[2025] UKPC 39
Privy Council Appeal No 0047 of 2024

JUDGMENT

Attorney General of the Cayman Islands and another (Respondents) *v* Shelliann Bush (Appellant) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Lloyd-Jones
Lord Sales
Lord Burrows
Lord Stephens
Lady Simler

JUDGMENT GIVEN ON
18 August 2025

Heard on 24 June 2025

Appellant
Rupert Wheeler
Michael West
(Instructed by KSG Attorneys at Law (Cayman Islands))

Respondent
David Pievsky KC
Heather Walker
(Instructed by Attorney General's Chambers (Cayman Islands))

LORD LLOYD-JONES:

Introduction

1. This appeal concerns whether the constitutional rights of Ms Shelliann Bush ("the appellant") under the Cayman Islands Constitution Order 2009 ("the Bill of Rights") have been infringed in circumstances where she has been denied the right to bring proceedings for unfair dismissal from her former employment.

Factual background

2. The appellant was employed from 3 October 2011 until 22 November 2021 by the Pines Retirement Home, a Cayman Islands non-profit organisation established to provide residential accommodation for the elderly ("the Pines"). She was initially employed as a receptionist, under the terms of a contract dated 10 October 2011. Her role changed to Assistant Day Care Co-ordinator on 17 August 2017, when she signed a new contract. Her employment was terminated on 22 November 2021.

3. At the relevant times the Pines was registered with the Director of Labour as a "charitable organisation", within section 2 of the Labour Act (2021 Revision) ("the Labour Act"). Clause 9.3 of the agreement of 17 August 2017 stated:

> "The Employee understand [sic] 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."

4. On or around 14 July 2021, the Pines established a mandatory testing policy for employees who had not been vaccinated against COVID-19. This consisted of a weekly PCR test. The consequence of non-compliance was suspension without pay.

5. The appellant was not vaccinated. She received a letter dated 14 July 2021 setting out the Pines' policy. It stated that, should she decide to become vaccinated, the weekly PCR tests would no longer be required.

6. By a memorandum dated 20 October 2021, Mrs Lynda Mitchell, Chief Executive Officer of the Pines, informed employees, including the appellant, that the Board of Directors of the Pines had decided to introduce a requirement for all current and future employees of the Pines to be vaccinated against COVID-19. The memorandum stated that

this requirement would be reflected in new contracts of employment commencing on 20 November 2021. Failure to be vaccinated would result in non-renewal, with effect from 21 November 2021.

7. In her affidavit the appellant stated that she considered that the vaccination requirement was very unfair. She was not clear about the possible side effects of the vaccine. She also had serious religious reservations about taking the vaccine and felt she was discriminated against for this reason. She wished to use the time between 20 October 2021 and 20 November 2021 to reflect carefully on what she was going to do. Her evidence was that she considered that she was being pressurised into being vaccinated without the Pines providing a full explanation or considering alternative options.

8. On 16 November 2021, the appellant took her weekly PCR test. The result was positive and she had to go into isolation at home. She informed the Pines immediately and sent the test result report by email.

9. By 20 November 2021, the appellant had not been vaccinated. She was still in isolation.

10. By letter of 22 November 2021, the appellant was advised by Mrs Mitchell that her employment was thereby terminated with effect from 22 November 2021 "in view of your non-compliance and no regards [sic] under the provision of the Labour Law". She was also advised that the Board of Directors had agreed a severance package.

11. By email of 6 December 2021, the appellant asked the Pines to state the reasons for her alleged non-compliance and the section of the Labour Act relied upon. On 15 December 2021, Mrs Mitchell responded by email stating that the appellant's employment had been terminated due to her failure to comply with the directive from the Board concerning vaccination. She also stated that the appellant's proposed severance payment was "as per the Cayman Islands Labour Law for dismissal".

12. The appellant instructed her attorneys to assist her in bringing a claim under the Labour Act for severance pay, compensation for unfair dismissal and a claim for damages for wrongful dismissal. Her attorneys wrote to the Pines on 17 February 2022 setting out her position.

13. On 19 February 2022, the appellant submitted a complaint to the Department of Labour and Pensions ("DLP") which included a submission from her attorneys, pursuant to section 54(1) of the Labour Act. That complaint sought compensation for unfair dismissal, discrimination and severance pay under the Labour Act, on the grounds that her dismissal for serious misconduct was not justified.

14. By email of 24 February 2022, a Senior Inspector of the DLP responded stating that the appellant's complaint could not be investigated because the Pines, as a charitable organisation, was not subject to the Labour Act. This is the decision challenged in these proceedings.

15. On 16 March 2022, the Pines responded to the appellant's letter of 17 February 2022. The Pines alleged that the appellant had been dismissed for serious misconduct because she had come to work on 16 November 2021 feeling unwell and had infected others, causing the death of a resident. The appellant disputes this allegation and maintains that she was unfairly dismissed and discriminated against because of her religious beliefs concerning vaccination.

16. By Petition filed on 18 July 2022 the appellant brought proceedings against the Attorney General of the Cayman Islands, the first respondent to this appeal, and the DLP, the second respondent to this appeal, pursuant to section 26(1) of Part 1 of Schedule 2 to the Bill of Rights challenging the decision of the DLP dated 24 February 2022. The appellant sought, among other things, a declaration, pursuant to section 23 of the Bill of Rights, that the Labour Act was incompatible with section 7 (right to a fair trial), section 9 (right to respect for private and family life), section 10 (freedom of conscience and religion) and section 16 (non-discrimination) of the Bill of Rights. The respondents opposed the declarations and orders sought.

Relevant legislation

The Labour Act (2021 Revision)

17. The Labour Act provides, among other things, a comprehensive statutory scheme for compensation for unfair dismissal. The remedies available to an employee under the Labour Act are not available to an employee in an action at common law for wrongful dismissal. In addition, the procedure under the Labour Act is simpler, speedier and cheaper.

18. Section 2 includes the following definitions:

> "'charitable organisation' means one accepted and registered as such by the Director; …
>
> 'Director' means the Director of Labour appointed under section 71(1);

‘employee’ means any individual who enters into or works under or stands ready to enter into or work under a contract of employment with an employer whether the contract be oral or written, express or implied; and the term includes a person whose services have been interrupted by a suspension of work during a period of leave or temporary lay-off; …

‘employer’ means any person who has entered into or stands ready to enter into a contract of employment with an employee, and includes any agent, representative or manager of such person who is placed in authority over an employee”.

19. Section 3 provides:

“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.”

20. Part VII makes provision 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."

"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 … 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 the person was redundant …

(3) The question whether an employer has acted reasonably for the purposes of this Part shall be determined in accordance with equity and the substantial merits of the case having regard to all the circumstances."

"Initiation of proceedings

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

Remedies for unfair dismissal

55. (1) Where, upon a complaint of unfair dismissal, a Labour Tribunal has determined that the dismissal was unfair it may order the payment by the employer to the person dismissed of a sum of money by way of compensation for unfair dismissal.

(2) In making an award of compensation under subsection (1), a Labour Tribunal shall have regard to—

(a) the length of the continuous employment of the person dismissed immediately preceding the dismissal;

(b) the likelihood of the person dismissed finding other comparable employment; …

(4) In the case of any action before any court in respect of a dismissal for which an award has been made under

subsection (1), the court shall, in making any award of damages, take into account and deduct from the award of damages any sum awarded by a Labour Tribunal under subsection (1)."

21. Section 71 provides for the appointment of a Director of Labour who is charged with securing the proper observance of the Labour Act.

22. Section 74 establishes Labour Tribunals for the purpose of hearing complaints from employers and employees.

The Bill of Rights

23. These proceedings were brought by the appellant pursuant to section 26(1) of the Bill of Rights which provides:

> "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."

24. Section 23 of the Bill of Rights provides:

> "23. (1) If in any legal proceedings primary legislation is found to be incompatible with this Part, the court must make a declaration recording that the legislation is incompatible with the relevant section or sections of the Bill of Rights and the nature of that incompatibility.
>
> (2) A declaration of incompatibility made under subsection (1) shall not constitute repugnancy to this Order and shall not affect the continuation in force and operation of the legislation or section or sections in question.
>
> (3) In the event of a declaration of incompatibility made under subsection (1), the Legislature shall decide how to remedy the incompatibility."

25. The substantive provisions of the Bill of Rights are similar but not identical to corresponding provisions in the European Convention on Human Rights ("ECHR") which also applies to the Cayman Islands. It was common ground before us that decisions on the interpretation of these articles of the ECHR have an important bearing on the interpretation of the provisions of the Bill of Rights.

26. Section 7(1) of the Bill of Rights provides in relevant part:

> "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."

Section 7 corresponds to article 6 ECHR which provides in relevant part:

> "6. (1) In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

27. Section 9(1) of the Bill of Rights provides in relevant part:

> "9. (1) Government shall respect every person's private and family life, his or her home and his or her correspondence."

Section 9 corresponds to article 8 ECHR which provides in relevant part:

> "8. (1) Everyone has the right to respect for his private and family life, his home and his correspondence."

28. Section 16 of the Bill of Rights provides in relevant part:

> "16. (1) Subject to subsections (3), (4) and (6), government shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution.

> (2) In this section, 'discriminatory' means affording different and unjustifiable treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, property, birth or other status.
>
> (3) No law or decision of any public official shall contravene this section if it has an objective and reasonable justification and is reasonably proportionate to its aim in the interests of defence, public safety, public order, public morality or public health.
>
> (4) Subsection (1) shall not apply to any law so far as that law makes provision— …
>
> > (d) whereby persons of any such description of grounds as is mentioned in subsection (2) may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is objectively and reasonably justifiable in a democratic society and there is a reasonable proportionality between the means employed and the purpose sought to be realised."

Section 16 corresponds to article 14 ECHR which provides in relevant part:

> "14. 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."

29. The petition was heard by Walters J in the Grand Court on 1 March 2023. In his judgment dated 25 April 2023 he held:

> (1) The Labour Act conferred on the appellant a substantive right not to be unfairly dismissed. Furthermore, section 3(b) of the Labour Act constituted a

procedural bar which prevented her from enforcing that right in breach of section 7 of the Bill of Rights. As a result the appellant's section 7 rights had been infringed.

(2) The appellant had been treated in a discriminatory manner contrary to section 16 of the Bill of Rights considered in conjunction with section 7. The relevant ground of discrimination was the appellant's status as an employee of a charitable organisation.

(3) There had been no violation of the appellant's substantive rights with respect to her private and family life contrary to section 9 of the Bill of Rights, or with respect to her freedom of conscience or religion contrary to section 10 of the Bill of Rights.

30. The respondents appealed to the Court of Appeal of the Cayman Islands against (1) and (2) above. The appellant did not seek to appeal to the Court of Appeal against (3) above. However, before the Court of Appeal the appellant also argued, pursuant to a respondent's notice, that, whether or not her section 7 rights had been breached, there had been a breach of her section 16 right not to be discriminated against when section 16 was considered in conjunction with section 7 and/or section 9 of the Bill of Rights. In this regard it was submitted that the Cayman Islands, although not obliged to do so, chose to legislate to provide a right to compensation for unfair dismissal under the Labour Act and did so in a way which unjustifiably excluded by section 3(b) those who were employed by a charitable organisation. That exclusionary provision, it was submitted, fell within the ambit or scope of the protection provided by section 7 and/or 9 of the Bill of Rights and discriminated against her contrary to section 16.

31. Following a hearing on 30 August 2023, the Court of Appeal (Goldring P, Moses and Beatson JJA) allowed the appeal and dismissed the appellant's respondent's notice. In a judgment dated 18 January 2024 Goldring P, with whom the other members of the court agreed, held:

(1) The appellant had no substantive civil right upon which section 7 could act. Section 3(b) of the Labour Act was not a procedural bar to the appellant's bringing a claim for unfair dismissal. Its effect was, rather, that employees of charitable organisations have no substantive right to protection from unfair dismissal. There was therefore no breach of section 7.

(2) The core value which section 7 seeks to protect is a procedural guarantee of a fair hearing in the determination of substantive rights that already exist. In the absence of a substantive right protecting against unfair dismissal, there was insufficient connection between the core values of section 7 and the unfair

dismissal provisions of the Labour Act, such that the appellant's situation did not fall within the ambit of section 7. Accordingly, there was no infringement of section 16 when read with section 7.

(3) The Labour Act is principally intended to protect the relationship between employer and employee, not to protect employees' enjoyment of a private life. The link between the core values protected by section 9 and the general protections of the Labour Act was too tenuous and insufficient for the unfair dismissal provisions to come within the ambit of section 9. Accordingly, there was no infringement of section 16 when read with section 9.

32. On 9 February 2024, the appellant filed a notice of motion seeking leave to appeal to His Majesty in Council against the Court of Appeal's order on the basis that the appellant was entitled to appeal as of right by virtue of section 3(1)(c) of the Cayman Islands (Appeals to the Privy Council) Order 1984 and section 26(3) of the Bill of Rights.

33. By Certificate of Order dated 20 March 2024, the Court of Appeal granted the appellant final permission to appeal to the Judicial Committee of the Privy Council on the issues described in the notice of motion.

Issues on appeal

34. The following issues arise on this appeal:

Issue 1: Whether the Court of Appeal erred in failing to hold that it was at least arguable that the appellant had a substantive civil right protecting her from unfair dismissal, on which she could found a claim that her inability to advance a statutory unfair dismissal claim breached her section 7 rights.

Issue 2: Whether the Court of Appeal was correct to find that the appellant's inability to advance a statutory unfair dismissal claim did not fall within the ambit of section 7, meaning that there could not be any question of unlawful discrimination contrary to section 16 read with section 7.

Issue 3: Whether the Court of Appeal was correct to find that there was too tenuous a connection between the provisions of the Labour Act allowing certain employees to challenge for unfair dismissal and the core values that section 9 is designed to protect, such that there could be no question of unlawful discrimination contrary to section 16 in denying the appellant the ability to advance a statutory unfair dismissal claim.

Issue 4: If the respondent is given leave to argue the point, whether the appellant's employment with the Pines, or the fact of her employment with a charitable organisation, would have been a protected "status" within section 16 in any event.

Issue 1: Whether the Court of Appeal erred in failing to hold that it was at least arguable that the appellant had a substantive civil right protecting her from unfair dismissal, on which she could found a claim that her inability to advance a statutory unfair dismissal claim breached her section 7 rights.

35. The appellant submits that the rejection by the DLP of her complaint alleging unfair dismissal under Part VII of the Labour Act constituted a violation of her rights under section 7(1) of the Bill of Rights.

36. Section 7(1) of the Bill of Rights provides that everyone has the right to a fair and public hearing in the determination of their legal rights and obligations by an independent and impartial court within a reasonable time. The right conferred by section 7 is, like article 6 ECHR, a procedural right in that it provides for access to the courts and a fair hearing. Although it is concerned with the means of vindication of substantive rights, it does not itself confer any such substantive rights. Its function is to guarantee certain important procedural safeguards in the exercise of rights accorded by national law and not ordinarily to require that particular substantive rights be accorded by national law (*R (Kehoe) v Secretary of State for Work and Pensions* [2006] 1 AC 42 per Lord Bingham at para 8). It is not concerned with the content of an individual's substantive rights nor does it confer any particular rights in substantive law on the individual (*Matthews v Ministry of Defence* [2003] 1 AC 1163 per Lord Hope at para 51.) The essential question for consideration is, therefore, whether the Labour Act constituted a procedural restriction preventing the appellant from enforcing her substantive rights so as to bring section 7 into play.

37. In *Grzęda v Poland* (2022) 53 BHRC 631 at para 257 the European Court of Human Rights (Grand Chamber) recently restated the general principles governing the application of article 6(1) ECHR as follows:

> "For article 6(1) in its 'civil' limb to be applicable, there must be a dispute over a 'right' which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right 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; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences

> not being sufficient to bring article 6(1) into play. … Lastly, the right must be a 'civil' right …"

38. An essential first step is, therefore, an accurate analysis of the appellant's substantive rights in domestic law. (See *Kehoe* per Lord Hope at para 28.)

Substantive right under the Labour Act

39. The appellant submits that it is at least arguable that the Labour Act gave her a right to make a claim alleging unfair dismissal but that section 3(b) prevented her from exercising that right in a section 7-compliant manner. In the alternative she submits that she had other relevant rights that were interfered with unfairly by her dismissal. She complains that section 3(b) of the Labour Act operated as a procedural bar to her bringing her claims before a section 7-compliant tribunal and that accordingly her section 7 right to a fair trial was violated. She submits that the Court of Appeal erred in holding that she had no substantive civil right upon which section 7 could operate. These alternative limbs of the appellant's case will be considered in turn.

40. First, the appellant maintains that she derived from the Labour Act a substantive right not to be unfairly dismissed. The Court of Appeal, correctly in the Board's view, approached this issue as a matter of statutory interpretation and asked whether there was a sufficiently arguable substantive right. The Board agrees with the Court of Appeal that the effect of section 3 of the Labour Act is entirely clear. That Act confers rights which did not previously exist in Cayman Islands law. In particular, it confers a right not to be unfairly dismissed. However, the Labour Act expressly provides in section 3(b) that it does not apply to charitable organisations. The legislative intention is clear: the rights and obligations created by the Labour Act do not apply to an employment relationship where the employer is a charitable organisation, such as the Pines. Such a relationship is excluded from the ambit of the legislation.

41. Furthermore, it is not arguable that section 3(b) amounts to a procedural bar. It is not concerned with how a substantive right may procedurally be vindicated but prevents a substantive right from arising in the first place.

42. On behalf of the appellant, Mr Rupert Wheeler submits that because the appellant was an employee within the definition of "employee" in section 2 of the Labour Act and because section 3(b) merely states that the Labour Act does not apply to charitable organisations (and does not state that it does not apply to charitable organisations and their employees), section 3(b) should be taken as creating a procedural bar to an employee enforcing her right to make a complaint of unfair dismissal against her charitable organisation employer. He submits that section 3(b) does not extinguish that substantive right not to be unfairly dismissed which is enjoyed by all employees but which cannot be

enforced against all employers. In the Board's view this submission is internally contradictory and untenable. The Labour Act cannot have conferred employment rights on employees of charitable organisations without imposing corresponding obligations on the charitable organisations as employers. As Sir John Goldring observed in the Court of Appeal, it could not have been intended to exclude charitable organisations from the application of the Labour Act while at the same time conferring on employees of those same bodies the rights which the legislation was creating. The legislation cannot exclude certain employers from the application of the Labour Act while at the same time creating employment rights for their employees. The clear intention was to exclude employees of charitable organisations from the enjoyment of those rights conferred by the Labour Act. If further support for this conclusion were needed, it can be found in the proviso to section 3(a) which states that the personnel regulations applying to the public service shall not be less favourable than those required by the Act. That assumes that the Labour Act does not apply to employees of the public service.

43. The Labour Act confers on those to whom it applies additional rights not otherwise enjoyed in the law of the Cayman Islands. However, it is not arguable that the Labour Act confers any substantive right on the appellant. The position is analogous to that in *Kehoe* where the House of Lords concluded that the Child Support Act 1991 did not confer on Mrs Kehoe any substantive right and that, as a result, article 6 ECHR was not engaged. As Mr David Pievsky KC points out, on behalf of the respondents, the appellant is attempting to derive a substantive right which has no arguable basis in law, by reference to the procedural right to a fair hearing.

44. In the event that her dismissal involved a breach of contract on the part of her employer, the appellant would, of course, enjoy at common law rights arising on wrongful dismissal which can be vindicated in the common law courts. She enjoys a right not to be wrongfully dismissed and if she were wrongfully dismissed would be entitled to sue her employer in breach of contract. Indeed, the appellant is currently pursuing an alternative claim for wrongful dismissal against her former employer. However, this does not assist her in the instant claim where she claims she has been denied the opportunity to vindicate her substantive right not to be unfairly dismissed.

Substantive right arising in international law or by reference to international standards

45. In the alternative, Mr Wheeler submits on behalf of the appellant that she has substantive unfair dismissal rights arising from some other source in international law or by reference to other generally recognised international standards. He submits that these protect the appellant from unfair dismissal and that they provide a foundation for her case that her section 7 rights have been infringed. In particular, it is alleged that she has the following employment-related civil rights protecting her from unfair dismissal:

(1) the right to remain in employment one currently holds;

(2) the right to engage in a wide variety of jobs in the care sector, even if one currently does not have one;

(3) the right to practise a profession of one's choosing; and

(4) the right to protection in the event of termination of employment.

It is submitted that section 3(b) of the Labour Act denied the appellant access to a court or tribunal for the vindication of these rights.

46. The appellant's submission, summarised above, seems to be derived from a passage in the judgment of Baroness Hale in *R (Wright) v Secretary of State for Health* [2009] 1 AC 739 at para 19 where she said:

> "This raises two questions. First, are we here concerned with a civil right at all? This is uncontroversial. As Lord Hoffmann explained in *Runa Begum v Tower Hamlets London Borough Council (First Secretary of State intervening)* [2003] 2 AC 430, paras 28–31, the scope of the concept of civil rights has been greatly expanded from the sorts of dispute which the original framers of the Convention had in mind. But since 1981 it has been held to include the right to practise one's profession (*Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1; see, for example, *Bakker v Austria* (2003) 39 EHRR 548). 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."

47. When this passage is considered in context, however, it can be seen that the appellant's submissions are based on a fundamental misreading. That appeal concerned the decision by the Secretary of State for Health provisionally to include the claimant care workers in a list of persons considered unsuitable to work with vulnerable adults under the Care Standards Act 2000 and, by reason of that listing, the decision by the Secretary of State for Education and Skills provisionally to include the claimants in a list of persons considered unsuitable to work with children under the Protection of Children Act 1999. The appeal concerned, in particular, the denial of a right to make representations before provisional inclusion in a list under the Care Standards Act 2000. The Supreme Court held that the right to remain in employment or to be able to engage in a particular

employment sector was a civil right within article 6 ECHR. The remarks of Baroness Hale, cited above, must be read in the context of this public law challenge to the decision of regulators to prohibit individuals from practising their profession. They are not addressing private law rights and obligations between employers and employees. The Supreme Court identified such substantive rights in public law and went on to hold that they fell within the autonomous ECHR concept of "civil rights". The decision provides no support for the proposition that the appellant enjoyed a substantive right in Cayman Islands law not to be unfairly dismissed.

48. The appellant also relies in this regard on the opinion of Judge Pinto de Albuquerque in his concurring judgment in *KMC v Hungary* (App No 19554/11), 19 November 2012 (at p 21) that:

> "… [T]he right to protection in the event of termination of employment has a minimum content in European human rights law, consisting of four core requirements: a formal written notice of termination of employment given to the employee, a pre-termination opportunity to respond given to the employee, a valid reason for termination, and an appeal to an independent body."

KMC concerned a claim by a civil servant who had been dismissed from her employment without any reasons having been given. Her complaint was that, a limitation period for exercising her right to sue for unlawful dismissal having expired, she was not in practical terms able to sue at all as her employer had not been obliged to give her any reasons for the dismissal and had not done so. The court held that under Hungarian law the applicant as a former government official had an undisputed "formal right" to challenge her dismissal in court, the precise nature of which was not explained. The court considered (at para 29) that that consideration alone allowed it to find that article 6 ECHR was applicable. The court held that the claim was admissible and that there had been a violation of the applicant's right of access to court in these circumstances. Contrary to the submission of the appellant, the decision does not support a universally existing substantive civil right to protection under European human rights law in the event of termination of employment. To the extent that the concurring opinion of Judge Pinto de Albuquerque may suggest the contrary, it does not reflect the current jurisprudence of the European Court of Human Rights.

49. Similarly, the judgment of the European Court of Human Rights in *Eskelinen v Finland* (2007) 45 EHRR 43 does not support the appellant's case. The observations of the Grand Chamber (at para 59) on which the appellant relies were made in the context of a submission by Finland that article 6 was not applicable to disputes raised by servants of the state such as police officers over their conditions of service because they did not fall within the autonomous ECHR concept of "civil rights" (para 39). That is an entirely

discrete issue which has no application to the present case. (See generally *Pellegrin v France* (1999) 31 EHRR 26.)

50. The dicta cited by the appellant do not support the broad propositions for which she contends. In particular, they do not support the existence of a substantive right in the domestic law of the Cayman Islands to which section 7 can attach in the present proceedings.

51. The appellant further submits that international law supports the arguable existence of relevant substantive rights in domestic law. In this regard, the appellant draws attention to a number of treaties which apply to the Cayman Islands and which, it is submitted, support the appellant's case that relevant substantive rights exist in the domestic law of the Cayman Islands:

> (1) Articles 6 (the right to work) and 7 (the right to the enjoyment of just and favourable conditions of work) of the International Covenant on Economic, Social and Cultural Rights. This treaty was extended to the Cayman Islands in 1976.
>
> (2) Article 5(e)(i) of the International Convention for the Elimination of All Forms of Discrimination which provides "the right of everyone, without distinction … the rights to work [and] to free choice of employment". This treaty was extended to the Cayman Islands in 1969.
>
> (3) Article 11(1)(a) of the Convention on the Elimination of All Forms of Discrimination against Women which refers to "the right to work as an inalienable right of all human beings". This treaty was extended to the Cayman Islands in 2016.
>
> (4) Article 23 of the Universal Declaration of Human Rights which provides for the "right to work".

52. In this regard Mr Wheeler on behalf of the appellant accepts that unincorporated treaties cannot confer rights or impose obligations in the domestic law of the Cayman Islands (*JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 per Lord Oliver of Aylmerton at p 499; *R (SC) v Secretary of State for Work and Pensions* [2022] AC 233 per Lord Reed at paras 77-78). Rather, he submits that international law norms can provide evidence in support of the existence of rights in domestic law, as long as those rights have an arguable independent anchor in the domestic legal system.

53. International law may sometimes influence domestic law within common law systems, such as that of the Cayman Islands. In *Belhaj v Straw* [2017] AC 964 Lord Sumption expressed the matter in the following way (at para 252):

> "In principle, judges applying the common law are not at liberty to create, abrogate or modify municipal law rights or obligations in accordance with unincorporated norms derived from international law, whether customary or Treaty-based. But, as Lord Bingham pointed out in *R v Lyons* [2003] 1 AC 976, at para 13, international law may none the less affect the interpretation of ambiguous statutory provisions, guide the exercise of judicial or executive discretions and influence the development of the common law. Although the courts are not bound, even in these contexts, to take account of international law, they are entitled to do so if it is appropriate and relevant: …"

In certain circumstances a rule of customary international law may be adopted into the common law. (See, for example, *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2019] QB 1075; cf *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355. See generally *The Law Debenture Trust Corporation plc v Ukraine* [2024] AC 411 at paras 204-205.) In this way customary international law may be regarded as one of the sources of the common law.

54. However, this lends no support to the appellant's attempt to establish a relevant substantive right in the present case. On the contrary, the submission faces insuperable obstacles including the following. First, the appellant's case on section 7 depends on establishing a domestic law right not to be unfairly dismissed. The appellant has been unable to point to any principle of international law or human rights law which even arguably requires a state to provide all employees or workers with unfair dismissal rights. As Mr Pievsky submits on behalf of the respondents, there is no principled basis for the notion that there is or should be a universal right to claim for unfair dismissal. Unlike wrongful dismissal, which arises at common law on breach of contract, unfair dismissal is a statutory concept varying in scope and content across jurisdictions as the relevant legislatures see fit. (Indeed, it is not unusual for certain categories of employees to be excluded from the scope of such statutory protection. The Board notes, for example, that in England and Wales when unfair protection rights were first introduced by the Employment Protection (Consolidation) Act 1978 they were not extended to members of the armed forces.) Secondly, the Parliament of the Cayman Islands has decided in passing the Labour Act that the scope of protection from unfair dismissal shall not extend to employees of charitable organisations. There is, as a result, no scope for the implication in the present case of any international law rule inconsistent with that (see *Keyu*).

55. For these reasons, the appellant has been unable to demonstrate an arguable case that section 3(b) of the Labour Act constitutes a procedural bar to a substantive right enjoyed by the appellant in Cayman Islands law not to be unfairly dismissed. As a result, section 7 of the Bill of Rights is not engaged. Ground 1 accordingly fails.

Issue 2: Whether the Court of Appeal was correct to find that the appellant's inability to advance a statutory unfair dismissal claim did not fall within the ambit of section 7, meaning that there could not be any question of unlawful discrimination contrary to section 16 read with section 7.

56. Section 51 of the Labour Act requires that a dismissal must be for good cause. If it is not, section 55 sets out the remedies available to the Labour Tribunal to enforce the employee's right not to be dismissed without good cause. The Court of Appeal accepted (at para 73) that these provisions constitute one of the ways in which the state demonstrates respect for a fair and independent hearing. However, they only do so where the employee has an underlying right not to be dismissed other than for good cause. Sir John Goldring continued, in a passage with which the Board respectfully agrees:

> "[Ms Bush] does not have such an underlying right. Section 7 cannot create one. The protection afforded by the section does not confer an unlimited right to a fair hearing in all contexts. It is a procedural guarantee of a fair hearing in the determination of whatever substantive right exists in the domestic legal order … That is the core value that section 7 seeks to protect. There is in my view little connection between that core value and a statutory scheme designed to protect employees from being dismissed without good reason."

57. In her written case the appellant now accepts that she can only succeed on her second ground if she establishes a violation of section 7 under Ground 1. For the reasons set out above, she is unable to do so and accordingly her Ground 2 also fails.

Issue 3: Whether the Court of Appeal was correct to find that there was too tenuous a connection between the provisions of the Labour Act allowing certain employees to challenge for unfair dismissal and the core values that section 9 is designed to protect, such that there could be no question of unlawful discrimination contrary to section 16 in denying the appellant the ability to advance a statutory unfair dismissal claim.

58. At first instance the judge rejected the appellant's case that her substantive rights to respect for her private and family life under section 9 of the Bill of Rights had been infringed. The appellant did not seek to challenge that holding before the Court of Appeal

but pursuant to a respondent's notice she did seek to rely on section 9 in conjunction with section 16. She maintained that she had been discriminated against because "the subject matter of the disadvantage (ie the ability for most other employees to challenge a dismissal from employment and claim damages for unfair dismissal) comprises one of the ways that the state gives effect to rights, including, but not limited to the rights assured by section … 9".

59. Section 16 does not impose a freestanding prohibition on discriminatory treatment. It prohibits discrimination only in the context of the rights and freedoms conferred by the Bill of Rights. In this respect, the Bill of Rights follows the scheme of the ECHR where article 14 similarly has no freestanding application. In the present case it is therefore necessary to consider whether the subject matter of the complaint is sufficiently closely connected with section 9 as to fall within its ambit. In order to satisfy this requirement it is not necessary to establish that a measure violates or interferes with the appellant's rights under section 9. The appellant need only show that it is sufficiently closely linked to section 9 to bring section 16 into play.

60. Ambit in this sense is a broad concept. In a much-cited passage in a concurring judgment in *Zarb Adami v Malta* (2006) 44 EHRR 3, Judge Sir Nicolas Bratza, President of the European Court of Human Rights, described it in the following terms:

> "The central question which arises is what constitutes 'the ambit' of one of the substantive articles, in this case article 4. It has been argued that 'even the most tenuous links with another provision in the Convention will suffice' for article 14 to be engaged. … Even if this may be seen as going too far, it is indisputable that a wide interpretation has consistently been given by the court to the term 'within the ambit'. Thus, according to the constant case law of the court, the application of article 14 not only does not presuppose the violation of one of the substantive Convention rights or a direct interference with the exercise of such right, but it does not even require that the discriminatory treatment of which complaint is made falls within the four corners of the individual rights guaranteed by the article. This is best illustrated by the fact that article 14 has been held to cover not only the enjoyment of the rights that states are obliged to safeguard under the Convention but also those rights and freedoms that a state has chosen to guarantee, even if in doing so it goes beyond the requirements of the Convention. (See, eg the *Belgian Linguistics Case (No 2) (Merits)* (1968) 1 EHRR 252, at para 9; *Abdulaziz, Cabales and Balkandali v United Kingdom* . . . at para 71.) This would indicate in my view that the 'ambit' of an article for this

> purpose must be given a significantly wider meaning than the 'scope' of the particular rights defined in the article itself."

61. In approaching this ground of appeal it is important to appreciate the basis on which it is advanced. It is a challenge to the exclusion of the appellant from the protection from unfair dismissal provided to others by the Labour Act. Mr Wheeler submits, on behalf of the appellant, that although it was not obliged to do so, the state chose to legislate to provide generally a right to compensation from unfair dismissal but did so in a way which unjustifiably excluded by section 3(b) those, such as the appellant, who were employed by a charitable organisation. He submits that that exclusion fell within the ambit of the protection provided by section 9 and discriminated against the appellant contrary to section 16.

62. In support of this submission the appellant relies, in particular, on two decisions of the UK Supreme Court. *In Re McLaughlin* [2018] 1 WLR 4250 concerned the rejection of a mother's claim for a widowed parent's allowance on the grounds that she was unmarried. In her judgment, with which the other members of the Supreme Court agreed, Baroness Hale noted, at para 17, the observation of the European Court of Human Rights in *Petrovic v Austria* (1998) 33 EHRR 14 at para 28 that article 14 comes into play "whenever the subject matter of the disadvantage … constitutes one of the modalities of the exercise of the right guaranteed". Baroness Hale, at para 21, approved the following passage from the judgment of Sir Terence Etherton MR in *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2018] 2 WLR 1063, para 55:

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

Baroness Hale had no difficulty in applying this principle to the facts of *McLaughlin* (at para 22):

> "Widowed parent's allowance is a positive measure which, though not required by article 8, is a modality of the exercise of the rights guaranteed by article 8. It has a more than tenuous

> connection with the core values protected by article 8: securing the life of children within their families is among the principal values contained in respect for family life. There is no need for any adverse impact other than the denial of the benefit in question."

63. In this regard the appellant also relies on *R (A) v Criminal Injuries Compensation Authority* [2021] UKSC 27; [2021] 1 WLR 3746 ("*CICA*"). The claimants applied for compensation under the Criminal Injuries Compensation Scheme (2012) as victims of modern slavery and trafficking but were refused under a rule excluding those with unspent criminal convictions. The claimants sought judicial review of the decision, inter alia on the ground that the exclusionary rule unjustifiably discriminated against them contrary to article 14 read in conjunction with article 4 ECHR. Lord Lloyd-Jones, with whom the other members of the court agreed, cited the passage from the judgment of Judge Sir Nicolas Bratza in *Zarb Adami v Malta* set out at para 60 above and continued (at para 39):

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

64. On the basis of these authorities, Mr Wheeler submits on behalf of the appellant that the unfair dismissal provisions of the Labour Act were a positive measure with a more than tenuous connection with the core values of section 9. He submits that the protection of respect for a person's private life and family life under section 9 includes as a core value a right not to be unfairly dismissed. The state, he submits, by its introduction of the remedies for unfair dismissal is showing respect for that section 9 right and such remedies must therefore be made available without discrimination.

65. At the heart of this ground of appeal lie the questions of the core values of section 9 and the proximity of the subject matter of complaint to those values. In *M v Secretary of State for Work and Pensions* [2006] 2 AC 91 Lord Bingham of Cornhill stated (at para 4):

> "It is not difficult, when considering any provision of the Convention, including article 8 …, to identify the core values which the provision is intended to protect. But the further a situation is removed from one infringing those core values, the weaker the connection becomes, until a point is reached when there is no meaningful connection at all. At the inner extremity a situation may properly be said to be within the ambit or scope of the right, nebulous though those expressions necessarily are. At the outer extremity, it may not. There is no sharp line of demarcation between the two. An exercise of judgment is called for. … I cannot accept that even a tenuous link is enough. That would be a recipe for artificiality and legalistic ingenuity of an unacceptable kind."

Similarly, Lord Nicholls stated (at para 14) with reference to the expressions "ambit" and "scope" and to the need for the impugned measure to be "linked" to the exercise of a guaranteed right:

> "The approach of the ECtHR is to apply these expressions flexibly. Although each of them is capable of extremely wide application, the Strasbourg jurisprudence lends no support to the suggestion that any link, however tenuous, will suffice. Rather, the approach to be distilled from the Strasbourg jurisprudence is that the more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the particular substantive article, the more readily will it be regarded as within the ambit of that article; and vice versa. In other words, the ECtHR makes in each case what in English law is often called a 'value judgment'."

(See also *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484 per Lord Bingham at para 13.)

66. In *Royal Cayman Islands Police Association v Commissioner of the Royal Cayman Islands Police Service* [2022] ICR 117 ("*RCIPA*"), Lord Stephens, delivering the judgment of the Board, sought to identify the core values of section 9 of the Bill of Rights in the context of employment disputes. The appellant association brought proceedings challenging a policy of mandatory retirement at the age of 55 for serving officers in service on a given date but not for those engaged after that date. One basis of challenge was discrimination under section 16 of the Bill of Rights read in conjunction with the right to respect for private life under section 9. Lord Stephens considered (at para 64) that an analysis of what was protected by article 8 ECHR in relation to an employment-related dispute between an individual and a state would enable identification of the relevant core

values. It would then be necessary to make a value judgement as to whether a personal interest close to that core was infringed or undermined.

67. In this regard he considered in detail three decisions of the European Court of Human Rights: *Denisov v Ukraine* (Application No 76639/11), *JB v Hungary* (Application 45434/12) and *Novakovic v Croatia* [2021] ELR 169. (See *RCIPA* at paras 65-79.) For present purposes it is sufficient to record the conclusion of the Grand Chamber in *Denisov* as to the scope of article 8 in employment-related disputes (at paras 115, 116):

> "115. The court concludes from the above case-law that employment-related disputes are not *per se* excluded from the scope of 'private life' within the meaning of Article 8 of the Convention. There are some typical aspects of private life which may be affected in such disputes by dismissal, demotion, non-admission to a profession or other similarly unfavourable measures. These aspects include (i) the applicant's 'inner circle', (ii) the applicant's opportunity to establish and develop relationships with others, and (iii) the applicant's social and professional reputation. There are two ways in which a private-life issue would usually arise in such a dispute: either because of the underlying reasons for the impugned measure (in that event the court employs the reason-based approach) or – in certain cases – because of the consequences for private life (in that event the court employs the consequence-based approach).
>
> 116. If the consequence-based approach is at stake, the threshold of severity with respect to all the above-mentioned aspects assumes crucial importance. It is for the applicant to show convincingly that the threshold was attained in his or her case. The applicant has to present evidence substantiating consequences of the impugned measure. The court will only accept that Article 8 is applicable where these consequences are very serious and affect his or her private life to a very significant degree."

68. In *RCIPA* (at para 81) Lord Stephens identified the following as core values of article 8 in employment-related disputes. The overriding core value in the ECHR is respect for human dignity and human freedom (*Pretty v United Kingdom* (2002) 35 EHRR 1, para 65). In addition he discerned the following core values of article 8 in employment-related disputes from *Denisov* and *JB*:

> "In *Denisov* the core values are protection from measures whose reasons are primarily, though not exclusively, connected with a suspect ground, … or from measures whose consequences are 'very serious' affecting private life to 'a very significant degree'. In *JB v Hungary* … the core value is freedom of choice in the sphere of private life. The substantive right in issue is relevant to whether the material facts are within the ambit of that right: …. In the context of an employment-related dispute between an individual and a state the reasons under the reason-based approach are limited and severity is a necessary component of a consequence-based approach. Those limitations must affect the assessment of whether the material facts are within the ambit of that aspect of article 8 ECHR."

69. In applying the reason-based approach and the consequence-based approach to the facts of *RCIPA*, Lord Stephens arrived at the value judgement that mandatory retirement on the grounds of age, which is an ordinary incident of modern life, is far removed from the core values in relation to employment-related disputes between an individual and a state which article 8 (and section 9) are intended to protect. As a result, he concluded that the dispute did not fall within the ambit of article 8 (and section 9).

70. In considering the application of section 9 to the facts of the present case it is important, however, not to lose sight of the fact that, unlike *RCIPA*, this appeal is not concerned with an allegedly discriminatory decision in an employment relationship but with a challenge to the scope of application of employment legislation. The issue here is whether the provisions of the Labour Act, and in particular the restriction under section 3(b), are compatible with section 16 of the Bill of Rights read in conjunction with section 9. The ambit of section 9 must be addressed at that level. More specifically, as Mr Pievsky put it on behalf of the respondents, the question is whether, by providing some employees with the right to sue their employer for unfair dismissal, Parliament chose to safeguard or promote the private life interests of those employees. As he submits, the answer to that question is of general and constitutional significance and cannot depend on the precise facts of a particular employment dispute that has later arisen between two private entities, even if it is that dispute which has led to the constitutional challenge. It is therefore necessary to focus on the relevant measure.

71. How seriously and directly does the allegedly discriminatory provision in section 3(b) of the Labour Act impinge upon the values underlying section 9? The Board would accept that employment-related disputes are not of themselves necessarily excluded from the notion of private life within section 9. At the level of individual claims in employment disputes, a statutory remedy for unfair dismissal may be invoked, for example, to protect employees from dismissal on suspect grounds or with certain consequences so as to engage the right to respect for private life under section 9. In this way section 9 rights may be vindicated. This does not mean, however, that the legislation itself is necessarily

within the ambit of section 9. The Board agrees with Sir John Goldring (at para 80 of his judgment in the Court of Appeal) that the purpose of the unfair dismissal provisions of the Labour Act is not to further employees' enjoyment of a private life or to protect them from dismissal for reasons intrinsically connected with their private life. On the contrary, they are intended to protect the relationship between employer and employee. It seems to the Board that this reason is remote from the core interests which section 9 is intended to protect and that the link is no more than tenuous.

72. For the same reasons, the provisions of the Labour Act granting protection from unfair dismissal cannot be regarded as a modality of the exercise of the rights guaranteed by section 9. *McLaughlin* and *CICA* are distinguishable on this basis. In choosing to confer protection from unfair dismissal on some but not all employees, Parliament is not choosing to safeguard or promote the private life interests of those employees. It is not applying a measure which has a sufficient connection with a core value protected by section 9 so as bring the measure within the ambit of section 9.

73. For these reasons, the challenge to the legislation does not fall within the ambit of section 9 and, accordingly, this basis for the application of section 16 also fails.

Issue 4: If the respondent is given leave to argue the point, whether the appellant's employment with the Pines, or the fact of her employment with a charitable organisation, would have been a protected "status" within section 16 in any event.

74. Before the Court of Appeal, the respondents did not contest that the appellant, as an employee of the Pines, had a relevant status within the meaning of section 16 of the Bill of Rights. Before the Board they applied for permission to argue the point. That application was opposed by the appellant.

75. Although the Board heard argument on the substantive point and on whether the respondents should be allowed to raise it, the Board considers that, in the light of its decision on Ground 3, it is unnecessary to consider the issue further.

Conclusion

76. For these reasons the Board will humbly advise His Majesty that the appeal should be dismissed.