine (6) (at para. 100)). […]*
>
> …

> *20. But not every case concerning dismissal at work engages art. 8 or s.9. Whether it will do so will depend upon whether some protected personal characteristic formed the ground of the dismissal or on the severity of the consequences of that dismissal. In Denisov (6) the court identified, in what it described as "employment-related scenarios involving Article 8," these two different approaches:*
>
> > "*102. [In employment-related scenarios], the Court applies the concept of 'private life' on the basis of two different approaches: (α) identification of the 'private life' issue as the reason for the dispute (reason-based approach) and (β) deriving the 'private life' issue from the consequences of the impugned measure (consequence-based approach)*."
>
> …
>
> *24 In the instant case, the judge heard the evidence of the second and third claimants (whose evidence was taken as representative of all of the claimants) as to the consequences they had suffered, but rejected the suggestion that there was any stigma or reputational damage which flowed from mandatory retirement at the age of 55."*

Petitioner's submissions

61. The Petitioner argues that as with a number of other rights, the state has a positive obligation to protect Article 8/§.9 rights. The ECHR guidance, "*Guide on Article 8 of the European Convention on Human Rights*" ("Art 8 Guidance") states at [5]:

> *"However, Member States also have positive obligations to ensure that Article 8 rights are respected even as between private parties (Bărbulescu v. Romania [GC], 2017, §§ 108-111 as to the actions of a private employer). In particular, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life (Lozovyye v. Russia, § 36). These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, for example, Evans v. the United Kingdom [GC], § 75, although the principle was first set out in Marckx v. Belgium)."*

62. It is argued that the Petitioner's dismissal was a decision that engaged article 8/§.9, as both the reason-based approach and the consequence-based approach are satisfied:

62.1 The reason for her dismissal was her failure to be vaccinated by the date set by the Pines[38]. She says that she had not been vaccinated due to her "*serious religious reservations about taking the vaccine*"[39]. It is argued that this can also be described generally as an unwillingness to submit to mandatory invasion of her bodily integrity, which in itself is protected by article 8/§.9[40].

62.2 It is claimed that the loss of her job impacts on the Petitioner's private life. She states that "*I found the whole issue very stressful. I was worried about my future and did not know what to do. I needed my job to support myself and my daughter*"[41]. Further, and significantly, she describes how the Pines also alleged (inconsistently) that the reason for her dismissal was serious misconduct, namely that "*my conduct resulted in other staff members and residents being infected, and caused the death of a resident*"[42]. As has been mentioned above, the Petitioner completely disagrees with this suggestion. She contends that if the reason for her dismissal was causing the death of a resident, then this plainly would have very serious consequences for her social and professional reputation and would engage article 8/§.9[43].

63. It is claimed that since article 8/§. 9 was engaged in the Petitioner's case, the failure of the Cayman Islands to have any measures in place to safeguard her rights is a breach of Article 8. It was necessary for the Labour Act protections (or similar) to apply to the relationship between the Petitioner and her employer. There is no justification for this interference.

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[38] First Affidavit para 5.
[39] First Affidavit para 12.
[40] See the Council of Europe Resolution 2361 (2021), "*Covid-19 Vaccines: ethical, legal and practical considerations*", which called for Member States to "[e]*nsure that citizens are informed that the vaccination is not mandatory and that no one is politically, socially or otherwise pressured to get themselves vaccinated, if they do not wish to do themselves*" (paragraph 7.3.1).
[41] First Affidavit para 14.
[42] First Affidavit para 22.
[43] See e.g. Art 8 Guidance, [101].

Position of Respondents

64. The Respondents' position is that §.9 of the Bill of Rights is simply not engaged by the Petitioner's dismissal.

65. In *Royal Cayman Islands Police Association and ten others v Commissioner of the Royal Cayman Islands Police Service and Attorney General*[44], the Court of Appeal considered whether mandatory retirement on the grounds of age fell within the ambit of section 9 of the Bill of Rights. It concluded it did not. In doing so, Moses J.A., in giving the leading judgment, noted as follows:

> *"20 But not every case concerning dismissal at work engages art. 8 or s.9. Whether it will do so will depend upon whether some protected personal characteristic formed the ground of the dismissal or on the severity of the consequences of that dismissal. In Denisov (6) the court identified, in what it described as "employment related scenarios involving Article 8," these two different approaches:*
>
> > *"102. [In employment-related scenarios], the Court applies the concept of private life' on the basis of two different approaches: (α) identification of the 'private life' issue as the reason for the dispute (reason-based approach) and (β) deriving the 'private life' issue from the consequences of the impugned measure (consequence-based approach). . . .*
> >
> > *103. Complaints concerning the exercise of professional functions have been found to fall within the ambit of 'private life' when factors relating to private life were regarded as qualifying criteria for the function in question and when the impugned measure was based on reasons encroaching upon the individual's freedom of choice in the sphere of private life."*
>
> **…**
>
> *22 In Denisov (6), the court rejected the President of the Court of Appeal's contentions as to the impact of a reduction to the ranks of a mere judge because his dismissal was due to managerial failings (para. 120). A reduction in monthly remuneration did not seriously affect the "inner circle" of his private life (para. 122) nor was there a substantial effect on his personal relationships or professional or social reputation (paras. 125, 129 and 131).*
>
> **…**
>
> *26 In Denisov (6), the court amplified what it meant by the reason-based approach, giving as examples dismissal by reason of sexual orientation (para. 104) from the armed forces (Smith v. United Kingdom (15)) and concluded (at para. 106): "As can be seen from these examples, the underlying reasons for the impugned*

[44] [2019 (1) CILR 107].

measure affecting professional life may be linked to the individual's private life and these reasons themselves may render Article 8 applicable."

27 It was essential to Mr. Jupp's argument that age could be likened to gender or sexual orientation. In Boyraz v. Turkey (4) a woman was dismissed from her position as a security officer in the Batman branch on the basis of her gender (60 E.H.R.R. 30, at para. 44): ". . . [A] measure as drastic as a dismissal from a post on the sole ground of sex has adverse effects on a person's identity, self-perception and self-respect and, as a result, his or her private life. The Court therefore considers that the applicant's dismissal on the sole ground of her sex constituted an interference with her right to respect for her private life (see, mutatis mutandis, Smith v United Kingdom, (2009) 29 E.H.R.R. 493 at [71]). Besides, the applicant's dismissal had an impact on her 'inner circle' as the loss of her job must have had tangible consequences for the material well-being of her and her family (see Volkov (2013) 57 E.H.R.R. 1 at [166]). The applicant must also have suffered distress and anxiety on account of the loss of her post. What is more, the applicant's dismissal affected a wide range of her relationships with other people, including those of a professional nature and her ability to practise a profession which corresponded to her qualifications (see Sidabras (2006) 42 E.H.R.R. 6 at [48]; Volkov (2013) 57 E.H.R.R. 1 at [166] . . .). Thus, the Court considers that art. 8 is applicable to the applicant's complaint."

33 These authorities establish, as British Gurkha Welfare Socy. v. United Kingdom (5) put it, that "discrimination on grounds of age should not be equated with other 'suspect' grounds of discrimination" (para. 88). Compulsory retirement on the grounds of age is miles away from the dismissal on the grounds of gender in Boyraz (4). Such retirement says nothing about the individual qualities of claimant officers; it does not have a bearing in any way on those personal characteristics which require particular protection, such as gender or sexual orientation. It is not even possible to equate mandatory retirement on the grounds of age with dismissal at all. A dismissal directed at a particular individual on the grounds of that person's age and on the grounds of consequential lack of capability may engage art. 8 but a blanket retirement policy does not. For those reasons, since there were no particular and serious individual consequences suffered, I conclude that s.9 is not engaged and, accordingly the gateway to s.16 has not been opened."

66. The Petitioner contends both that the reason for her dismissal was an issue touching on her 'private life' and that the consequences of the dismissal impact on her private life, thus bringing the dismissal within the 'ambit' of §.9 of the Bill of Rights. The Respondents disagree on both counts.

67. The Respondents do not dispute that the reason for the Petitioner's dismissal was her status as a person who was not vaccinated against Covid-19. They say that whilst this was a matter of personal

choice on the part of the Petitioner, that alone is not sufficient to bring the dismissal within the ambit of the Petitioner's 'private life'. A closer connection with an inviolable characteristic/a person's conduct in their private life is needed.

68. It is argued that the Petitioner's dismissal on the basis of her vaccination status cannot be equated with dismissal on the grounds of sexual orientation, gender, and sex life. Those are factors which go to the very core of a person's identity and self-perception. This is not a case in which the employer has failed to respect key aspects of the Petitioner's identity or her relationships outside of the workplace. It is a case in which the employer has adopted a general policy/management instruction for legitimate reasons connected with the operation of its business, to which the Petitioner has failed to adhere by choice. The ensuing dismissal is not sufficiently connected to the Petitioner's identity so as to bring it within the ambit of §.9. Further, in the absence of any evidence from the Petitioner that she practises any recognised religion, and that administration of the Covid-19 vaccination would run counter to a substantial body of opinion from proponents of that religion, the nexus between the Petitioner's purported religious beliefs and her dismissal is, at best, tenuous.

69. As to the Petitioner's suggestion that her dismissal engages §.9 because of the negative effects it had on her personal life, namely that it caused her stress and worry about her future, the Respondents do not accept that this has reached the threshold of severity necessary to engage §.9. The distress and anxiety arising from the fact of termination and the need to find new employment are matters to a greater or lesser extent involved in every dismissal. Further, whilst the Petitioner points to the reasons given for her dismissal as having potentially serious consequences for her social and professional reputation, the Respondents note that the Petitioner has put forward no concrete evidence to suggest that her reputation has been damaged. As the ECtHR noted in *Denisov v Ukraine* [GC], no. 76639/11, 25 September 2018, at §114:

> *"It is thus an intrinsic feature of the consequence-based approach within Article 8 that convincing evidence showing that the threshold of severity was attained has to be submitted by the applicant. As the Grand Chamber has held, applicants are obliged to identify and explain the concrete repercussions on their private life and the nature and extent of their suffering, and to substantiate such allegations in a proper way (see Gillberg, cited above, §§ 70-73)…"*

70. Even if the Respondents are wrong in their primary position and, contrary to the Respondents' submissions, the Petitioner's dismissal can be said to come within the ambit of §.9, the Respondents dispute that they are under a positive obligation to adopt measures conferring on the Petitioner a mechanism by which to challenge her dismissal, by her private sector employer, for reasons connected with her vaccination status.

71. The general principles applicable to assessing a State's positive obligations under Article 8 in *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014, which concerned the question of whether respect for the applicant's private and family life entailed a positive obligation on the State to provide an effective and accessible procedure allowing the applicant to have her new gender legally recognised while remaining married.

72. In *Bărbulescu v. Romania* [GC], no. 61496/08, ECHR 2017 (extracts), which concerned the monitoring, by a private sector employer, of employee communications, the ECtHR also noted as follows, at §117-119:

> *"117. ...labour law has specific features that must be taken into account. The employer-employee relationship is contractual, with particular rights and obligations on either side, and is characterised by legal subordination. It is governed by its own legal rules, which differ considerably from those generally applicable to relations between individuals (see Saumier v. France, no. 74734/14, § 60, 12 January 2017).*
> *118. From a regulatory perspective, labour law leaves room for negotiation between the parties to the contract of employment. Thus, it is generally for the parties themselves to regulate a significant part of the content of their relations (see, mutatis mutandis, Wretlund v. Sweden (dec.), no. 46210/99, 9 March 2004, concerning the compatibility with Article 8 of the Convention of the obligation for the applicant, an employee at a nuclear plant, to undergo drug tests; with regard to trade-union action from the standpoint of Article 11, see Gustafsson v. Sweden, 25 April 1996, § 45, Reports 1996-II, and, mutatis mutandis, Demir and Baykara v. Turkey [GC], no. 34503/97, §§ 140-46, ECHR 2008, for the specific case of civil servants). It also appears from the comparative-law material at the Court's disposal that there is no European consensus on this issue. Few member States have explicitly regulated the question of the exercise by employees of their right to respect for their private life and correspondence in the workplace (see paragraph 52 above).*
> *119. In the light of the above considerations, the Court takes the view that the Contracting States must be granted a wide margin of appreciation in assessing the need to establish a legal framework governing the conditions in which an*

employer may regulate electronic or other communications of a non-professional nature by its employees in the workplace."

73. Taking account of the principles to be derived from the Strasbourg Court's jurisprudence with respect to the extent of a contracting state's positive obligations under Article 8 of the Convention, the Respondents submit that:

73.1 this case does not touch on 'essential aspects' of the Petitioner's private life. As noted at paragraph 25 above, the Petitioner's vaccination status does not, in the Respondent's view, go to the core of her identity in the way that her gender or sexual orientation might;

73.2 the petitioner was free to negotiate with the Pines with respect to the terms and conditions of her employment and as to the remedies for any breach of those terms;

73.3 in any event, the effect of the Petitioner's dismissal was not such as to preclude her from working for another employer who did not impose the same vaccination requirements as the Pines; the Petitioner was free to exercise her right to physical autonomy/integrity by taking up employment elsewhere.

74. Against that background it is a step too far to suggest that the government is under a positive duty to introduce a legislative framework enabling the Petitioner to challenge her dismissal on the basis of her vaccination status.

Analysis and discussion

75. As was said in *Pinnock,* the question of an infringement of Article 8/§.9 "*will depend upon whether some protected personal characteristic formed the ground of the dismissal or on the severity of the consequences of that dismissal".* As mentioned above it was also said in that case that *"… the judge heard the evidence of the second and third claimants (whose evidence was taken as representative of all of the claimants) as to the consequences they had suffered, but rejected the suggestion that there was any stigma or reputational damage which flowed from mandatory retirement at the age of 55."*

76. In this case there was no evidence from the Pines as to the facts leading up to the dismissal of the Petitioner or any explanation of her dismissal other than the correspondence exhibited by the

Petitioner. In my view, there is no evidence in which to assess satisfactorily the context within which the Petitioner was dismissed. It is alleged that the Petitioner attended work on 16 November 2021 when she was unwell, without having completed a PCR test and later that day tested positive for Covid-19[45]. The dismissal email is dated 22 November 2021 and just refers to the Petitioner's "*noncompliance*". This is followed by an email dated 21 December 2021 which states that the Petitioner was dismissed for failing to comply with the mandate from the Pines Board of Directors in relation to vaccination. That mandate is not in evidence.

77. 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.

78. 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.

Discrimination

79. §.16 of the Bill of Rights states:

> *"16. (1) Subject to subsections (3), (4), (5) 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."*

[45] Letter from the Pines to KSG dated 16 March 2022.

80. §.16 is similar in terms to Article 14 of the ECHR, which states:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

81. Discrimination is not a free-standing right. To amount to discrimination in breach of §.16, the discriminatory treatment must be "***in respect of*** *the rights under this Part of the Constitution*", i.e. under the Bill of Rights. However, it is not necessary to show that there has been a *violation* of the substantive provision to prove discrimination[46]. There just has to be discrimination within the ambit of the substantive provision.

82. The general approach to Article 14 adopted by the ECtHR was summarised in four propositions by the UK Supreme Court in *R (SC) v Secretary of State for Work and Pensions*[47] (adopting the ECtHR approach in *Carson v United Kingdom*[48]*):*

> *"(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."*

83. In addition, "*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*

[46] *Carson v United Kingdom* (2010) 51 EHRR 13.
[47] [2022] A.C. 223 at [37].
[48] (2010) 51 EHRR 13 at [61].

guaranteed by those articles, as Judge Bratza explained in his concurring judgment in Adami v Malta (2006) 44 EHRR 3, para 17." (at [39]).

84. As with other rights, Article 14/§.16 creates a positive obligation "*to prevent, stop or punish discrimination*" (see the ECHR "*Guide on Article 14 of the Convention*" at [42]).

Petitioner's submissions

85. The Petitioner argues that there has been a breach of the Petitioner's rights under Article 8/§.7 and that her status as an employee of a charitable organisation has led her to be subject to different treatment compared to others in a similar situation (i.e. other employees). That different treatment is the denial of the means to challenge her dismissal under the Labour Act (or through similar legislation) and is within the ambit of her constitutional rights.

86. The Petitioner argues that under section 16(2), "*discriminatory*" is given a wide definition and includes "*other status*". It is submitted by the Petitioner that being an employee of a charitable organisation is a relevant status for these purposes.

87. It is argued that in assessing status, a wide and generous approach must be adopted. Examples of wide interpretations of status include military rank as against civilian, residence, and previous employment with the KGB (*Stevenson v Secretary of State for Work and Pensions* [2017] EWCA Civ 2123, [36]). The prohibited grounds go well beyond innate characteristics (*Stevenson*, [38]). The Court of Appeal in *Stevenson* concluded that:

> "*[i]n the majority of cases, it is probably now safe to say that the need to establish status as a separate requirement has diminished almost to vanishing point.*" ([41])

88. In *R (RJM) (FC)) v SSWP* [2008] UKHL 63 at [5] (referred to in *Stevenson*), Lord Walker said:

> *"The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual's personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person's family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to*

> *the development of an individual's personality (they reflect, it might be said, important values protected by arts 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within art 14. (Lord Neuberger instances military status, residence or domicile, and past employment in the KGB). Like him, I would include homelessness as falling within that range, whether or not it is regarded as a matter of choice (it is often the culmination of a series of misfortunes that overwhelm an individual so that he or she can no longer cope). The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify. There is an illuminating discussion of these points (contrasting Strasbourg jurisprudence with the American approach to the Fourteenth Amendment) in the speech of Baroness Hale of Richmond in AL (Serbia) v Secretary of State for the Home Department [2008] 1 WLR 1434, paras 20—35."*

89. The Petitioner submits that the Petitioner's status as an employee of a charitable organisation amounts to a status for the purposes of discrimination.

90. In relation to the question of different treatment of persons in analogous situations, it is submitted that the Petitioner is an employee of a charitable organisation. It is argued that she is in a relevant, similar situation to all other employees who are not employed by charitable organisations. The relevant difference is the discrimination; the fact that the Petitioner and other employees of charitable organisations do not have the protection of the minimum standards of the Labour Act.

91. The Petitioner refers to an equivalent example of unjustifiable comparative treatment which was given in *Lester & Pannick* at 4.14.12:

> *"Article 14 extends not only to those elements of a substantive right which a state is required by the Convention to guarantee, but also to aspects of the right which the state chooses to guarantee, without being obliged under the Convention to do so. For example, art 6 of the Convention does not compel states to institute a system of appeal courts. However, there would be a violation of art 14 if a state provided a right of appeal to some individuals, while unjustifiably debarring others in similar circumstances from appealing."*

92. The Petitioner argues that, by analogy, once the unfair dismissal protections of the Labour Act are granted to employees generally, article 14/§.16 is breached by denying those protections to employees of charitable organisations (and churches) without justification.

Respondents' submissions

93. The position of the Respondents is relatively straightforward. They argue that there have been no breaches of the Petitioner's rights and that therefore no question of an infringement of her rights under §.16 of the Bill of Rights arises.

Analysis and discussion

94. It his written submissions, Counsel for the Petitioner cited a short extract from paragraph 41 of the judgment in *Stevenson.* The full paragraph reads as follows:

> *"With apparent reference to this sentence, Lord Mance and Lord Hughes JJSC, delivering the judgment of the Supreme Court in R (Kaiyam) v Secretary of State for Justice [2014] UKSC 66, [2015] AC 1344, said at [52] that the European court here expressed itself "in terms which might, literally read, eliminate any consideration of status". This comment was made obiter, and Mr Buley for Fiona did not argue that this point had yet been reached in the jurisprudence of the Strasbourg court. Nevertheless, it seems to me to provide a realistic recognition of the direction in which the Strasbourg court's jurisprudence is moving, and to reinforce Lord Wilson's conclusion that if the alleged discrimination falls within the scope of a Convention right, the question of status will normally be answered in the claimant's favour on the basis that he or she possesses either a personal or an identifiable characteristic assessed in the light of all the circumstances of the case. In the majority of cases, it is probably now safe to say that the need to establish status as a separate requirement has diminished almost to vanishing point."*

95. I have already found that the Petitioner's rights under §.7 have been infringed. 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* means that the Petitioner has been discriminated against for the purposes of §. 16 of the Bill of Rights.

Waiver

96. As I alluded to earlier, after the hearing I had asked counsel to prepare further brief written submissions to address an issue relating to the Petitioner's 2017 Contract. Clause 9.3 of that contract reads as follows:

> *"9.3 The Employee understand and accepts that as The Pines is a charitable organization, the Employee's employment hereunder is not subject to, and does not have the statutory protection afforded by the Labour Law."*

My question to counsel was the extent to which that clause could have an effect on the Petitioner's right or standing to bring these proceedings.

Petitioner's submissions

97. The Petitioner argues as follows:

97.1 The clause merely recites that the Petitioner agrees and understands that the Labour Act does not apply to her employment at the Pines. It does not, however, mean that she agrees that it is lawful for the Labour Act not to apply or that she agrees that she should have no remedies. Furthermore, it does not say that the Petitioner waives her right to issue a petition to challenge the law.

97.2 The approach of the ECHR to waivers is set out in *DH v Czech Republic*[49] in which it is stated:

> *"In view of the fact that a difference in treatment has been established in the instant case, it follows that any such consent would signify… a waiver of the right not to be discriminated against. However, under the*

[49] (2008) 47 E.H.R.R. 3.

> *Court's case law, the waiver of a right guaranteed by the Convention—in so far as such a waiver is permissible—must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent and without constraint."*

97.3 It is argued that to be an effective waiver the clause would have to state (at a minimum):

97.3.1 That the Petitioner had been informed of and was aware of the *specific* statutory protections under the Labour Act that will not be available to her as an employee of a charitable organisation.

97.3.2 That she agreed that she would not be protected by those statutory protections and that she cannot later claim that she should be protected by them.

97.3.3 That she understood that, through signing the contract, she was not entitled to bring any constitutional petition challenging the Labour Act on the grounds that it breaches her rights and/or is incompatible with the Bill of Rights.

Respondents' submissions

98. The Respondent argues as follows:

98.1 The jurisprudence of the ECHR confirms that Convention Rights may be waived, provided such waiver is unequivocal, freely entered into, and does not conflict with an important public interest.

98.2 Clause 9.3 expressly and unequivocally states that the Labour Act would not apply to the Petitioner's employment with the Pines. She would therefore be aware in entering into the employment contract that, not only would she not have any rights under the Labour Act itself, but also that any rights under the Bill of Rights that would otherwise be given effect by the provisions of the Labour Act would not apply to her employment. These include the rights under §§.7(1), 9 and 10 Bill of Rights, which the Petitioner asserts are incompatible with the §.3(b) of the Labour Act.

98.3 The Petitioner freely entered into the employment agreement, she was not compelled to work for a charity and could have taken employment with an employer which was subject to the Labour Act.

98.4 The Petitioner's waiver of her constitutional rights in this case does not conflict with any important public interest, it pertains only to her own individual circumstances. In any event, no important public interest is cited in the Petition or in the written and oral submissions on behalf of the Petitioner.

98.5 It follows that all the requirements for a valid waiver of constitutional rights are met in this case, and consequently having waived her rights, the Petitioner has no standing to file the Petition under §.26 (1) Bill of Rights.

98.6 As the Petitioner's rights under §§.7(1), 9 and 10 Bill of Rights were waived upon entering into her employment agreement with the Pines, §.16 Bill of Rights cannot apply because discrimination must be in respect of rights under Bill of Rights.

Analysis and discussion

99. There is not much between the parties in relation to the relevant law which is summed up as follows:

> *"152. An individual cannot be deemed to have waived a right if he or she had no knowledge of the existence of the right or of the related proceedings (Schmidt v. Latvia, 2017, § 96 and case-law references cited).*
> *153. In the Contracting States' domestic legal systems, a waiver of a person's right to have his or case heard by a court or tribunal is frequently encountered in civil matters, notably in the shape of arbitration clauses in contracts.*
>
> **2. *Conditions***
>
> *154. Persons may waive their right to a court in favour of arbitration, provided that such waiver is permissible and is established freely and unequivocally (Suda v. the Czech Republic, 2010, §§ 48-49 and case-law references cited; Tabbane v. Switzerland (dec.), 2016, §§ 26-27 and 30). In a democratic society too great an importance attaches to the right to a court for its benefit to be forfeited solely by reason of the fact that an individual is a party to a settlement reached in the course of a procedure ancillary to court proceedings (Suda v. the Czech Republic, 2010, § 48). The waiver must be attended by minimum safeguards commensurate to its importance (Eiffage S.A. and Others v. Switzerland (dec.), 2009; Tabbane v. Switzerland (dec.), 2016, § 31).*[50]

100. In *Lester, Pannick and Herberg*[51] a similar summary appears:

[50] Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb).
[51] Human Rights Law & Practice.

> ***4.6.43*** *The Convention does not require a public hearing if an accused or a party has waived his right to such a hearing, provided that the waiver is unequivocal and there is no important public interest consideration that calls for the public to have the opportunity to be present*[52]*."*

101. In the context of arbitration, a party waiving a right to pursue a claim in court as opposed to by way arbitration is substituting one remedy for another, but they still have a remedy. Such an agreement may be found in a contract where there is likely to have been some element of equality of bargaining power. In this case, a number of issues arise:

    101.1 In my view it is by no means clear what, if anything, the Petitioner understood by the clause in question. As counsel for the Petitioner has argued, the clause could well be said to just be an acknowledgement by the Petitioner of the state of the law as set out in the Labour Act. I do not think that it could be described as unequivocally waiving her rights to bring these proceedings.

    101.2 The other issue is that the clause is in a contract with the Pines. Even if it might be said to constitute a waiver and the circumstances supported such a construction, the remedy currently sought is against the Respondents and not the Pines. Therefore, the extent to which the clause could be binding on the Petitioner in the context of these proceedings is questionable.

102. Overall, having considered the arguments put forward, I do not think that it can be said that clause 9.3 can constitute a waiver of the Petitioner's rights to bring these proceedings.

Conclusion

103. For the reasons set out above:

    103.1 I find that the Petitioner's rights under §.7 of the Bill of Rights were infringed.

    103.2 The Petitioner's claim in respect of §§. 9 and 10 of the Bill of Rights are dismissed.

    103.3 The Petitioner was discriminated against in contravention of §.16 of the Bill of Rights.

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[52] Application 11855/85: *Håkansson v Sweden* (1990) 13 EHRR 1, ECtHR, at para 66, applied in Application 16717/90: *Pauger v Austria* (1997) 25 EHRR 105, ECtHR, at para 58. See *Warren v Random House Group Ltd* [2008] EWCA Civ 834, [2009] 2 WLR 314: offer of amends under Defamation Act 1996 constituted a waiver.

Remedy

104. Of the remedies sought by the Petitioner, I am of the view that the only order that it is open to me to make is a declaration that §.3(b) of the Labour Act is incompatible with the Bill of Rights[53]. Counsel can make further submissions in relation to the question of damages.

Costs

105. There is no order for costs as Regulation 10(2) of the Legal Aid Regulations, 2016 provides: "*No order for costs in favour of an assisted person may be made against the Crown*".

Hon Justice Alistair Walters
Acting Judge of the Grand Court

[53] The same arguments must in my view also apply to §.3 (c) of the Labour Act.