



D COURT OF THE CAYMAN ISLANDS
 ER OF SS. 23 & 26(1) OF THE CONSTITUTION
 MATTER OF O.77A GCR

Cause No. of 2022
 LACV75 OF 2022

SHELLIANN BUSH

Petitioner

-and-

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

First Respondent

(2) THE DEPARTMENT OF LABOUR AND PENSIONS

Second Respondent

 PETITION

TO: THE GRAND COURT OF THE CAYMAN ISLANDS

This Humble Petition of Shelliann Bush, c/o KSG Attorneys-at-Law, 4th Floor Harbour Centre, 42 North Church Street, Grand Cayman, Cayman Islands, shows that:

1. The Petitioner is Ms Shelliann Bush, a Caymanian.
2. The First Respondent is the Attorney General of the Cayman Islands.
3. The Second Respondent is the Department of Labour and Pensions ("**DLP**") (pursuant to O.77A, r.4(2)).
4. The Petitioner brings these proceedings pursuant to sections 26(1) 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 her rights and freedoms under the Bill of Rights.
5. The Petitioner seeks a declaration of incompatibility in respect to section 3(b) of the Labour Act (2021) ("**the Labour Act**") on the basis that it is incompatible with the Bill of Rights.

This Petition was presented by KSG Attorneys-at-Law, Attorneys for the Petitioner, whose address for service is 4th Floor Harbour Centre, 42 North Church Street, Grand Cayman, KY1-1107, P.O. Box 2255.

6. The Petitioner asserts that the Respondents have breached her rights and freedoms under sections 7 (fair trial), 9 (private life), 10 (conscience & religion) and 16 (non-discrimination) of the Bill of Rights.
7. The breaches arise from the DLP'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 ("**the Decision**").
8. This decision also amounts to a breach of the Petitioner's rights assured by the European Convention on Human Rights (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); Article 1 of Protocol No. 12 (general prohibition of discrimination)).
9. 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:
 - i. A declaration that section 3(b) of the Labour Act is incompatible with the Bill of Rights.
 - ii. Alternatively, an order quashing the DLP's Decision and a direction that the Labour Act apply to charitable organisations.
 - iii. Damages for the loss sustained by the Petitioner as a result of the Labour Act denying her an effective remedy.
 - iv. Further and other relief.
 - v. Costs.

FACTUAL AND LEGAL BACKGROUND

10. This Petition arises out of the dismissal of the Petitioner from her employment at the Pines Retirement Home ("**the Pines**"), 60 Pines Drive, George Town, Grand Cayman, Cayman Islands. The Pines is a charitable organisation within the definition of section 2 of the Labour Act.
11. The Petitioner commenced employment with the Pines on the 3rd October 2011, through a contract of employment executed on the 10th October 2011.

Dismissal of the Petitioner

12. On the 22nd November 2021, the Pines terminated the Petitioner's employment. Immediately prior to this termination, her position was Assistant Day Care Coordinator.
13. The Petitioner alleges that she was the subject of unfair dismissal by the Pines:
14. On the 14th July 2021, the Petitioner received a letter from The Pines, titled "*Weekly PCR Test for Non-Vaccinated Staff*". The letter required that, from the 19th July 2021, staff who had not received a COVID-19 vaccination must take a PCR test on a weekly basis. The letter stated that failure to comply with this requirement would result in suspension without pay. It further stated that PCR tests would not be required for those who had been vaccinated. The Petitioner was not vaccinated at this time.
15. On the 20th October 2021, The Pines issued a memorandum titled "*Mandatory COVID-19 Vaccination for Staff*" ("**the 20th October 2021 Memo**"). It stated 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*".

16. On the 16th November 2021, the Petitioner tested positive after taking her weekly PCR test, as per the policy. This result was communicated to The Pines. She was directed to isolate herself in line with the government requirement in place at the time. She informed her supervisor immediately of the result and the need to isolate.
17. On the 25th November 2021, whilst still in government imposed isolation, the Petitioner received a letter via email. This letter, dated the 22nd November 2021, was titled "*Termination Effective 22nd November 2021*". The letter stated "*[i]n view of your noncompliance and no (sic) regards under the provision of the Labor Law, your employment is hereby terminated effective today*". Despite the reference to the Labour Act, the letter did not specify how this termination purported to be compliant with the law.
18. On the 6th December 2021, the Petitioner emailed Mrs Lynda Mitchell, the CEO of The Pines. The Petitioner asked for confirmation of (i) the alleged element or basis of non-compliance and (ii) the section of the Labour Act relied upon for the termination.
19. On the 15th December 2021, Mrs Mitchell replied stating "*[a]s per the mandate from the Pines Retirement Home Board of Directors, all staff must be vaccinated for COVID-19, on or before the 22nd November 2021, and agree to COVID booster shots thereafter when necessary. Unfortunately, you did not meet that deadline, failing to comply with a directive from the board.*" The letter did not state which section of the Labour Act the termination relied on.
20. The Petitioner alleges that this dismissal was unfair for the following non-exhaustive reasons:
- i. The 20th October 2021 Memo had given all staff one month, between the 20th October 2021 and the 21st November 2021, to receive a vaccination. The Petitioner, however, had been subject to mandatory isolation on the 16th November 2021, following her positive test on that date. The Pines was fully aware of her isolation, as the Petitioner had told her superiors about it. It should have been obvious to the Pines management that the Petitioner could not receive the vaccination whilst in mandatory isolation. Notwithstanding this, the

Pines proceeded to terminate her employment on the basis that she had not received it. In effect, she was denied the additional six days granted to other employees. This was unfair and in breach of the Pines' own policy.

- ii. The Pines' mandatory vaccination policy was unfair. It, *inter alia*, failed to consider deployment in a different role as an alternative to vaccination, failed to consider alternatives such as regular testing, and failed to provide any or sufficient information about the advantages and disadvantages of vaccination to allow employees to make an informed choice. As a result, the dismissal of the Petitioner pursuant to the policy was unfair.
- iii. The Pines' mandatory vaccination policy was discriminatory. It failed to take into account the Petitioner's religious reservations regarding accepting the vaccine.

The Complaint to the Director of Labour

21. On the 24th February 2022, the Petitioner submitted a complaint to the Director of Labour dated the 18th and 19th February 2022 ("**the Complaint**"), pursuant to section 54(1) of the Labour Act.
22. The Complaint alleged that the Petitioner (i) was unfairly dismissed within the meaning of Part VII of the Labour Act and (ii) was discriminated against within the meaning of section 80(1).
23. In respect to unfair dismissal, the Petitioner claimed that her dismissal had not been fair because it had not been in accordance with section 50 (termination after fixed term of employment) or 51 (dismissal for good cause) of the Labour Act (as per section 49(1) of the Labour Act).
24. Through the Complaint, the Petitioner sought the following:
 - i. Compensation for unfair dismissal assessed pursuant to Part VII of the Labour Act.

- ii. Severance pay assessed pursuant to Part V of the Labour Act.
- iii. Due and unpaid vacation leave.

The DLP's Decision

25. On the 24th February 2022, the Senior Labour & Pensions Inspector replied to the complaint as follows ("**the Decision**"):

"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."

26. This Decision was based on section 3(b) of the Labour Act, which states that the Act does not apply to charitable organisations, such as the Pines.

Breach of Petitioner's Rights

27. The effect of section 3(b) of the Labour Act is to deny the Petitioner (and other persons employed in charitable organisations) the protections of the Labour Act. In particular, the Decision denied the Petitioner:

- i. The right to severance pay under Part V of the Labour Act.
- ii. The right to seek determination of entitlement to severance pay from the Director of Labour under section 46.
- iii. Any protection from, or compensation for, unfair dismissal under Part VII of the Labour Act.

- iv. The right to seek determination of whether she was unfairly dismissed, pursuant to section 46.
- v. The right to seek further determination of the issues stated above, whether by the Labour Tribunal, the Appeals Tribunal or the Court under Part IX, or at all.
- vi. The protection from discrimination afforded by section 80 of the Labour Act.
- vii. All other protections, rights and remedies that are provided to employees by the Labour Act.

28. The Decision and section 3(b) of the Labour Act are in breach of the Petitioner's constitutional rights under the Bill of Rights and the European Convention on Human Rights. Contrary to section 16 of the Bill of Rights, the Petitioner is discriminated against in respect of her Constitutional rights due to her status as a charitable organisation worker (see also Article 14 ECHR; Article 1 of Protocol No. 12).

29. Rights to challenge dismissal from employment as unfair exist for all other private employees (under the Labour Act) or public employees (under section 54 of the Public Service Management Act (2018 Revision and the Personnel Regulations (2022 Revision)).

30. Section 3(b) of the Labour Act results in the government discriminating against the Petitioner in respect of the following rights:

- i. Section 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”*. The Petitioner's status as an employee of a charity means she is unable to challenge unfair dismissal and determine her legal rights and obligations (see also Article 6 ECHR).
- ii. Section 9(1) – *“Government shall respect every person's private [...] life”*. Private life encompasses issues arising from loss of employment. The Petitioner is unable to vindicate her right to private life due to her status as a worker at a charitable organisation, unlike employees of private or government employers (see also Article 8 ECHR).

- iii. Section 10(1) – “*No person shall be hindered by government in the enjoyment of his or her freedom of conscience*”. The Petitioner is discriminated against because she cannot vindicate her right to freedom of conscience in the context of her employment, unlike private or government employees (see also Article 9 ECHR).

31. The Petitioner’s right to an effective remedy for discrimination under Article 13 ECHR is also infringed.

RELIEF

32. Your Petitioner therefore humbly prays for the following relief pursuant to section 27 of the Bill of Rights:

- i. A declaration that section 3(b) of the Labour Act is incompatible with the Bill of Rights.
- ii. Alternatively, an order quashing the DLP’s Decision and a direction that the Labour Act apply to charitable organisations.
- iii. Damages for the loss sustained by the Petitioner as a result of the Labour Act denying her an effective remedy.
- iv. Further and other relief.
- v. Costs.

Dated this 18 day of July 2022



KSG

Attorneys for the Petitioner

AND To:

This Petition was presented by KSG Attorneys-at-Law, Attorneys for the Petitioner, whose address for service is 4th Floor Harbour Centre, 42 North Church Street, Grand Cayman, KY1-1107, P.O. Box 2255.

1. The Attorney General of the Cayman Islands
2. The Department of Labour and Pensions