[2021] JMSC Civ. 194

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2021 CV 04578

BETWEEN	**DORIC WHITE**	**CLAIMANT**
AND	**DIGICEL (JAMAICA) LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr Hadrian Christie and Ms Abbi-Gaye Coulson, instructed by HRC Law for the Claimant

Messrs. Kevin Powell and Sundiata Gibbs, instructed by Hylton Powell for the Defendant

Ms Althea Jarrett, Q.C., Director of State Proceedings, appearing *amicus curiae*.

Heard: November 4, December 2 & 20, 2021

Constitutional law – COVID-19 vaccination policy – Breach of constitutional rights under Charter of Fundamental rights and Freedoms (Constitutional Amendment) Act, 2011 — Whether court should exercise or decline jurisdiction under section 19 of the Charter of Fundamental Rights and Freedoms – The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, sections 13(1)(c), (3)(a), (b), (j)(ii), (p) and (s), sections 17 & 19.

Injunction – whether serious issue to be tried – constitutional claim – whether adequate remedy in any other law – whether damages are an adequate remedy – law of contract

WINT-BLAIR, J

> *"The judges are the mediators between the high generalities of the constitutional text and the messy details of their application to concrete problems. And the judges in giving body and substance to the fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time."*[1]

[1] This is an application for injunctive relief filed by the claimant who seeks the following orders[2]:

[2] *Until the court's final decision on the claim, the Defendant company be restrained from enforcing its COVID-19 vaccination policy (contained in the Defendant's letter dated 29 September 2021) in any manner prejudicial to the interest of the claimant and/or prejudicial to the Claimant's employment within the Defendant's organization in any manner that would result in:*

(a) The withholding of the Claimants' (sic) salaries;

(b) The termination of the Claimants' (sic) employment as result of their (sic) failure to comply with the defendant's written and/or unwritten vaccination policy; and/or

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[1] Lord Hoffman in Boyce and Joseph v R, 64 W.I.R. 37 at 48f.
I had indicated to counsel at the outset, that I intended to shamelessly reproduce the submissions they made in this matter verba ipsissima, to which they both graciously and pleasantly consented. I am grateful for the e-copies which they have provided and for their invaluable industry and assistance. I must also mention the extraordinary efforts of Ms. Camenia Roberts and Ms. Tassja Mitchell without whom the timely delivery of this decision would not have been possible.

[2] In an urgent notice of application for court orders filed on November 2, 2021

(c) The imposition of any obligation on the claimant to submit to COVID-19 testing and/or to disclose the results of his COVID-19 test results in the absence of any signs or symptoms of COVID-19;

(d) The imposition of any financial obligation on the Claimants, (sic) including the (sic) bearing the cost of COVID-19 testing.

1. The costs of the application be costs in the claim.

2. Such other orders as the court deems fit."

[3] The Judicature Supreme Court Act, 1880 by section 49(h) confers jurisdiction on the Supreme Court to grant an interlocutory injunction in all cases in which it appears just or convenient to the court to do so. The Civil Procedure Rules also provide in Rule 17.1(1) that the court may grant the interim remedy of an interlocutory injunction.

***Whether there is a serious question to be tried**.*

[4] In keeping with the quotation of Lord Hoffman above, the just society lives in the land of wood and water, on the island of Jamaica, land we love. The time of that just society is the year of our Lord 2021, in which a global pandemic known as COVID-19 has pervaded every aspect of known life and plunged this nation into masks and alcohol.

[5] It is at this time in our history that Digicel, a telecommunications company, with its head office in Kingston, Jamaica, decided, to implement a policy in relation to COVID-19 for all its employees ("the policy"). The policy took effect on September 29, 2021 and provided, among other things, as follows:

> *"By close of business on Friday 15th October 2021, all employees should submit their vaccination card showing proof of vaccination – whether partial or full – to HR.*
>
> - *Employees who are not vaccinated as of Friday 15th October 2021 will be required to submit a negative PCR test result taken in the preceding 72 hours every two weeks to HR. This will*

permit them to attend work. These tests will be done at the employees' expense. Antigen tests will not be accepted.

- *Any employee who is unable to produce a current PCR test result, and who cannot attend work for this reason, will be required to take the days on which they are absent as unpaid leave – or alternatively they can choose to have these days taken from their vacation allowance.*
- *If an employee has used up all their vacation days, the absent days will be taken as unpaid leave.*
- *This policy is applicable to all our employees regardless of work location. To be clear, employees will not be allowed to work remotely as a means of avoiding taking the vaccine or avoiding PCR testing.*
- *All new hires must be fully vaccinated in advance of starting their role with Digicel.*

Please note that exemptions to this policy will only be granted for medical reasons and will require the employee to submit a doctor's report verifying why the individual is unable to be vaccinated against COVID…"

[6] The Privy Council, **in National Commercial Bank Jamaica Limited v Olint Corporation Limited**[3], in keeping with the decision in **American Cyanamid Co v Ethicon Ltd**[4] affirmed the settled position that before an interlocutory injunction is granted, the court must first be satisfied that there is a serious issue to be tried.

Where the substantive matter and the interlocutory relief are the same

[3] [2009] UKPC 16
[4] [1975] 1 All ER 504

[7] The test for establishing a serious issue is that the issue must be neither frivolous nor vexatious. However, where granting the interlocutory relief is tantamount to granting the relief sought in the substantive claim as in the application at bar, then this court must undertake a more extensive review of the merits, in order to be satisfied that the applicant for injunctive relief is likely to prevail if the matter goes to trial.

[8] There is extensive authority establishing that before granting an interim injunction, the court must be satisfied that the evidence available at the hearing of the application discloses that the claimant has real prospects of succeeding in his claim for a permanent injunction at the trial[5].

[9] In the case of **Re Lord Cable (deceased) Garratt and Others v Waters and Others**[6] Slade J stated:

> *"On any claim for an interlocutory injunction the court must still, as a first step, consider whether the evidence available to the court discloses or fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial; if the available evidence fails to disclose this, the motion must fail in limine and questions of balance of convenience will not fall to be considered at all*.[7]**"**.*"*

[10] In **American Cyanamid**, the principle was laid down that the court must be satisfied that the claim is not frivolous or vexatious. It is not for the court at the interlocutory stage to conduct a mini-trial or to attempt to resolve conflicts which arise on the evidence, nor to determine questions of law which call for "detailed argument and mature considerations."

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[5] American Cyanamid Co v Ethicon Ltd (supra)[1975] 1 All ER 504 at 511; Also see also Halsbury's Laws of England, 5th edition, volume 12, paragraph 385

[6] [1976] 3 All ER 417

[7] [1976] 3 All ER 417 at 432

[11] Slade J, went on to say:

> *"American Cyanamid Co. v Ethicon Limited may have led prospective plaintiffs to the belief, perhaps partially justified, that it is not necessary for them to adduce* ***affidavit evidence in support of a motion for an interlocutory injunction of such a precise and compelling nature as might have been required before that decision. Nevertheless, in my judgment it is still necessary for any plaintiff who is seeking interlocutory relief to adduce sufficiently precise factual evidence to satisfy the court that he has a real prospect of succeeding in his claim for a permanent injunction at the trial****. If the facts adduced by him in support of his motion do not by themselves suffice to satisfy the court as to this, he cannot in my judgment expect it to assist him by inventing hypotheses of fact on which he might have a real prospect of success.[8]" (emphasis mine).*

[12] Their Lordships, in **National Commercial Bank Jamaica Limited v Olint Corporation Limited** [9] adopted a similar approach saying:

> *16. It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American*

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[8] at page 431

[9] (supra) [2009] UKPC 16 at paras 16 to 19

Cyanamid Co v Ethicon Ltd [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.[10]

In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408:

"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."

Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that

the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.

…

What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in Shepherd Homes Ltd v Sandham [1971] Ch 340, 351, "a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted."

[13] Based on the authorities, this court must be satisfied by evidence presented at the hearing of the application for interim injunction that the claimant has a real prospect of succeeding in his claim for a permanent injunction at the trial[11].

[14] In the instant case, the claimant has filed a fixed date claim form seeking orders as set out hereunder:

1. *A declaration that the Defendant Company's Vaccination Policy, as contained in its letter dated 29 September 2021, is unlawful in breach of the contract of employment between the Claimant and Defendant and in breach of the Claimant's Fundamental Rights and Freedoms.*

[11] American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504 at 511; Also see also Halsbury's Laws of England, 5th edition, volume 12, paragraph 385

2. *An injunction restraining the Defendant Company, its servants, agents, assigns and associated companies, from enforcing its written COVID-19 Vaccination Policy, contained in a letter dated 29 September, 2021, in any manner prejudicial to the interest of the Claimant and/or prejudicial to the Claimant's employment within the Defendant's organization in any manner that would result in:*

   (a) The withholding of the Claimant's salary;
   (b) The demotion and/or adverse material change to the Claimant's post of employment or job description/functions within the Defendant's organization.
   (c) The termination of the Claimant's employment as result of their (sic) failure to comply with the defendant's written and/or unwritten vaccination policy; and/or
   (d) The imposition of any obligation on the Claimant to subject himself to COVID-19 testing;
   (e) The imposition of any financial obligation on the Claimants, (sic) including the provision of regular mandatory COVID-19 polymerase chain reaction ("PCR") test results at the Claimant's expense.
3. *Damages*
4. *Interest on Damages*
5. *Cost (sic)*
6. *Such further and other relief as the Honourable Court thinks just.*

The constitutional jurisdiction of the single judge

[15] The claimant having raised constitutional redress in his fixed date claim form filed, it is the view of this court, that the interlocutory relief being sought if granted would be tantamount to granting the relief sought in the substantive claim. To this end, the court, made orders for the filing of submissions on the constitutional aspects of the claim. Counsel for the claimant, had caused the Attorney General to be served as is required by the Rules and Ms. Althea Jarrett, Queens Counsel and Director of State Proceedings appeared in the matter at the invitation of the court to lend her assistance which was greatly appreciated.

The stage at which the Supreme Court is to consider a claim for constitutional redress

[16] This court is aware of the decision of the Privy Council in **Thakur Jaroo v The Attorney General of Trinidad and Tobago**[12] which was cited by counsel for the defendant, Mr. Powell and which is one of the trilogy of cases dealing with section 14(1) of the Constitution of Trinidad and Tobago.

[17] In **Jaroo**, the Board **rejected** the submission that a mere allegation was not enough to entitle the applicant to proceed by way of an originating motion, provided he could **establish** that there had been a breach of the constitutional guarantee, the choice of remedy was a matter for the individual. The Privy Council dealt with that submission in this way at paragraphs 38 and 39:

> *"Their Lordships do not accept this argument. The appropriateness or otherwise of the use of* ***the procedure afforded by section 14(1) must be capable of being tested at the outset when the person applies by way of originating motion to the High Court. All the court has before it at that stage is the allegation. The answer to the question whether or not the allegation can be established lies in the future.*** *The point to which Lord Diplock drew attention was that the value of the important and valuable safeguard that is provided by section 14(1) would be diminished if it were to be allowed to be used as a general substitute for the normal procedures in cases where those procedures are available.* **His warning of the need for vigilance would be deprived of much of its value if a decision as to whether resort to an originating motion was appropriate could not be made until the applicant had been afforded an opportunity to establish whether or not his human rights or fundamental freedoms had been breached.**

[12] [2002] UKPC 5

> *"Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse."*

[18] **Jaroo** makes it clear that it is for the claimant to consider his position before approaching the Supreme Court under section 19(1) of the Charter. Should the claimant elect to go forward with the application, the court will consider whether to grant or deny the application at the initial stage when the allegation is made, not at the trial stage when the allegation must be proven. The evidence to be adduced at by the claimant must therefore be capable of making out a prima facie case.

Judge-Driven Case Management

[19] In the exercise of its wide case management powers, the court, in furthering the overriding objective of dealing with cases justly; in the determination of the real issues to be tried and having regard to the nature of the issues raised, decided that as the fixed date claim form raised the issue of constitutional redress that counsel should be asked to file separate submissions to address this issue for the assistance of the court.

[20] It is clear from section 19 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ("the Charter") that the Supreme Court has been vested with original jurisdiction and more importantly, in section 19(1) the words *"without prejudice to any other action with respect to the same subject matter which is lawfully available"* have been included in the section. This means that the Charter gives the Supreme Court the power to enquire into and to scrutinize all constitutional claims and constitutional rights emanating from the supremacy of the constitution. However, constitutional issues are not impervious to either being struck out or remitted pursuant to section 19(4).

[21] The court invited submissions on the issue as there was no application before the court pursuant to section 19(4) of the Charter. Counsel for the claimant, Mr. Christie submitted that the court could not exercise this power until the matter was fully ventilated at a trial in the Full Court.

[22] Ms. Jarrett, QC submitted that the court is entitled at this preliminary stage to determine whether the claim as filed should proceed as one in which the court will exercise its exceptional jurisdiction or one without the grounds of constitutional redress. To answer the concern that the claimant will somehow suffer some disadvantage she submitted that, if the court chooses in the exercise of its discretion not to proceed under the constitutional redress provisions, it would still be obliged to consider constitutional issues that arise and make a determination as to an appropriate remedy outside of a constitutional remedy.

[23] The issue as to whether or not there is a distinction between power and jurisdiction is settled by the trilogy of Privy Council cases out of Trinidad and Tobago, the rules from other courts in the regions and our courts, which is that the jurisdiction that section 19 gives to the Supreme Court is not just to hear a constitutional claim but to grant remedies, which encompasses the power to make orders, issue writs and give directions. The remedy may be a declaration,

it can be injunctive relief under any other law, or at common law and it need not be under section 19.

[24] Mr Powell agreed with Queens Counsel that the court could exercise its Part 25 powers to narrow the issues and determine the order in which issues should be heard at any stage of the proceedings and that the claimant's submission that the court lacked jurisdiction were misconceived. If the court declined jurisdiction pursuant to the exercise of its powers under section 19(4) then the matter would be remitted.

[25] I disagree with Mr. Christie on the issue of when the single judge may hear a constitutional claim and by way of comment, it cannot be right that the commencement of an application under section 19 of the Constitution will guarantee a hearing before the Full Court for any claim seeking constitutional redress, irrespective of how hopeless, misconceived or vexatious it may be simply because breaches of constitutional rights are alleged.[13]

[26] The idea behind robust case management is to identify the points to be raised at trial and the issues in dispute. A single judge has a duty to examine the claim to see whether it is to go forward to the trial court however constituted. It does not matter how a claim can be or is characterized legally. What matters is whether the facts of the dispute fall within the ambit of the constitutional jurisdiction of the court.

[27] Additionally, there are no civil proceedings heard by the Supreme Court to which the wide ranging case management powers of the court do not apply. The court is never without its Part 25 jurisdiction while it employs its Part 26 powers. In Rule 26.1(2)(k) of the Civil Procedure Rules ("CPR"), states:

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[13] These comments are of general application and not a personal view of this case, the personal view of a judge is irrelevant.

*26.1 (1) The list of powers in this rule **is in addition to** any powers given to the court by any other rule or practice direction or by any enactment* (emphasis mine).

(2) Except where these Rules provide otherwise, the court may -

(k) exclude an issue from determination if it can do substantive justice between the parties on the other issues and determining it would therefore serve no worthwhile purpose;(emphasis mine).

[28] The defendant's counsel has cited the decision of the Court of Appeal in **Dawn Satterswaite v The Asset Recovery Agency**,[14] at paragraph 138 which sets out the powers of the single judge to deal with, at an early stage questions relating to constitutional relief and I endorse this position:

> *"[138] In the result, based on the guidance given in the authorities, it is very important for a party who perceives that a breach of their constitutional rights has occurred, or that questions have arisen in relation to their constitutional rights, to decide how they wish to properly access the court, and to make such adjustments as are legally appropriate in the process through the courts. In any event, we share the view put forward by the Attorney General, that a court need not be constituted as a "Constitutional Court" and a claim need not come before the court, as an originating motion, for a judge of the Supreme Court to determine questions arising, which relate to a party's constitutional rights, as far as is applicable and necessary, in cases where the main relief sought is not constitutional redress."*

[14] [2021] JMCA Civ 28

[29] This court is bound by that decision and also the trilogy of decisions of the Privy Council out of Trinidad and Tobago which were extensively discussed in **Satterswaite** as indicated by Ms Jarrett, QC.

[30] As a preliminary issue, the court embarked upon a consideration of the issue constitutional redress pursuant to section 19 of the Charter.

THE CLAIMANT'S SUBMISSIONS ON INJUNCTIVE RELIEF

[31] The claimant began his submissions by stating what he considers to be relevant legislation that empowers the court to grant interlocutory injunctions. The Supreme Court is empowered to grant interlocutory injunctions pursuant to section 49(h) of the Judicature (Supreme Court) Act, 1880 where it appears to the court to be just or convenient that such order should be made. The court is also empowered to grant injunctive relief under rule 17.1 (1) of the CPR.

[32] The claimant submits that when considering whether to grant or refuse an injunction, the court must consider, inter alia:

(a) whether there is a serious issue for trial;

(b) whether damages will be an adequate remedy; and

(c) whether the justice of the cases favours granting the injunction.

[33] The claimant further submits that as stated by Straw, JA in **Tara Estates Limited v Milton Arthurs**[15], "[t]he principles as to whether to grant an injunction are elucidated in the oft-cited decision of American Cyanamid. Of particular importance is Lord Diplock's observation that at the interlocutory stage, what is

[15] [2019] JMCA Civ 10, [35]

important is that the court establishes that the claim being brought is not frivolous or vexatious, and that there is a serious issue to be tried".

[34] Therefore, it is safe to say that if the case before the court is not fit for striking out (i.e. frivolous / vexatious), then there are serious issues to be tried.

[35] The purpose of an interim injunction is to improve the chance of the court being able to do justice after a determination of the merits at trial. So, the court must assess whether granting or withholding an injunction is more likely to produce a just result.[16] Unless the court otherwise directs, a party applying for an interim order under CPR Part 17 must undertake to abide by any order as to damages caused by the granting or extension of the injunction.[17]

[36] Moreover, he submits that according to **Allen v Jambo Holdings Ltd & Ors**[18] an applicant's impecuniosity is not a bar to accepting his undertaking as to damages.

Contract law in employment

[37] The claimant highlights that "although much of modern employment law is contained in statutes and statutory instruments, the legal basis of employment remains the contract of employment between the employer and the employee- Halsbury's Laws of England[19]. The general law of contract applies to a contract of employment — **Laws v London Chronicle (Indicator Newspaper) Ltd[20]**.

[38] He states that in **Johnson v Unisys Ltd[21]**, Lord Hoffmann, explained:

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[16] See- Tara Estates Limited v Milton Arthurs (supra), [36]
[17] CPR 17.2(2).
[18] [1980] 2 502
[19]Volume 39 (2014), para. 1
[20] [1959] 2 All ER 285, 287E
[21] [2001] 2 801

"...At common law the contract of employment was regarded by the courts as a contract like any other, The parties were free to negotiate whatever terms they liked and no terms would be implied unless they satisfied the strict test of necessity applied to a commercial contract. Freedom of contract meant that the stronger party, usually the employer, was free to impose his terms upon the weaker. But over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem, the law has changed to recognise this social reality. Most of the changes have been made by Parliament.... And the common law has adapted itself to the new attitudes, proceeding sometimes by analogy with statutory rights. "

[39] According to Halsbury's Laws of England[22] "the contractual basis can, however, cause problems where the traditional rules of contract law do not produce solutions appropriate to the realities of employment..." The authors have also identified that it is sometimes tempting to apply a principle to do justice in employment law that may affect the wider law of contract adversely if it is applied there. The law and principles applied to contracts of employment must therefore be assessed in the context of contract law on a whole. He posits that an example of such a situation is **Buckland v Bournemouth University Higher Education Corporation**[23].

[40] The claimant asserts that under the contract of employment, an employer's basic obligation is normally the payment of remuneration, not the provision of

[22] Volume 39 (2014), para 1
[23] [2010] 4 ALL ER 186

work; but, there are exceptions[24]. An employer is therefore obliged to pay an employee his due salary, whether or not the employer decides to provide work to his employee. He cites the decision of **Devonald v Rosser & Sons**[25] to support his assertion.

[41] There is also a general concept of "a right to work", though it has seen little development since the decision of **Langston v Amalgamated Union of Engineering workers & Anor**[26]. In that decision it was held that the Plaintiff had an arguable case that his contract of employment gave him a right to attend and do his work.

[42] Lord Denning, MR also stated that:

> *"We have repeatedly said in this court that a man has a right to work, which the courts will protect...I would not wish to express any decided view, but simply state the argument which could be put forward for Mr Langston. In these days an employer, when employing a skilled man, is bound to provide him with work. By which I mean that the man should be given the opportunity of doing his work when it is available and he is ready and willing to do it. A skilled man takes pride in his work. He does not do it merely to earn money. He does it so as to make his contribution to the wellbeing of all. He does it so as to keep himself busy, and not idle. To use his skill, and to improve it. To have the satisfaction which comes of a task well done... "*

[43] He argues that the decision of **William Hill Organisation Ltd v Tucker**[27] states that an employer is not entitled to force its employees to take leave unless there is an expressed term within the parties' contract of employment. “In a contract

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[24] Halsbury's Laws of England Volume [39] (2014), para 22
[25] [1906] 2 KB 728
[26] [1974] 1 ALL ER 980
[27] [1998] IRLR 313

of employment, there is an implied term that the employer will not, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence between the employer and employee.... The kinds of behaviour which may breach the term of trust and respect... may include... (5) unwarranted docking of pay; (6) attaching unreasonable conditions to remuneration; (7) persistent attempts to vary conditions of employment..." [28]

[44] He continues by stating that if an employer wishes to introduce new methods or techniques that are so different from what has happened previously that they would alter fundamentally the nature of the job that the employee is contracted to do, their introduction would constitute a variation of contract which, on ordinary principles, would require the consent of the employee. [29]

[45] A term may be implied into a contract of employment, either under the 'officious bystander' test or the 'business efficacy' test. Both tests are subjective and look for implied agreement by both parties — not on a mere question of reasonableness.[30]

[46] Whether expressly stated or not, the following additional duties will be imposed upon the employer as an implied term in every contract of employment:

a) duty to provide a safe place of work:

b) duty to exercise contractual discretion rationally:

c) duty to indemnify or reimburse employee[31].

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[28] Halsbury's Laws of England Volume 39(2014), para. 48

[29] Halsbury's Laws of England Volume 39(2014), para. 64

[30] Halsbury's Laws of England Volume 39(2014), para 114

[31] Halsbury's Laws of England Volume 39(2014), para 40

Serious issue to be tried

[47] The claimant states that the present novel-coronavirus pandemic has brought with it many new challenges and issues. The issue of vaccine mandates within the employment context is just one of them. He submits that there are serious issues to be determined in the present claim and nationwide, so that the rights and obligations of employers and employees are made clear. He avers that these include:

a) whether he has a constitutional right to refuse the insertion of a vaccine or any instrument into his body without having to provide reasons;

b) whether he has a constitutional right to refuse the available COVID-19 vaccines on the basis of his religion and conscience in circumstances where the vaccines were researched, developed, and/or manufactured with the aid of cells that are derived from aborted foetuses in contravention of his Christian Faith;

c) whether the defendant has a duty to respect the Fundamental Rights & Freedoms of its employees;

d) whether he, as an employee, waives and/or relinquishes to his employer any of his Fundamental Rights & Freedoms under the parties' contract of employment and, if so, to what extent;

e) whether the design of the defendant's policy is such that the he has no reasonable or practical option except to be vaccinated against the COVID-19 virus;

f) whether the defendant can indirectly coerce / force him to take one of the COVID-19 vaccines in contravention of his beliefs and opinions

through the implementation of a policy with no reasonable or practical alternative;

g) whether the obligations imposed upon him under the defendant's policy are in keeping with or in breach of the parties' contract of employment;

h) whether the defendant as an employer can mandate him to undergo bi-weekly COVID-19 testing, which involves the insertion of an implement into his body, without him exhibiting any signs or symptoms of COVID-19;

i) whether the defendant can impose an obligation on him that includes a financial burden of bearing the cost of COVID-19 testing without his consent to an amendment of his contract of employment;

j) whether the defendant has a contractual right to demand his private and confidential medical information relating to his vaccination status;

k) whether the defendant's exercise of any implied or expressed term within the contract of employment is confined by the test of 'reasonableness';

l) whether the defendant's policy is reasonable based on the available knowledge about the COVID-19 virus, its variants, and the available vaccines;

m) whether it is reasonable to mandate an employee who works remotely from home to either be vaccinated or undergo bi-weekly testing to perform their work from home before they can receive a salary;

n) whether the policy is a self-induced frustrating event introduced by the defendant;

o) whether an employer can force / compel / require an employee to take unpaid leave from work and, whether such action would amount to a suspension from duties without pay; and

p) whether the defendant can force him to use his paid vacation days in circumstances where he is ready, willing, and able to work.

[48] The claimant went further to submit that he has more than an arguable case on these issues. In fact, he has a strong case with the more likely chance of success. There are undoubtedly serious, novel and interesting issues to be determined at trial in respect of his constitutional rights. All the options in the policy would either violate his constitutional right to liberty, security of the person, private life, freedom of beliefs, freedom of religion, freedom of conscience, or his right to life (including his right to livelihood).

[49] The policy states that he must undergo and incur the cost of testing while his medically exempted counterparts who are also vaccinated have no such obligations. This is an indication that he is being punished for exercising his constitutional rights and freedoms to refuse vaccination.

[50] The claimant submits that his relationship with the defendant is based primarily in contract and there are no express terms of their contract that could permit the defendant to mandate him to receive a COVID-19 vaccine; to test every two weeks; to pay for said testing at his own expense; to disclose his vaccination status, his COVID-19 test results or any medical condition he may have to preclude him from taking a COVID-19 vaccine; or to take unpaid leave from work, all against his will.

[51] There are no such terms that can be implied into the contract. None of the known and accepted tests for implied terms could result in bestowing such a massive power on an employer to mandate matters so personal and private to an employee. Such matters could only be based on expressed contractual terms, no less could justify the defendant's policy.

[52] He contends that the foregoing point applies to the following parts of the policy:

a) *"[A]ll employees should submit their vaccination card showing proof of vaccination- whether partial of full - to HR"*

There is no express term that allows the defendant to mandate him to provide his private and confidential medical information as a condition precedent before he can perform his work and receive his salary. There is also no known implied term that can justify such an obligation.

b) *"Employees [who are unvaccinated] will be required to submit a negative PCR test result…every two weeks to HR… at the employees' expense"*

The first clear and undeniable breach of contract is the imposition of the cost of testing on employees. This is in violation of the employer's "implied duty to indemnify or to reimburse [employees]... against all liabilities and losses and in respect of all expenses incurred by the employee[s]…in consequence of obedience to [the employer's] orders..."[32].

Also, there is no expressed or implied term on which the employer can rely to force employees to undertake COVID-19 testing or to disclose the results of such testing, which is private and confidential medical information. These requirements have been imposed unilaterally by the defendant as a mandatory condition precedent before he can perform his duties or receive his salary. As indicated above, the sole condition precedent under common law to the claimant receiving his salary is his readiness and willingness to perform his work. Any new condition precedent can only be imposed by mutual agreement.

[32] Halsbury's Laws of England Volume 39 (2014), para. 40

c) *"Any employee who is unable to produce a current PCR test result, and who cannot attend work for this reason will be required to take the days on which they are absent as unpaid leave…"*

Once an employee is ready and willing to work, an employer cannot force the employee to take leave from work neither paid nor unpaid unless the contract of employment allows it.[33]

Unless the contract of employment is terminated or frustrated or he is laid-off in accordance with established laws, the defendant's duty to pay his salary continues unabated. It is therefore in breach of the contract of employment to create a new unilateral basis on which to refuse to pay an employee his agreed salary despite him being ready, willing, and able to perform his duties.

[53] The claimant submits that when all these matters are considered, it is a serious arguable issue for the court to determine at trial whether the imposition of those requirements by the defendant is in breach of his contract of employment.

[54] The defendant appears to be imposing these terms upon him by relying on its duty to provide employees with a safe place of work and to ensure that its premises are safe for visitors. However, he argues that this is not enough unless there is a term within his contract of employment to allow for this unilateral imposition on such a basis. For this to be permissible within the employment context, it must be permissible in the general law of contract that applies to other contractual relationships.[34]

[33] William Hill Organisation Ltd v Tucker (supra)

[34] Buckland v Bournemouth University Higher Education Corporation (supra)

[55] Even if it was permissible for the court to consider the defendant's duties to others in his contract of employment, those duties are not absolute. They only require the defendant to take reasonable steps to provide a safe place for workers and visitors. He says that the evidence before the court makes clear that the requirement for vaccination or testing is unreasonable because:

a) His evidence (from the Director of the Centre for Disease Control) shows that the wearing of masks alone reduces the risk of infection by 80%;

b) The defendant's COVID-19 protocols have so far been effective, such that there is no evidence of there being an outbreak or transmission at its premises;

c) the defendant has, for the past several months, required him to carry out his duties remotely from home and there have been no complaints about the quality of his work or his ability to do so to his employer's satisfaction;

d) no orders of Government under the DRMA has required or permitted such drastic action; and

e) the requirements of the defendant's policy interfere with employees' constitutional rights.

Adequacy of damages

[56] The claimant asserts that damages would not be an adequate remedy in these circumstances as he is seeking to protect his contractual and constitutional rights including the prevention of unquantifiable financial and other losses that can cause an unquantifiable crippling effect on his life.

[57] Some of authorities cited above make clear that the relationship of an employee and employer is unique. As Lord Hoffman stated in **Johnson**, "a person's

employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity, and a sense of self-esteem." It is trite law that emotional harm, such as embarrassment and loss of self-esteem are not ordinarily matters that are recoverable in damages under a claim for breach of contract. He cites **Addis v Gramaphone Company Limited**[35] in support of his argument.

[58] He states that while damages at the end of the court proceedings can adequately compensate for the monies that would be due to him under the contract of employment and the monies spent on COVID-19 testing, it cannot compensate for the hardship and inconvenience of being without light, water, food and possibly shelter. It cannot compensate for the loss of dignity arising from being unable to care for his family. It cannot compensate for the loss of dignity, self-esteem, and opportunity for self- and professional development. This is in circumstances where he would be bound to remain in the defendant's employment indefinitely without a salary and without the ability to take on new employment.

[59] He submits that as stated in the Labour Relations Code, "...work is a social right and obligation, it is not a commodity; it is to be respected and dignity must be accorded to those who perform it, ensuring continuity of employment, security of earnings, and job satisfaction." This is the concept of employment that led Lord Denning MR to state in **Langston** that "a man has a right to work, which the courts will protect..."

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[35] [19091 AC 488

[60] Even if he were to comply with the policy to secure his salary, damages could not adequately compensate him for the violation of his body and the breaches of his fundamental rights and freedom.

[61] He highlights the following finding of the U.S. Fifth Circuit Court of Appeal in **BST Holdings, L.L.C. & Ors v OSHA & Ors**[36] :

> *"From economic uncertainty to workplace strife, the mere spectre of the Mandate has contributed to untold economic upheaval in recent months. Of course, the principles at stake when it comes to the Mandate are not reducible to dollars and cents. The public interest is also served by maintaining our constitutional structure and maintaining the liberty of the individuals to make intensely personal decisions according to their own convictions — even, or perhaps particular when those decisions frustrate government Officials."*

[62] Therefore, damages would not be an adequate remedy within the context of these circumstances which favours granting the injunctions sought.

Balance of convenience / justice of the case

[63] The claimant submits that the least irremediable harm would be caused by granting the injunction sought. Without it, he would be forced to either vaccinate or test bi-weekly, thereby violating his constitutional rights that ought to protect autonomy of the person. Even if his right to refuse vaccination and testing in these circumstances are yet to be decided, the court should protect against the

[36] No. 21-60845 (5th Cir. 2021), D

risk that he could later be found to have such a constitutional right that is violated by the defendant until trial.

[64] As the U.S. Fifth Circuit Court of Appeal stated in **BST Holdings, L.L.C. & Ors v OSHA & Ors**[37] the "*loss of constitutional freedoms for even minimal periods of time unquestionably constitutes irreparable injury."*

[65] He continued by stating that the absence of an injunction would also allow the defendant to take an unfair advantage of its imbalance in power between the two sides. The defendant would achieve the objective of the policy, i.e. coercing vaccination or resignation through the unlawful withholding of salary and imposition of a financial burden. All the cases indicate that, the court ought to take steps to protect a person's right to work and their employment. This is not just a contractual right, but also a social right, that would mean nothing if the defendant can take steps to erode or undermine that right flippantly without restraint.

[66] On the other hand, if the injunction were to be granted, there is no known risk or danger that the defendant may reasonably complain about. Up to today's date, he has never contracted COVID-19, as he has adhered to the COVID-19 safety protocols. It is both nationally and internally mandated that he must remain at home if he were to experience flu-like symptoms. Both the defendant's business and his livelihood and salary may continue pending the outcome of this claim if the injunction were to be granted.

[67] He acknowledges that while he has been unable to unearth credible evidence on the frequency of such carriers and the level of risk of transmission, asymptomatic carriers of COVID-19 exist. In any event, persons within the defendant's organization and across the nation have been given the opportunity to take the COVID-19 vaccines. Therefore, those who have received the

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[37] (supra)

COVID-19 vaccines are protected and will most likely experience only mild symptoms if they were to contract the virus. The danger that he poses to such employees, visitors, and other persons is therefore minimal and that is assuming if he is asymptomatic.

[68] Furthermore, the policy allows for medically-exempt persons to remain within the defendant's employment and continue their work at its premises while unvaccinated and, he poses no greater risk than any of those medically-exempt individuals.

[69] The claimant submits that the risk of a lawsuit or loss arising from any internal transmission is far too remote and unlikely. In the past twenty (20) months, there have no such lawsuits against the defendant or any other entity in Jamaica. The court should also consider that prior to the availability of vaccines, there was no requirement by the defendant for its employees to be tested biweekly yet still it had no known cases of internal transmission or lawsuits filed against it.

[70] Of importance, the claimant states that he has provided evidence to the court that all his work can be conducted remotely and in the balance of convenience, this should weigh heavily. The defendant has said that it would ask its employees to attend the office from time to time; but, there is no evidence that this is actually necessary. Therefore, while the injunction is in place, the defendant can permit him to work remotely and still obtain the performance of his duties if it so requires.

[71] The claimant states that the contention of seriously adverse human resources and staff relations consequence is merely an allegation. The court has no information to assess this risk for itself, such as the number of unvaccinated employees who would have to continue to test while he benefits from an injunction. If the defendant's contention that vaccination is a choice, then it cannot rely on those who have chosen vaccination to justify its allegation of

adverse consequences if they chose to be vaccinated. The only issue would be the number of persons who are unvaccinated and must be tested.

[72] Moreover, the allegation of adverse consequences should not be given much weight as it would have the effect of asking the court to leave all employees subjected to what may later be deemed an unlawful policy. This is in circumstances where there is a strong case that the employees bearing the cost of testing is contrary to the implied terms of the contract of employment and that has no legal right to force employees to take unpaid leave from work.

[73] An injunction coupled with an expedited trial would mitigate against the defendant's allegations of serious adverse consequences.

[74] Consequently, the claimant submits that the following matters should be considered within the balance of convenience:

a) the strength of his case against the defendant's;

b) The defendant's unilateral imposition of conditions upon him;

c) the social importance and social right to work and earn a living;

d) the disruption / destruction to private life arising from unemployment;

e) His fundamental right to refuse the vaccine;

f) His fundamental right to refuse medical procedure;

g) His fundamental right to his confidential medical records;

h) the imbalance in power between him and the defendant;

i) the Court's commitment to protect an employee's right to work;

j) the absence of evidence of the extent of risk of asymptomatic infection being caused by him;

k) the effectiveness of existing policies that mitigate against COVID-19;

l) the public policy consideration of precluding persons from openly defying the sanctity of a contractual relationship, which is at the root of commercial life.

THE DEFENDANT'S SUBMISSIONS ON INJUNCTIVE RELIEF

[75] The defendant submits that the claimant cannot cross the first hurdle of showing that there are serious issues to be tried[38]. Mr. Powell submitted that there is extensive authority establishing that before granting an interim injunction, the court must be satisfied that the evidence available at the hearing of the application discloses that the claimant has real prospects of succeeding in his claim for a permanent injunction at the trial[39].

[76] In **Re Lord Cable (deceased) Garratt and Others v Waters and Others**[40] Slade J stated:

> *"On any claim for an interlocutory injunction the court must still, as a first step, consider whether the evidence available to the court discloses or fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial; if the available evidence fails to disclose this, the motion must fail in limine and questions of balance of convenience will not fall to be considered at all."*[41]

[77] In considering whether there is a serious issue to be tried in this case, the defendant contends that the court should note that it has not required the claimant to take a vaccine. It has required all vaccinated employees to submit proof of vaccination and all unvaccinated employees to submit a negative PCR test bi-weekly. Therefore, as the claimant is not a vaccinated employee, the

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[38] Serious issue to be tried relates to serious issues regarding the grant of a permanent injunction

[39] American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504 at 511; Also see also Halsbury's Laws of England, 5th edition, volume 12, paragraph 385

[40] [1976] 3 All ER 417

[41] [1976] 3 All ER 417 at 432

only obligation that the policy places on him is to periodically submit a negative PCR test.

[78] The defendant submits that there is no serious issue to be tried involving the court granting a permanent injunction restraining the defendant from imposing such a requirement, whether as a matter of contract or under the constitution.

[79] The defendant argues that the legal relationship between an employer and employee is determined by the individual contract of employment. The claimant's contract does not prohibit them from implementing the policy. Under the terms of his contract of employment, the claimant agreed to comply with company "…policy which may be promulgated from time to time…**"**[42]

[80] The defendant asserts that the claimant will no doubt argue that his contract of employment does not expressly incorporate or permit a company policy in the terms of the COVID-10 vaccination policy. However, even if this is correct, it would be an implied term of the contract for the policy to be implemented.

[81] The defendant submits further, that there is the common law duty implied into contracts of employment for an employer to provide a safe place of work. The common law duty has been described in this way[43]:

> *"At common law, an employer is under a duty to take reasonable care for the health and safety of his employees in all the circumstances of the case so as not to expose them to an unnecessary risk. For convenience, in applying the principle in particular cases, the employer's obligation has long been recognised as threefold in character, that is to say, to provide: (1) a competent staff of employees; (2) adequate material; and (3) a*

[42] Page 20 at paragraph 4.1.2

[43] Halsbury's Laws of England/Employment (Volume 39 (2021), paras 1-346; Volume 40 (2021), paras 347-728; Volume 41 (2021), paras 729-1086; Volume 41A (2021), paras 1087-1509)/1. Nature of a Contract of Employment/ (1) Employment under Contract/(iii) Employer's Obligations and Liabilities/d. Duty of Care/34. Extent of duty of care at common law for employee's health and safety

proper system of work and effective supervision. The duty may vary with the employee's particular circumstances which are known, or ought reasonably to be known, to the employer; and may encompass a duty not to continue to employ an individual who is liable to develop some illness if he carries out the job which he is employed to do. An employer's duty to take reasonable care to carry on his operations so as not to subject his employees to unnecessary risks is a single and continuing duty, applicable in all circumstances. The duty is personal to the employer; and, if he entrusts its performance to some other person, he is vicariously liable for any negligence on the part of the person so appointed in performing the duty."

[82] It is the submission of the defendant that the evidence is that the policy seeks to protect the health and safety of their staff, customers and suppliers and to restore its operations to a state of normalcy. All the material presently before the court confirms the seriousness of the pandemic and the benefits of vaccination and testing. This is especially important in the context of a workplace where their employees can be required at short notice to physically attend office and in circumstances where they are seeking to return to normalcy.

[83] Additionally, the defendant states that the duties and obligations imposed by various statutes and regulations support their actions in implementing the policy. It highlights the Occupier's Liability Act ("the OLA"), which imposes on them as the occupier of premises, a duty of care to visitors. For the purposes of the OLA, the defendant would be an occupier of its head office and other premises at which it carries on its operations, and its staff would be visitors. This duty includes taking reasonable steps to ensure that visitors to premises do not contract the COVID-19 virus, as among the objectives of the policy.

[84] The defendant also points to section 2(1) of the Law Reform (Common Employment) Act contending that the provision indicates that it may be held liable if an employee passes on COVID-19 to other employees. This potential

liability is the reason for the policy's objectives which include mitigating against employee-to-employee transmissions.

[85] Furthermore, the defendant posits that the Labour Relations and Industrial Disputes Act ("the LRIDA") and the Labour Relations Code ("the Code") indicate that though a failure to observe any provision of the Code does not itself render the defaulting party liable to any proceedings, the Industrial Dispute Tribunal can take it into account in determining any question before it. Paragraph 12 (A)(i) of the Code imposes a duty on employers to **adopt suitable measures for** their **workers' protection, and the prevention of the spread of epidemic or infectious disease.** Paragraph 12(B)(iii) provides that employees must "**cooperate with management and fellow workers in the development of all safety and welfare measures**.

[86] The respective duties imposed under the Code allow, and perhaps even require employers to implement a workplace vaccination policy in the present circumstances, and employees to observe and comply with it.

[87] Consequently, the defendant submits that in all the circumstances there is no serious issue to be tried as to whether the implementation of the policy breaches the claimant's contract of employment.

[88] The defendant submits that a similar argument applies to the claim that the policy breaches the claimant's constitutional rights. In considering this issue, it is relevant to emphasise that the policy does not require the claimant (or any of its employees) to be vaccinated. The claimant is free to exercise his right to not be vaccinated. On this basis alone, none of the constitutional rights alleged to be infringed by the policy have been engaged or affected in any way.

[89] Furthermore, even if the court were to determine that the policy in some way infringes any of the constitutional rights claimed by the claimant, the overwhelming evidence, even at this stage, is that the policy is demonstrably

justified in a free and democratic society. The defendant states that the court approaches this question by considering four components[44]:

a. First, the challenged law must be for a proper purpose, that is to say, the purpose or objective must be sufficiently important to warrant violation of the right or freedom (the proper purpose component).

b. Second, the measures or the means chosen to secure the purpose or objective must be carefully designed (the careful design component). By careful design it is meant that the means must be rationally connected to the objective sought to be met... Rational here means that it has to be shown that the measures or means are capable of realising the purpose or objective of the law.

c. Third, the right or freedom is to be impaired as little as possible (minimum impairment component).

d. Fourth, there is a proportionate relationship between the important objective and the effects of the measures, legislative or action (the proportionate effect component). This means that even if …[an] action meets the first three components [it] may be declared unconstitutional if the deleterious effects…are so severe that the [action] cannot be justified.

[90] The defendant asserts that it easily satisfies the first requirement (the proper purpose component). The effects of the pandemic on the health of infected persons and on its operations is a sufficiently important objective to warrant some infringement on personal rights.

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[44] See Julian J Robinson v Attorney General of Jamaica (supra) at paragraph 203 (l)

[91] The defendant further asserts that the second requirement (the careful design component) is met based on the material already before the court. Despite the claimant's protests, vaccination will assist in protecting the health of the defendant's employees and together with regular testing will allow it to return to normal operations. Even without considering the increased risk of transmission to unvaccinated employees, an employer has a vested interest in avoiding serious illness among employees as their illness or death will invariably impact its business.

[92] It contends that there is no serious issue as to whether the third requirement (the minimum impairment component) is satisfied in relation to the objectives of the policy. The submission of negative PCR tests permits an employee to choose not to be vaccinated and the policy would obviously be frustrated, and the objectives not achieved if there was no consequence for an employee who refused to comply with it.

[93] The defendant submits that the imposition of and the requirements under the policy are reasonable. Employees were given reasonable notice of the implementation of the policy, including permitting them to use unpaid vacation leave. An exception was made for employees who could not be vaccinated for medical reasons and employees were given the option to provide negative PCR tests if they choose to not be vaccinated.

[94] Finally, the defendant submits that given the importance of the objectives and the effects of the policy, the proportionate effect component is satisfied.

[95] It avers that courts in many other jurisdictions have considered similar issues and have arrived at similar conclusions.

[96] The defendant cites the case of **Solomakhin v Ukraine**[45], a 2012 decision of the European Court of Human Rights (the "ECHR"), which was before the COVID-19 pandemic. The applicant was being treated as an outpatient at a hospital in Donetsk, in the Ukraine, for a respiratory illness. During one of his visits, he was vaccinated against diphtheria although he had consistently objected to being vaccinated.

[97] The applicant sued the hospital and public health authorities, claiming that he had suffered several chronic diseases as a result of the vaccination. After the court dismissed his claim, he filed an application with the ECHR. He contended that the forced vaccination breached his privacy rights under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), which is similar in terms to section 13(3)(j) of our Charter.

[98] A unanimous 8-member panel of the ECHR agreed that the applicant's rights had been impacted. They explained:[46]

> *"Compulsory vaccination – as an involuntary medical treatment – amounts to an interference with the right to respect for one's private life, which includes a person's physical and psychological integrity, as guaranteed by art 8(1)."*

[99] However, they went on to hold that[47]:

> *"…such interference was clearly provided by law and pursued the legitimate aim of the protection of health. It remains to be examined whether this interference was necessary in a democratic society. In the*

[45] [2012] ECHR 451
[46] Paragraph 33
[47] At paragraphs 35 and 36

Court's opinion the interference with the applicant's physical integrity could be said to be justified by the public health considerations and necessity to control the spreading of infectious diseases in the region.".

[100] The ECHR therefore concluded that *"In view of the above considerations, the Court finds no violation of art 8 of the Convention in the present case"*[48].

[101] The defendant notes that the facts of **New Health New Zealand Inc v South Taranaki District Council**[49] were very different, but the reasoning and conclusions of the Supreme Court of New Zealand are equally persuasive. In that case, the District Council decided to add fluoride to the drinking water it supplied to two towns in order to improve poor dental health in those towns. The appellant challenged the decision on the ground (among others) that it breached section 11[a] of the New Zealand Bill of Rights Act 1990, which provided that "*Everyone has the right to refuse to undergo any medical treatment".*

[102] The Supreme Court held that the District Council had breached that right. They explained:[50]

"…fluoridation of drinking water is the provision of medical treatment. It involves the provision of a pharmacologically active substance for the purpose of treating those who ingest it for dental decay. We agree with the courts below that people who live or work in areas where fluoridation occurs have no practical option but to ingest the fluoride added to the water. So the treatment is compulsory."

[103] However, as the ECHR did in **Solomakhin**, the New Zealand Supreme Court held that the challenge failed. After applying the same test that the court applied

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[48] Paragraph 39
[49] [2018] 4 LRC 592
[50] Paragraph 99

in **Julian Robinson**, they concluded that the objective of preventing and reducing dental decay was sufficiently important to justify a limitation on the section 11 right, and the limitation caused by the decision to fluoridate the water was demonstrably justified in a free and democratic society.

[104] The court acknowledged that the scientific evidence relating to fluoridation was "**contentious**" but was prepared to rely on the fact that *"the benefits of fluoridation are considered to be significant and the detriments insignificant by the World Health Organization and the Ministry of Health"*[51].

[105] Finally, there is the very recent decision by the Trinidad and Tobago High Court in **Clairmont v The Minister of Health and The AG**[52]. Ms. Clairmont, a Trinidadian citizen, was visiting the British Virgin Islands when on March 21, 2020, she learned that all borders to Trinidad and Tobago would be closed effective midnight on the following day.

[106] After several requests, the Minister of National Security only granted her permission to enter on August 20, 2020. She returned to Trinidad and Tobago on September 13, 2020 after experiencing harrowing difficulties, which she alleges resulted in the miscarriage of a child.

[107] Ms. Clairmont challenged the validity of the border closure order, contending that among other things, it breached the following constitutional rights:

a. the right to liberty;
b. the right to protection of the law;
c. the right to freedom of movement; and
d. the right to freedom from arbitrary detention, imprisonment or exile of any person.

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[51] Paragraph 121
[52] Claim No. CV2020-03855, delivered March 29, 2021

[108] The court dismissed the claim, holding that *"the issuance of the impugned Regulation constitutes a proportionate interference with the affected constitutional rights in this time of a global pandemic and as such it is not a contravention of the said rights"*[53].

[109] The defendant submits that in all the circumstances and applying the reasoning found in the authorities there is no serious issue to be tried in relation to the alleged constitutional breaches.

THE EVIDENCE

THE CLAIMANT'S POSITION

[110] The claimant commenced his employment with the defendant as a Data Specialist by a contract of employment dated August 17, 2015. A copy of the employment contract has been exhibited. The claimant said he was promoted to Senior IS Data Specialist and began working in that new position on September 1, 2015.

[111] The vaccination policy went into effect before he returned from vacation leave. He was told that he *"must take time off from work by using my unused vacation days. Otherwise I would be required to comply with the policy by submitting myself to vaccination or PCR testing."* The claimant extended his vacation leave, for two reasons, first, his heavy reliance on his salary and second, he wanted time to consider the defendant's new policy and his options.

Vaccination

[112] The claimant said he obtained legal advice and elected to commence these proceedings against the defendant as he is opposed to being vaccinated for these reasons:

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[53] Paragraph 27

"This COVID-19 Vaccination Policy was issued by the Defendant company shortly before I went on vacation leave from 6 – 15 October 2021, which had been approved before the policy was released. On my return to work, I was advised of the policy's implementation. I spoke to the HR Department and was informed by them, that in order for me to receive my salary for the month of October 2021, I must take time off from work by using my unused vacation days. Otherwise, I would be required to comply with the policy by submitting myself to vaccination or PCR testing. Due to my heavy reliance upon my salary, I decided to extend my vacation leave while I considered the Defendant's new policy and my options.

Having sought and obtained legal advice on this matter, I have decided to seek redress through these court proceedings, as I am not inclined to take any of the COVID-19 vaccines that are available at this time. My position is based on my religion, my doubts and uncertainty about the mid-term and long-term effects of the available vaccines, and other personal opinions and reasons.

Based on the research I have conducted into the available COVD-19 vaccines I concluded that "part of the research and development into the vaccines involved the use of cell tissues from aborted fetuses (sic). The concept of abortion runs contrary to my Christian faith, as my faith and the tenets of my religion believe in the sanctity of life.

I have been a Christian my entire life…

For Christians, human life is sacred and is a gift which is to be respected and protected. The Christian faith as I have always understood and accepted it, believes that life begins at conception and therefore,

abortion is morally wrong. Abortion is therefore contrary to the Christian faith's position against murder.

It is therefore against my faith and against my conscience to take or benefit from a vaccine that was developed using the products of one of the greatest sins against Christianity. I could not live with myself knowing that I participated in or supported the use of aborted fetuses (sic) in any way.

Unfortunately, the defendant's vaccination policy provides no exemption on religious grounds or based on conscience, I have therefore been put in a position by the defendant where I must choose between my faith and my livelihood/survival.

Apart from my religious convictions, I have my doubts about the mid-term and long-term effects of the COVID-19 vaccine. Neither the manufacturers of the available vaccines nor any governmental agency has been able to confirm with any reasonable certainty whether there may be any risk of future mid-term or long-term effects from taking the vaccine.

I have also borne in mind that the information and science surrounding the COVID-19 viruses (sic) and the available vaccine (sic) is constantly growing and sometimes changing.

All except one vaccine have (sic) been given only emergency use authorization by the Federal Drug Agency ("FDA") in the United States of America and possibly other places. From all statements made by the Government of Jamaica, it appears that our local reliance on these vaccines is based primarily on the approval given by the FDA, which explains their concept of "emergency use authorization" on their website and one of the points made by them is that:

*"FDA must ensure that recipients of the vaccine under an [emergency use authorization] EUA are informed to the extent practicable given the applicable circumstances, that … **they have the option to accept or reject the vaccine.**" (emphasis claimant's).*

As at the date of this affidavit, I know of only one vaccine that has received full approval. That is the vaccine manufactured by Pfizer, which is known as Cormirnaty. All other vaccines have only emergency use authorization. But despite Pfizer's full approval, the mid-term and long-term effects are still uncertain.

[113] The claimant went on to state reasons of immunity for manufacturers from lawsuits if the vaccine later harms any one.

"Death has resulted across the world from the taking of the vaccine, while this is an extremely low percentage, "I believe that I must be allowed to make my own decision to take on the risk of death – no matter how large or small that risk may appear."

[114] In terms of risks, the claimant asserts that there are those who have taken the vaccine and suffered from myocarditis, pericarditis and Guillain-Barré syndrome. He states that he needs to know before he can make an informed medical decision to take the vaccine. Further, the vaccines have side effects which he must be allowed to choose to submit to as it would involve risk, bodily discomfort or serious illness.

[115] Lastly, the vaccine is newly developed, not fully approved and does not provide absolute immunity. Vaccinated individuals still contract the virus albeit with milder symptoms. They are hospitalized and die from COVID-9 which has *"broken through their vaccine protection."*

"The protection given by vaccines is not permanent…the efficacy of the vaccines begin (sic) to wane after a few months. "I therefore foresee that the Defendant will be implementing future policies of requiring employees

to receive further vaccine or booster shots. At no time have I ever agreed with my employers for them to have such control over my body under our contract of employment."

PCR Tests

[116] The clamant avers that bi-weekly testing in circumstances where he worked and continues to work remotely and does not attend the company's physical property for work is unreasonable. The cost of PCR tests can be more than Twenty-Five Thousand Dollars ($25,000) per test. He would be required to spend Fifty Thousand Dollars ($50,000) per month which represents 20% of his net pay. He finds it to be *"inexplicable and unreasonable"* that he would be put to this expense each month to work from home.

a. *"Lastly – and very importantly – both the taking of the vaccine and the PCR testing require the insertion of an instrument and/or substance into my body, which I do not wish to have inserted, especially as frequently as my employer has mandated."*
b. *"On the other hand, the Defendant Company is an entity valued over billions of United States Dollars, which can afford to pay me my salary pending the resolution of these court proceedings and also undertake the cost of testing if this court were to find the requirement for regular PCR testing reasonable in the interim."*

Financial hardship

c. *In light of the Defendant's vaccination policy, I am on edge about my salary while I await the outcome of this claim. I do not know how I will survive if I am not paid for November 2021. My vacation will end on 29 October 2021, and it is unlikely that the Defendant will pay me*

my salary even if I work remotely for the entire month. All my work can be done remotely, as I have done for the past several months.

d. *I am unable to survive with such uncertainty, as I have responsibilities that I must satisfy each month. I earn a net take-home salary of about $258,000.00 per month, which is just sufficient to meet my month(sic) expenses. I also do not have any great savings that can allow me to continue indefinitely without my salary. And, in this present pandemic, it would be very difficult for me to find new employment within a short period of time."*

THE DEFENDANT'S POSITION

[117] The evidence of the Human Resources Director in response was that the defendant is an international full-service communications provider operating in thirty-two (32) markets worldwide. It operates from its head office with a staff complement of one thousand four hundred and ninety-six (1,496) persons. There are over two thousand (2,000) people working at the head office in different businesses and on different floors.

[118] Before the advent of COVID-19, the defendant submits that it required its staff members to be physically present to fulfil their duties. The head office has an open plan with bench-type seating with an average station width of five and a half (5 ½) feet.

[119] The defendant further submits that it recognized that given the risks associated with COVID-19 including the method of transmission; it had a duty to try to ensure that its staff members and members of the public who would attend its head office and interact with its staff were not put at risk of exposure to the virus. Therefore, it adopted suitable measures for the protection of its staff and visitors to its head office. These included various safety measures and protocols.

[120] On or about April 2020, the Digicel group developed and issued the Digicel COVID-19 HR Playbook to support and guide the companies in the group,

including the defendant, on best practices in dealing with the pandemic. The Playbook was updated and re-issued in September 2020, a copy has been exhibited to the affidavit.

[121] The defendant asserts that to ensure social distancing, it implemented a system in which staff members were assigned to a blue team or a yellow team. Blue and Yellow team members would physically attend work on alternate weeks. The Blue and Yellow teams are part of the wider Digicel Staff Workplace Re-Entry Plan. The defendant states that this plan is a comprehensive document which sets out the nature of and extent of the support that it should give to staff. It also discusses under the heading *'Policies and Regulations'* that HR is to re-issue the Digicel Remote Work Policy and among other things, establish and communicate penalties for violations. Under the heading 'Scaling and Staff Availability for Re-Entry' *with the sub-heading 'Proportions and Scaling', it says the following:*

> *"Remote Work has been successfully executed at a rate of approx. 95% and will be a definite part of our future and as such;*
>
> *-As part of managing social distancing – alternate desks will be utilized*
>
> *-Anticipating a 40% - 50% office re-entry*
>
> *-Re-Entry will be phased at an initial 20% then two additional increments of 10% each. Over 3 months."*
>
> Under the heading: *Regarding Staff Availability* it says: *People Managers in Conjunction with HR will be required to survey and establish availability based on:*
>
> *….*
>
> *-Staff who are unable to work remotely due to connectivity challenges."*

The Re-entry plan will be phased and will commence with essential functions/personnel with varying proportions from the functional group areas per need.

The initial re-entry group will consist fractions(sic) of Facilities, HR, Customer Care, Retail and Finance. (note that some functions have been very effective at WFH and these will be included in the 2nd and 3rd Phases.)
-Functional Leads/Directors will determine essential personnel for inclusion."[54]

[122] The defendant states that it has sensitized its staff to the potency of the virus and the efficacy of vaccinating against the disease through emails and testimonials. It hosted town hall meetings with speakers from various relevant backgrounds and expertise between September 9 and October 11 at which as many as one thousand eight hundred and twenty (1,820) members of staff attended. They were addressed by Dr. Melody Ennis, Director of Family Health Services, Ministry of Health and Wellness and Professor Winston Davidson, Public Health Specialist and Educator. The other speakers were a physician, a virologist and a pharmacist. There were also religious speakers from the Seventh Day Adventist Church, the Holiness Church of Christiana, the head of the Jamaican Roman Catholic Church and the President of the Jamaica Council of Churches.

[123] The defendant posits that it donated funds to the National Health Fund for the purchase of vaccines for general use in Jamaica as well as additional vaccines for use in the Private Sector Organisation of Jamaica Vaccination Initiative vaccination blitz which it hosted.

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[54] Excerpts from the Digicel Staff Workplace Re-Entry Plan

[124] It states that it has had one hundred and forty-eight (148) staff members test positive for COVID-19, with one (1) death. The defendant also states that it had to air lift three (3) employees for medical attention overseas as they were seriously ill as a result of COVID-19. The head office had to be closed for long periods because of COVID-19 during the months of March, August and October 2020 and February, April and August 2021.

The policy

[125] In September 2021 Digicel Group issued a group-wide policy for all the companies across thirty-two (32) countries. The terms of the policy were contained in a letter dated September 29, 202 to all staff. It applied to all Digicel's contractors and to visitors to an extent.

[126] The defendant avers that the primary purposes of the policy are first, the protection of the health and safety of its staff, customers, suppliers and the general public that interact with it, by reducing the risk and effects of being infected with COVID-19; second, restoring the company's operations to a state of normalcy.

[127] It further asserts that the intent of the policy is to achieve these purposes by satisfying the discrete objectives of preventing or reducing the likelihood of serious illness or death in the event of infection and reducing the risk of an infected person transmitting the virus in the workplace.

The defendant's response to the claimant's evidence

[128] The defendant posits that the claimant has exhibited an outdated job description in his affidavit as his job description was updated in June, 2021 and applied retroactively as at February 2021. He was on the Yellow team which was on a rotation schedule of alternate weeks in office.

[129] In September 2021 The claimant was asked to work from home effective September 20, until otherwise advised. This was to accommodate the Finance

Department which had increased in numbers and now required additional floor space on the 9th floor which was the one occupied by the claimant. The defendant contends that the claimant was not the only member of the Group IT Department who was to work from home as this was to minimize the risk to staff and ensure adherence to the COVID-19 protocols for social distancing.

[130] It further contends that the members of the department in which the claimant works can be asked to return to the head office at short notice either permanently or for meetings or training. This underscores the need for staff members who work from home to provide negative PCR test results to resume work in office under the policy.

[131] The defendant submits that PCR tests are known to be more reliable, more accurate and there has been a recent reduction in prices in Jamaica which they assert will likely trend downwards.

[132] Moreover, the defendant submits that The claimant had a further ten (10) days' vacation leave for the remainder of 2021. The policy allows him to take unpaid vacation leave. It does not permit employees to work remotely as a means of avoiding vaccination or testing. From time to time the defendant requires its employees to be physically present at the head office whether for meetings or training.

[133] It avers that the policy applies to one thousand four hundred and ninety-six (1,496) members of staff employed and assigned to the Digicel Group. It also applies to the staff members of all the entities within the Digicel Group and to its contractors and retail stores, numbering seven thousand four hundred and thirty-one (7,431) in total.

[134] The defendant further avers that if the claimant succeeds in having the policy not apply to him, then there would be adverse human resource and staff relations consequences as the defendant would have in place a policy that does

not apply to all its staff equally. Similarly, if the defendant were to pay for the claimant's tests it would lead to an inequitable application of the policy.

[135] Further, the defendant states that it has to consider that the other members of staff would be placed at an increased risk by having the claimant be made exempt from the policy even until the determination of the claim.

[136] The defendant maintains that the policy does not compel the claimant to be vaccinated. There is an alternative, which is to submit a medical report verifying that he cannot be vaccinated or submit negative PCR tests bi-weekly. If he succeeds in this claim, the court would order the defendant to repay all sums expended by him and it undertakes to pay any award of damages which it may be ordered to pay.

[137] Additionally, the defendant notes that the updated job description for the claimant's job at paragraph (f) says the following:

> *"Working safely is a continuing condition of employment. Digicel Group is committed to establishing and maintaining a safe and healthy working environment and considers safety to be an integral aspect of every job function. As a condition of your employment, you will be required to observe and fully comply with all HSE rules/policies/procedures and applicable legislative provisions as well as wear the appropriate Personal Protective Equipment (PPE) when and where applicable."*

The evidence presented by the claimant

[138] In this case, the claimant does not fall within the medical exemption allowed under the policy. There is no evidence that the defendant was ever notified of the claimant's objection to the policy on religious grounds.

[139] There is also no evidence that the claimant has suffered any loss. He has chosen not to take the test as he works from home and does not see the need to comply given his current remote work location. To this is added the fact that

the cost of PCR testing is prohibitive. He also does not wish to have any instruments inserted into his body. However, he also wants the court to find that if he has to undergo PCR tests that the defendant should pay for it.[55] The evidence of the employer paying for testing has not been pleaded. The defendant counters in its affidavit by saying that paying for the PCR tests of one employee would lead to a policy which is not applied equally to all staff and would result in serious adverse human resources and staff relations consequences.

[140] There is no evidence of the claimant registering his discontent with the policy with anyone at the company. There is no evidence of his requesting a religious exemption and being turned away. There is no evidence of any attempt at finding common ground. The absence of evidence is not evidence.

[141] The claimant said he obtained legal advice before filing suit. He ought to have been told that there is mandatory mediation in the Supreme Court. In other words, if he had not sat down with the defendant before filing suit, he would have had to sit down with them afterwards. The reasons for not attempting to register his objection and to mitigate any possible loss has not been given in evidence.

[142] The defendant has set out in its affidavit that there is in existence a remote work policy which allows employees to work from home. The reason for the claimant being allowed to work remotely has been set out in their evidence. They went on to say that there is to be a phased re-entry of employees back to its head office and that this would include the claimant whom hitherto had worked in person at the head office.

[143] The claimant makes the bald assertion that he works from home and therefore the policy does should not be applied to him. He has offered no evidence as to

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[55] Para 40 of the claimant's affidavit.

the work from home policy of his employer, how he came to fall under the remote work policy and whether the phased re-entry includes his position, that he was a member of the Yellow team which worked in office on rotation.

[144] The claimant has assumed that he can work remotely because he wants to. It appears that this bald assertion is one which he believes is sufficient to convert the claim into one in which constitutional redress would be tenable. This is an erroneous assumption. This assumption is not a conclusion that a constitutionally protected right has been contravened. That is a matter of fact and law. The court has no evidence upon which to make its assessment as the claimant has not adduced any and the court could not be expected to act on this assumption.

Cases cited by the Claimant

BST Holdings v Occupational Safety and Health Administration, United States Department of Labour[56] - *"Take your shot, take your test or hit the road."*

[145] In this case, an Emergency Temporary Standard ("the mandate") was issued by the Occupational Safety and Health Administration ("OSHA") on November 5, 2021. It required "all employers of 100 or more employees to develop, implement and enforce a mandatory COVID-19 vaccination policy and to require any workers who remain unvaccinated to undergo weekly COVID-19 testing and wear a face covering at work in lieu of vaccination."[57]

[146] The United States Court of Appeals for the Fifth Circuit consolidated the petitions of a diverse group of covered employers, States, religious groups and individual citizens. They argued that the mandate imposes a financial burden on them, exposes them to severe financial risk for a failure to comply and

[56] No. 21-60845 (5th Cir. 2021), November 6, 2021.
[57] See COVID-19 Vaccination and Testing Emergency Temporary Standard, 86 Fed, Reg. 61,402 (Nov. 5, 2021)

threatens to destroy their workforces and business prospects by forcing reluctant employees to *"take their shots, take their tests or hit the road."*

[147] The petitioners sought a stay and ultimately a permanent injunction of the mandate pending judicial review. The statute from which OSHA derived its authority to issue the mandate provides "for direct and immediate judicial review in the United States Court of Appeals for the Circuit wherein any person who may be adversely affected by an ETS resides or has his principal place of business."[58]

[148] The traditional factors for the grant of a stay pending judicial review are:

(1) Whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
(2) Whether the applicant will be irreparably injured absent a stay;
(3) Whether issuance of the stay will substantially injure other parties interested in the proceeding; and
(4) Where the public interest lies.

[149] The court found that each of the factors favoured the grant of a stay. The court held that the challenge to the mandate was likely to succeed on the merits for these reasons that the OSH Act was enacted to assure Americans "safe and healthful working conditions and to preserve our human resources." The legislative power of Congress as ordered by the Constitution could not be delegated to an executive agency such as the Occupational Safety and Health Administration. Such an agency rooted in federal bureaucracy, had not been given the power to make "sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways."

[58] See 29 U.S.C., section 655(f)

[150] The court found that the mandate was fatally flawed as it was written as it was a government pronouncement which was:

a. Over inclusive, meaning it applied to every employer and employee in the country without taking into account the obvious differences between the risks ("a security guard on a lonely night shift and a meatpacker working shoulder to shoulder in a cramped warehouse.")
b. The mandate was also under inclusive meaning "it purported to save employees with 99 or more co-workers from a grave danger in the workplace, while making no attempt to shield employees with fewer than 98 co-workers from the very same threat."
c. The mandate took too long, in a situation described as an emergency, which was a global pandemic which has lasted for almost two years; OSHA took nearly two months to respond to an announcement by the President of his intention to impose a national vaccine mandate. The court said "one could query how an emergency could prompt such a deliberate response. In similar cases we've held that OSHA's failure to act promptly does not conclusively establish that a situation is not an emergency, but may be evidence that a situation is not a true emergency."
d. The mandate grossly exceeds OSHA's authority.
e. The courts have uniformly found that OSHA's authority to establish temporary emergency standards is an emergency power to be delicately exercised in only limited situations.
f. The mandate has not accounted for the varying degrees of susceptibility of workers to the grave danger it sought to address.
g. That OSHA had failed to meet its threshold burden in order to enact a lawful mandate that the employees are in fact exposed as defined by the governing legislation.

[151] There was a recognition by the appellate court that individual employers could choose their own methods to "abate a recognized hazard under the general duty clause." It was for each employer to improve worker safety by electing to

employ standards which eliminate the hazard or materially reduces it, hazard is defined in the OSH. The court did not encourage the application of a general standard, as this would lead to an ineffective or counterproductive result as the information regarding the emergency changed.

[152] In **BST**, a one size fits all mandate was said to be not likely to be constitutionally sound for reasons of States rights, the federal government's authority under the Commerce Clause, the constitution's division of governmental powers, delegated legislative authority and the statutory interpretation of the OSH Act.

[153] In the instant case, this court notes that in **BST**, the appellate court was concerned with the issuance of a stay of proceedings, the matter had not been heard nor was there a decision on the merits at the time of writing. This case is unhelpful to the claimant's case as it is based on entirely different factual and legal circumstances. The case at bar does not involve the state or any law which has been enacted by the state. It does not impose a requirement outside of the organisation on anyone else. There is also no question of vertical application in the case at bar.

[154] At the time of the writing of this decision, the decision in **BST** had been reviewed by the United States Court of Appeals for the Sixth Circuit in an opinion delivered on December 17, 2021 it overturned the stay granted by the Fifth Circuit in the case of **Massachusetts Building Trades Council, et al. v United States Department of Labor, Occupational Safety And Health Administration et al**.,[59] by a majority, for the reasons set out below:

> *"The major questions doctrine is inapplicable here, however, because OSHA's issuance of the ETS is not an enormous expansion of its regulatory authority. OSHA has regulated workplace health and safety on a national scale since 1970, including controlling the spread of*

[59] December 17,202; Pursuant to Sixth Circuit I.O.P.32.1(b) File Name:21a0287p.06 (unrep.)

disease. See Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 520 (1981). As cataloged at length above, vaccination and medical examinations are both tools that OSHA historically employed to contain illness in the workplace. The ETS is not a novel expansion of OSHA's power; it is an existing application of authority to a novel and dangerous worldwide pandemic…. As discussed at length, the OSH Act confers authority on OSHA to impose standards and regulations on employers to protect workplace health and safety, including the transmission of viruses in the workplace. See 29 U.S.C. §§ 651(b), 655(c).

OSHA's ETS authority is circumscribed not only by the requirements of grave danger and necessity, but also by the required relationship to the workplace. Id.; see United Steel workers of Am., 647 F.2dat 1230. And OSHA honoured those parameters, issuing emergency standards only eleven times, including the currently challenged ETS…

We begin with the contention endorsed by the Fifth Circuit that the standard automatically fails because OSHA did not issue the ETS at the outset of the pandemic. The claim that COVID-19 does not present "a true emergency" in the workplace has no foundation in the record and law and ignores OSHA's explanations. OSHA addressed COVID-19 in progressive steps tailored to the stage of the pandemic, including consideration of the growing and changing virus, the nature of the industries and workplaces involved, and the availability of effective tools to address the virus. This reasoned policy determination does not undermine the state of emergency that this unprecedented pandemic currently presents.

Even if we assume that OSHA should have issued an ETS earlier, moreover, "to hold that because OSHA did not act previously it cannot do so now only compounds the consequences of the Agency's failure to act." ...

*The record establishes that COVID-19 has continued to spread, mutate, kill, and block the safe return of American workers to their jobs. To protect workers, OSHA can and must be able to respond to dangers as they evolve. As OSHA concluded: with more employees returning to the workplace, the "rapid rise to predominance of the Delta variant" meant "increases in infectiousness and transmission" and "potentially more severe health effects." 86 Fed. Reg. at 61,409–12. OSHA also explained that its traditional non-regulatory options had been proven." OSHA acted within its discretion in mak*ing *the practical decision to wait for Federal Drug Administration (FDA) approval of the vaccines before issuing the ETS; "this fact demonstrates appropriate caution and thought on the part of the Secretary." These findings, therefore, coupled with FDA-approved vaccines, more widespread testing capabilities, the recognized Delta variant and the possibility of new variants support OSHA's conclusion that the current situation is an emergency, and one that can be ameliorated by agency action. Health effects may constitute a "grave danger" under the OSH Act if workers face "the danger of incurable, permanent, or fatal consequences . . ., as opposed to easily curable and fleeting effects on their health." Fla. Peach Growers Ass'n, Inc. v. U.S. Dep't of Labor, 489 F.2d 120, 132 (5th Cir. 1974). The "grave danger" required to warrant an ETS is a risk greater than the "significant risk" that OSHA must show to promulgate a permanent standard under § 655(b) of the Act. See Indus. Union Dep't, 448 U.S. at 640 n.45. But the ultimate determination of what precise level of risk constitutes a "grave danger" is a "policy consideration that belongs, in the first instance, to the Agency." Asbestos Info. Ass'n, 727 F.2d at 425 (accepting OSHA's determination that 80 lives at risk over six months was a grave danger).*

The Fifth Circuit's conclusion, unadorned by precedent, that OSHA is "required to make findings of exposure—or at least the presence of COVID-19—in all covered workplaces" is simply wrong. BST Holdings,

17 F.4th at 613 (emphasis in original). If that were true, no hazard could ever rise to the level of "grave danger" because a risk cannot exist equally in every workplace and so the entire provision would be meaningless. Almost fifty years ago, the Third Circuit quickly dismantled this argument:

On this point, OSHA has demonstrated the pervasive danger that COVID-19 poses to workers—unvaccinated workers in particular—in their workplaces. First, OSHA explains why the mechanics of COVID-19 transmission make our traditional workplaces ripe for the spread of the disease, putting workers at heightened risk of contracting it. Transmission can occur "when people are in close contact with one another in indoor spaces (within approximately six feet for at least fifteen minutes)" or "in indoor spaces without adequate ventilation where small respiratory particles are able to remain suspended in the air and accumulate." Transmissibility is possible from those who are symptomatic, asymptomatic, or presymptomatic, and variants are likely to be more transmissible.

American workplaces often require employees to work in close proximity—whether in office cubicles or shoulder-to-shoulder in a meatpacking plant—and employees generally "share common areas like hallways, restrooms, lunchrooms [,] and meeting rooms."

…In cases where OSHA determines that a substance is sufficiently harmful that a grave danger would be created by exposure, OSHA must be allowed to issue necessary regulations. In other words, exposure can be assumed to be occurring at any place where there is a substance that has been determined to be sufficiently harmful to pose a grave danger and where the regulations that have been determined to be necessary to meet that danger are not in effect. This interpretation of subsection 6(c)(1) is supported by the existence of subsection 6(d), which provides that any affected employer may obtain a variance from any standard if

he can show that "the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard."

Our dissenting colleague argues that OSHA fails to satisfy the "grave danger" in the workplace limitation on its authority because it does not establish that "all covered employees have a high risk both of contracting COVID-19 and suffering severe consequences." (DissentOp.at 49) But this section on "Grave Danger" explains that OSHA is not required to show the presence of COVID-19 in every workplace industry by industry nor that every employee will be harmed in the same serious way by it. Am. Dental Ass'n, 984 F.2d at 827 (holding that OSHA is not required to proceed "workplace by workplace"). corroborates its conclusion: scientific studies and findings prescribed by the CDC show that the nature of the disease itself provides significant cause for concern in the workplace. (citing studies).

OSHA relied on public health data to support its observations that workplaces have a heightened risk of exposure to the dangers of COVID-19 transmission. Many empirical, peer reviewed studies cited by OSHA have found that because of the characteristics of our workplace, "most employees who work in the presence of other people (e.g., co-workers, customers, visitors) need to be protected."

Reports produced by state public health organizations corroborate that finding. See, e.g., (North Carolina Department of Health and Human Services reporting that "number of cases associated with workplace clusters began increasing in several different types of work settings, including meat processing, manufacturing, retail, restaurants, childcare, schools, and higher education."); (Colorado Department of Public Health & Environment reporting similar outbreaks across many types of

industries.); id. (Louisiana Department of Health, reporting that "[m]ore than three quarters of outbreaks through [August 24, 2021] were associated with workplaces.").

Having established the risk to covered employees in the workplace, OSHA also set out evidence of the severity of the harm from COVID-19. Apart from death, COVID-19 can lead to "serious illness, including long-lasting effects on health," (now named "long COVID"). It has also "killed over 725,000 people in the United States in less than two years." The number of deaths in America has now topped 800,000 and healthcare systems across the nation have reached the breaking point. COVID-19 affects individuals of all age groups; but on the whole "working age Americans (18-64 years old) now have a 1 in 14 chance of hospitalization when infected with COVID-19."

Our dissenting colleague argues that OSHA fails to satisfy the grave danger "in the workplace" limitation on its authority because the Secretary did not specify how many employees would contract the virus at work and instead "calculated the number of people who happen to work who would, in any event, contract COVID-19." (Dissent Op. at 51) As shown in this section, however, OSHA presented substantial evidence both that the workplaces of virtually every industry across America present a heightened risk of COVID-19 exposure to employees and that a clear pre-dominance of COVID-19 outbreaks come from workplaces.

Compounding matters, mutations of the virus become increasingly likely with every transmission, contributing to uncertainty and greater potential for serious health effects. Based on this record, the symptoms of exposure are therefore neither "easily curable and fleeting" nor is the risk of developing serious disease speculative. See Fla.Peach Growers, 489 F.2d at 132; Dry Color Mfrs.Ass'n, 489 F.2d at 106.

OSHA further estimated that the standard would "save over 6,500 worker lives and prevent over 250,000 hospitalizations over the course of the next six months." This well exceeds what the Fifth Circuit previously found to present a grave danger. See Asbestos Info. Ass'n, 727 F.2d at 424 (assuming that 80 deaths over six months would constitute a grave danger). As the death rate in America has continued to climb throughout 2021, those estimates may prove to be understated. And where grave danger exists in a workplace, of course OSHA may consider the statistical proof on lives saved and hospitalizations prevented when issuing an ETS, even if the risk to individual workers varies within workplaces.

A few Petitioners attack the veracity of some of the studies on which OSHA relies in its ETS or point to other studies that they claim contradict the studies on which OSHA relied. But the court's "expertise does not lie in technical matters."

"[I]t is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from facts and probabilities on the record to a policy conclusion." Id. (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983)).

OSHA pointed to extensive scientific evidence, including studies conducted by the CDC, of the dangers posed by COVID-19. We therefore cannot say that OSHA acted improperly in light of its clear reliance on "a body of reputable scientific thought." Indus. Union Dep't., 448 U.S. at 656. Case: 21-7000 Document: 386-2 Filed: 12/17/2021 Page:23

The claim that COVID-19 exists outside the workplace and thus is not a grave danger in the workplace is equally unavailing. As discussed above, OSHA routinely regulates hazards that exist both inside and

outside the workplace. More to the point, OSHA here demonstrated with substantial evidence that the nature of the workplace—commonplace across the country and in virtually every industry—presents a heightened risk of exposure.

Union Petitioners illustrate this point as well. Within one week in mid-November, Michigan had reported 162 COVID-19 outbreaks, 157 of which were in workplaces;5 Tennessee reported 280 COVID-19 outbreaks, 161 of which were in workplaces;6 Washington state reported 65 outbreaks, of which 58 were in workplaces.7 And other states similarly experienced outbreaks predominantly in the workplace.8 COVID-19 is clearly a danger that exists in the workplace.

Some Petitioners contend that COVID-19 is no longer a grave danger and claim that OSHA's delay in promulgating the ETS is evidence that no grave danger exists. As explained, however, OSHA provided its reasoning for the delay. When the pandemic began, "scientific evidence about the disease" and "ways to mitigate it were undeveloped." 86 Fed. Reg. at 61,429. At that point, OSHA chose to focus on non-regulatory options, and crafted workplace guidance "based on the conditions and information available to the agency at that time," including that "vaccines were not yet available." Id. at 61,429–30.

The voluntary guidance, however, proved inadequate, and as employees returned to workplaces the "rapid rise to predominance of the Delta variant" meant "increases in infectiousness and transmission" and "potentially more severe health effects." Id. at 61,409–12.

At the same time, the options available to combat COVID-19 changed significantly: the FDA granted approval to one vaccine on August 23, 2021, and testing became more readily available. These changes, coupled with the ongoing risk workers face of state-wide COVID-19.

And we know that in our nation, over 800,000 people have died in less than two years and the numbers continue to climb, with more of those deaths having occurred in 2021 than in 2020. Based on the wealth of information in the 153-page preamble, it is difficult to imagine what more OSHA could do or rely on to justify its finding that workers face a grave danger in the workplace.

It is not appropriate to second-guess that agency determination considering the substantial evidence, including many peer-reviewed scientific studies, on which it relied. Indeed, OSHA need not demonstrate scientific certainty. As long as it supports it conclusion with "a body of reputable scientific thought," OSHA may "use conservative assumptions in interpreting the data . . ., risking error on the side of overprotection rather than under protection." Indus. Union Dep't, 448 U.S. at 656.

To issue an ETS, OSHA is also required to show that the ETS is "necessary to protect employees from" the grave danger. This standard is more demanding than the "reasonably necessary or appropriate" standard applicable to permanent standards. To pass muster, OSHA must demonstrate, by substantial evidence, that the regulation is essential to reducing the grave danger asserted. See Dry Color, 486 F.2d at 105. In addition, OSHA must address economic feasibility because the ETS's "protection afforded to workers should outweigh the economic consequences to the regulated industry." Asbestos Info. Ass'n, 727 F.2d at 423.

…These actions were to no avail as COVID-19 transmission rates in the workplace continued to climb and COVID-19-related complaints continued to pour in, suggesting "a lack of widespread compliance." With nothing left at his disposal to curb the transmission in the workplace, the Secretary issued the ETS. We find that this explanation satisfies the Secretary's obligation.

Turning to assess the remaining evidence supporting OSHA's necessity finding, OSHA explained that the pandemic in the United States has significantly changed course since the emergence of COVID-19 in early 2020, necessitating an ETS at this point in time. In particular, the emergence of the Delta variant significantly increased transmission when reported cases had been dwindling for months. The realities of the Delta variant significantly changed public health policy and underscored a need for issuing an ETS—not only to control the variant itself, but to control the spread of the disease to slow further mutations.

Recognizing this new reality, the Agency crafted an ETS with options for employers, noting that "employers in their unique workplace settings may be best situated to understand their workforce and strategies that will maximize worker protection while minimizing workplace disruptions."

Regarding the vaccine component of the ETS, OSHA explained the importance of vaccination to combat the transmission of COVID-19 and relied upon studies demonstrating the "power of vaccines to safely protect individuals," including from the Delta variant.

Extensive evidence cited by OSHA shows that vaccination "reduce[s] the presence and severity of COVID-19 cases in the workplace," and effectively "ensur[es]" that workers are protected from being infected and infecting others. (citing studies). Likewise, the face-covering-and-test facet of the ETS is similarly designed based on the scientific evidence to reduce the risk of transmission and infection of COVID-19.

Regular testing "is essential because SARS-CoV-2 infection is often attributable to asymptomatic or pre-symptomatic transmission." (citing studies). And wearing a face covering provides an additional layer of protection, designed to reduce "exposure to the respiratory droplets of co-workers and others [and] . . . to significantly reduce the wearer's ability to spread the virus."

Vaccinated employees are significantly less likely to bring (or if infected, spread) the virus into the workplace. And testing in conjunction with wearing a face covering "will further mitigate the potential for unvaccinated workers to spread the virus at the workplace."

Based on the evidence relied on by OSHA, these measures will "protect workers" from the grave dangers presented by COVID-19 in the workplace. And OSHA is required to minimize a grave danger, even if it cannot eliminate it altogether. Nat'l Grain & Feed Ass'n v. Occupational Safety & Health Admin., 866 F.2d 717, 737 (5th Cir. 1988).

OSHA limited the ETS to coverage of 100 or more employees, based on four reasons. First, as a practical matter, those employers have the administrative and managerial capacity to be able to promptly implement and meet the standard. Second, the coverage threshold is sufficiently expansive to ensure protection to meaningfully curb transmission rates to offset the impact of the virus. Third, the ETS "will reach the largest facilities, where the most deadly outbreaks of COVID-19 can occur." And finally, the standard is consistent with size thresholds established in analogous congressional and agency decisions, including standards promulgated by the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, requirements under the Affordable Care Act (in allowing greater flexibility with its requirements for employers with 100 or fewer employees), and requirements under the Family Medical Leave Act (exempting compliance for employers with fewer than 50 employees given decreased administrative capacity and inability to easily accommodate such employee absences).

OSHA explored the dangers in varied workplaces and industries and concluded that "employees can be exposed to the virus in almost any work setting" and that employees routinely "share common areas like hallways, restrooms, lunchrooms[,] and meeting rooms" and are at risk

of infection from "contact with co-workers, clients, or members of the public."

OSHA supported those conclusions by relying on peer-reviewed studies and data collected by government health departments. But in any case, OSHA tailored the ETS by excluding workplaces where the risk is significantly lower, including those where employees are working exclusively outdoors, remotely from home, or where the employee does not work near any other individuals.

The argument that the ETS is overinclusive because it imposes requirements on some workers that are at lesser risk of death than others overlooks OSHA's reasoning. OSHA promulgated the ETS to prevent employees from transmitting the virus to other employees—that risk is not age-dependent.

OSHA found that unvaccinated workers in workplaces where they encountered other workers or customers faced a grave danger and that vaccination or testing and masking were necessary to protect those workers from COVID-19. Those workers are in "a wide variety of work settings across all industries."

Courts are "generally unwilling to review line-drawing performed by the [agency] unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem." Cassel v. FCC, 154 F.3d 478, 485 (D.C. Cir. 1998) (alteration in original) (quoting Home Box Off., Inc. v. FCC, 567 F.2d 9, 60 (D.C. Cir. 1977)).

OSHA's ETS readily shows a relationship to the underlying regulatory problem—larger employers are better able to implement the policies, are at heightened risk, and regulating them will be a significant step in protecting the entire workforce from COVID-19 transmission. And of course, agencies can later revise, refine, and broaden (or narrow) their

regulations, but exigent circumstances allow there to be some reasonable discretion at the initial steps of promulgating a regulation

The Supreme Court has long recognized the power of Congress to delegate broad swaths of authority to executive agencies under this standard and has ultimately concluded that extremely broad standards will pass review. See id. at 2129. How broad? Delegations to regulate in the "public interest," Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943), to set "fair and equitable prices," Yakus, 321 U.S. at 427, and to issue air quality standards "requisite to protect the public health," Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 472 (2001). See Gundy, 139 S. Ct. at 2129 (collecting sources).

The foregoing analysis shows that Petitioners cannot establish a likelihood of success on the merits, and this reason alone is sufficient to dissolve the stay. Nken, 556 U.S. at 433–34.

We also conclude, however, that Petitioners have not shown that any injury from lifting the stay outweighs the injuries to the Government and the public interest. To merit a stay, Petitioners bear the burden to demonstrate an irreparable injury; "simply showing some 'possibility of irreparable injury' fails to satisfy the second factor." Nken, 556 U.S. at 434–35 (quoting Abbassi v. INS, 143 F.3d 513, 514 (9th Cir. 1998)).

Moreover, because this case involves the Government as an opposing party, the third and fourth factors "merge." Id. at 435. The Fifth Circuit failed to analyze any harm to OSHA, instead baldly concluding that a stay will "do OSHA no harm whatsoever." BST Holdings, 17 F.4th at 618.

We engage in our own balancing of the parties' harm.

C. Irreparable Harm

Relying on employee declarations, other Petitioners claim that they will need to fire employees, suspend employees, or face employees who

quit over the standard. These concerns fail to address the accommodations, variances, or the option to mask-and-test that the ETS offers. For example, employers that are confident that they can keep their employees safe using alternative measures can seek a variance from the standard pursuant to 29 U.S.C. § 655(d). Or employers may choose to comply with the standard by enforcing the mask-and-test component, which are entirely temporary in nature and do not create irreparable injuries. These provisions of the ETS undercut any claim of irreparable injury. By contrast, the costs of delaying implementation of the ETS are comparatively high. Fundamentally, the ETS is an important step in curtailing the transmission of a deadly virus that has killed over 800,000 people in the United States, brought our healthcare system to its knees, forced businesses to shut down for months on end, and cost hundreds of thousands of workers their jobs. In a conservative estimate, OSHA finds that the ETS will "save over 6,500 worker lives and prevent over 250,000 hospitalizations" in just six months.

A stay would risk compromising these numbers, indisputably a significant injury to the public. The harm to the Government and the public interest outweighs any irreparable injury to the individual Petitioners who may be subject to a vaccination policy, particularly here where Petitioners have not shown a likelihood of success on the merits. In light of the foregoing, we find that the factors regarding irreparable injury weigh in favor of the Government and the public interest.

[155] While the decisions from the USA are not binding on this court, the data presented to the court is noteworthy. The facts are important in cases of this nature.

The Constitutional Claim

THE CLAIMANT'S SUBMISSIONS

[156] It was submitted on the claimant's behalf that the claim is not a challenge against the efficacy of COVID-19 vaccines or against persons who have chosen to become vaccinated.

[157] Mr Christie, counsel for the claimant asserts that the claim concerns the freedom to choose, to form one's own opinions and beliefs (including religious beliefs) and the freedom of every individual to make their own autonomous decision in respect of their body.

[158] He submits that having regard to the clear historical developments of human rights in employment law and especially the new obligation for private citizens (natural and juristic) to respect the constitutional rights of others, it is time to consider implying a new term that employers must respect the constitutional rights of their employees. This is the argument posited by Law Lecturer Joe Atkinson of Sheffield University in his article entitled 'Implied Terms and Human Rights in the Contract of Employment'[60], which has been published in the Industrial Law Journal.

Interpretation of the Constitution and Fundamental Rights

[159] Counsel began his submissions by examining the methods used by courts to interpret the constitution.

[160] Counsel, Mr. Christie submits that the methods used to interpret the constitution in Commonwealth jurisdictions is far from settled. He further submits that there are various approaches that are given different weight depending on the circumstances of the case and the parts of the constitution that are being interpreted.

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[60] Joe Atkinson, Implied Terms and Human Rights in the Contract of Employment, Industrial Law Journal, Volume 48, Issue 4, December 2019, Pages 515–548

[161] Mr Christie asserts that when interpreting sections of the constitution that bestows rights upon citizens, a generous interpretation approach is the most frequently used method as many of the constitutional rights are framed in sufficiently broad term and that derogations from guaranteed constitutional rights are to be construed narrowly in order to secure the most meaningful protection for the guaranteed rights.[61]

[162] The case of **Brendan Bain** illustrates that that constitutional rights can be applied horizontally and enforced by one private citizen against another.

Fundamental rights and freedoms in employment law

[163] Counsel asserts that that before **Brendan Bain**, the application of human rights law in the context of employment law would have been considered unlikely. However, in **Brendan Bain**, the Full Court adopted a novel approach in deciding whether the defendant breached the claimant's constitutional rights. He states that the Full Court used a concept of punishment that is deciding whether the defendant's termination of the claimant's employment was an act of punishing him for exercising his right to freedom of expression.

[164] He asserts that it important to first resolve the interplay between sections 19(1) and 19(3) of the Charter. It is his submission that, for the two sections to operate cohesively, they must be interpreted in such a way that allows a person to pursue constitutional redress even though he has other causes of action on which to pursue the matter (whether or not those other causes of action are joined in the constitutional suit); therefore, his other available actions are not prejudiced; and if the court is satisfied that some other law provides the

[61] **R v Hughes** 2 AC 259

applicant with adequate means of redress, it has a discretion to either exercise its power or to decline to do so.

[165] Furthermore, counsel submits that as a general rule, the question concerning whether the court should exercise its discretion under section 19 (4) should be determined at trial and not as a preliminary consideration.[62]

[166] Moreover, it is Mr Christie's submission that the court's penultimate consideration is determining the meaning of adequate redress. He posits that the Nebraskan Court of Appeal in **Fyfe v Tabor Turnpost**[63] defines adequate redress (albeit dealing with adequate remedy at law vs. equity) as "an adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

[167] Counsel contends that in the context of the instant claim, an employer has a duty to pay wages, provide work and a safe and healthy work environment and to indemnify employees.

[168] Firstly, Counsel asserts that before the court exercises its discretion under section 19(4) of the Charter, it must first be satisfied that there has been an infringement of constitutional rights and that the power to award constitutional redress has arisen. It is only then that the court can truly decline to exercise its power to grant redress.

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[62] The claimant relies on the case of Merson v Cartwright [2006] 3 LRC 264 to support this submission.
[63] 22 Neb. App 711

[169] He submits that the trilogy of Trinidadian cases of **Kemrajh Harrikissoon v Attorney General of Trinidad and Tobago**[64], **Thakur Jaroo v Attorney General of Trinidad & Tobago**[65] and **Attorney General of Trinidad & Tobago v Siewchand Ramanoop**[66] were decided under a completely different constitutional regime than that which exists in Jamaica. The Trinidadian constitution does not create any obligation or discretion on the court to decline the exercise of its powers if adequate means of redress exists under other law. Instead, the courts created its own self-imposed protection to limit the use of the constitution in cases. However, the Jamaican Constitution expressly states that even if adequate means of redress exists, the court has a discretion to grant constitutional redress. Parliament passed the law granting a discretion to the court and not an automatic bar. Consequently, the he argues that the two approaches are inconsistent.

[170] Additionally, counsel submits that there is a distinction between the words "power" and "jurisdiction". He states that in the context of section 19(4) of the Charter "power" refers to the court's power to decline to grant constitutional redress that is make such orders, issue such writs, and give such directions" under section 19(3).

[171] Counsel contends that section 19(6) illustrates that there is a dichotomy between 'power' and 'jurisdiction'. The powers are essentially the orders that the court may make under the constitution when exercising its jurisdiction to hear and determine applications under the constitution.

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[64] [1980] AC 265

[65] [2002] UK PC 5

[66] [2005] UK PC 15

[172] Therefore, he asserts that the court's discretion is confined to declining to exercise its power to grant redress, and not to decline hearing and determining a constitutional claim.

[173] Counsel further contends that if the court was given the discretion to decline to exercise its jurisdiction to hear and determine a claim for constitutional redress, then this would be expressly stated in the provision. Therefore, in keeping with the narrow interpretation that is to be given to restrictions on rights under the constitution, section 19(4) should be read as being limited to the court having the discretion to decline exercising the powers of making orders, issuing writs, and giving directions for the enforcement of constitutional rights.

[174] Counsel also submits that the judicial principles underlying constitutional redress (such as vindication, compensation, and deterrence) support the position that while adequate redress may exist under some other law, the vindication of a person's constitutional rights (whether by declaration or damages) does not automatically occur through the adequacy of other redress. In some cases, it will, and in some cases it won't.

[175] He posits that the Privy Council in **Observer Publications Ltd v Matthew and Ors**[67] stated that human rights that are guaranteed by the Constitution are intended to influence the practical administration of the law and that their enforcement cannot be reserved for cases in which it is not even arguable that an alternative remedy is available. He argues that the human rights guaranteed in the Jamaican Constitution are intended to be a major influence upon the relationship between private citizens and the relationship between citizens and the state. This he further argues is even more important as the constitution has horizontal application.

[67] (2001) 58 WIR 188

[176] Secondly, counsel submits that the court's discretion under section 19(4) is better suited for consideration by the trial judge, who will determine the extent of damages, and to award such damages under s.19(1) of the Charter if he finds the damages under contract law to be inadequate.

[177] He argues that the court's discretion to decline to exercise its powers at the inception of court proceedings should be done on one of the following bases. The first basis is at the trial of the preliminary issue on whether the court ought to decline exercising its jurisdiction under section 19(4) of the Charter or, striking out the proceedings on the basis that the claim is either an abuse, frivolous or vexatious, or discloses no reasonable grounds for pursuing constitutional redress.

[178] He further submits that to decline the exercise of the court's power carries with it an implied acknowledgement of there being a breach and the power to grant redress arising. Therefore, the correct way to do so is either by summary judgment or striking out the proceedings.

[179] However, counsel argues that if the court was to consider whether to exercise its discretion at an early stage then the effect of the use of the discretion would be tantamount to striking out the constitutional proceedings – albeit on the basis that the subject matter would proceed under some other law. Therefore, the principles relating to the striking out of proceedings may be relevant to consider in the exercise of that discretion before evidence can be heard. In this regard, he submits the decision of Lloyd LJ in **Williams & Humbert v W. & H. Trade Marks**,[68] in which there was a discussion on novel proceedings and the striking out of an unarguable claim.

[180] Moreover, he contends that if the court decides to exercise its discretion under s.19(4) at this time, it would preclude the trial judge from providing what he (the

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[68] [1986] 1 A.C 368

trial judge) considers adequate redress based on the circumstances. He argues that the state of the evidence is not static and evolves as the proceedings progress, including the nature and extent of harm suffered by a claimant. Therefore, the exercise of the court's discretion to decline the trial judge's powers to grant redress under the constitution would permanently preclude him from obtaining constitutional redress no matter the circumstances that exist as at the date of trial, which in many cases may differ from the circumstances at filing.

[181] Thirdly, counsel asserts that in considering whether he has an arguable case that he has no adequate remedy in some other law the court must examine his alternative cause of action, his claim for breach of contract.

[182] He submits that damages under contract law have been accepted as inadequate where damages would be difficult to quantify, only nominal damages are available, loss of amenity damages and gain-based damages.

[183] Furthermore, it is his submission that his claim for breach of contract would provide inadequate redress as the issues for the court to determine under contract law are separate and distinct from his constitutional argument that the scheme and design of the policy are calculated to punish him for exercising his right to refuse vaccination by imposing upon him a burden of testing and the expense of testing. He also states that it is doubtful whether that issue, which is supported by the principles of **Brendan Bain**, can be pursued in a claim for breach of contract simpliciter.

[184] Consequently, he contends that there is no real tangible value to gain from the exercise of the court's constitutional jurisdiction at this time in these circumstances. The pursuit of constitutional redress would not materially increase the time or cost of the proceedings, nor the evidence that is led. If he succeeds on his claim for breach of contract, then the court would assess damages for breach of contract in any event. In that assessment, the question

of whether the damages permissible under the contract are adequate to cover all his losses and harm suffered would naturally arise when the court considers the measure of damages and for what areas of damage/harm the court can provide recompense and those areas that it cannot.

[185] Additionally, counsel submits that he has an arguable case for the following reasons:

a. The defendant's policy is unconstitutional based on its design. The policy punishes any person who manifests their right to belief and autonomy over their body by imposing upon them the burden of weekly testing and the burden of undertaking the cost of those tests, while employees who are unvaccinated for medical reasons, not by choice, bear neither of these two burdens;

b. it puts the claimant in a position where he must relinquish his right to his life (including livelihood), his right to security of the person, his right to his liberty, his right to his personal beliefs and religion, and/or his right to his private life;

c. The defendant's policy is designed to coerce the claimant to take a vaccine against his personal beliefs and his religious beliefs, as the said policy creates pseudo-options, which are not realistic for any employee to choose and is tantamount to a constitutional violation;

d. The policy is not demonstrably justifiable in a free and democratic society, having regard to the risks existing as at the date of the policy, the benefits of the policy, and the alternative less-intrusive options available to the defendant in lieu of the policy;

e. The claimant's pleadings disclose an arguable case that has a real, not frivolous, chance of success in obtaining constitutional redress, whether it be damages or only a declaration.

[186] A claim for breach of contract will not provide him with adequate means of redress, due to the failure of contract law to account for the damages arising from the distress and despair caused to him, having to be tested weekly and undergoing the unwelcomed physical violation of his body, the disclosure of his private medical information, the loss of his vacation leave under force of the policy, the social, financial, and mental harm that naturally by-product of the loss of income from employment, the indignity of treatment for which he complains. Counsel argues that the defendant has not addressed in its evidence why medically exempt unvaccinated workers are not required to undergo bi-weekly PCR testing. He contends that the defendant's argument that unvaccinated persons pose a greater or increased risk to others equally to both sets of unvaccinated workers. He further argues that the only difference between both sets of unvaccinated workers is that one set exercised their constitutional right to choose while the other had no choice.

THE DEFENDANT'S SUBMISSIONS

[187] Conversely, the defendant disputes the claimant's claim that the policy breaches his constitutional rights and his contract of employment.

[188] The defendant contends that constitutional relief is inappropriate pursuant to section 19 of the Charter and has cited a number of authorities to bolster its position. The defendant further contends that if the court is satisfied that the claimant has an alternative adequate remedy, it should decline to exercise its constitutional jurisdiction citing again the trilogy of Privy Council cases of **Thakur Jaroo v Attorney General of Trinidad & Tobago** and **Attorney General of Trinidad & Tobago v Siewchand Ramanoop** and the Jamaican

decisions of **Dawn Satterswaite v Assets Recovery Agency**[69] and **Deborah Chen v The University of the West Indies**[70]

[189] Counsel for the defendant, Mr. Powell submits that the decisions from the Privy Council highlight the court's approach to constitutional claims brought where adequate common law remedies exist.

[190] Firstly, Mr Powell submits that in **Jaroo,** the court determined that the issue of alternative redress should be decided early in proceedings and that resorting to a constitutional claim where there is an available common law remedy is an abuse of process.

[191] Secondly, Mr. Powell asserts that **Ramanoop** re-emphasized the court's view that a claim for constitutional relief should not be entertained in circumstances where there is a parallel adequate remedy available to the applicant. It states that the Privy Council noted that despite its different wording, the Trinidadian constitution was similar to many other Caribbean constitutions that empower the court to decline constitutional relief where other means of legal redress is available. The court also discussed the general approach a court should take when deciding whether to permit a constitutional complaint to proceed.

[192] Further that the Privy Council determined that the jurisdiction of the court to grant constitutional redress where a parallel adequate remedy exists was only to be engaged in cases containing some special feature which render it appropriate for the exercise of the jurisdiction.

[193] In the decisions of **Dawn Satterswaite** and **Deborah Chen** the Jamaican courts considered and applied the principles laid down by the Privy Council in **Ramanoop** and concluded that the court ought to refuse constitutional redress where it is determined that alternate adequate relief is available to the applicant

[69] [2021] JMCA Civ 28
[70] [2021] JMSC Civ 01

under any other law. Counsel contends that a claim for breach of contract is an obvious alternate remedy and that this has been acknowledged by the claimant in his fixed date claim form where he seeks damages and injunctive relief for breach of contract.

[194] Furthermore, counsel posits that the claimant seeks damages, declaratory relief and an injunction to prevent the policy from applying to him and, in that regard, adequate redress for him would be in those terms.

[195] Counsel contends that, based on the claimant's allegation that the policy has been unilaterally imposed on him in breach of his contract of employment, the remedies that would be available to him in a claim for breach of contract are not only adequate but, in some respects, identical to the substantive redress he seeks in his constitutional claim.

[196] There is no dispute that the legal relationship between an employer and employee is determined by a contract of employment. Therefore, the policy must be implemented in accordance with those terms. Counsel further states that if the court were to hold that the defendant implemented the policy in breach of the claimant's contract of employment then he would be entitled to redress, a declaration that the policy does not apply to him and damages for any losses he incurred in complying with it.

[197] Counsel argues that the policy applies to all of the defendant's employees, and it does not compel the claimant (or any employee) to be vaccinated. The claimant can refuse to be vaccinated and in that case, the policy provides for him to submit a negative PCR test every two weeks. Counsel further argues that at its highest, the claimant must pay for those tests and any loss he suffers as a result can be compensated in money.

[198] Additionally, counsel submits that there is no evidence that the instant case contains some special feature which would render it appropriate for the court to exercise its jurisdiction to grant constitutional relief.

[199] He also submits that constitutional relief is not appropriate as it is clear from the affidavit evidence that the instant case will involve disputes of fact. The court will have to determine both legal and factual questions and those disputes will require cross-examination involving contested expert evidence. In these circumstances, counsel, Mr. Powell contends that a constitutional claim would be wholly unsuitable and that this factor is a further reason for the court to decline to exercise its jurisdiction.

[200] Finally, counsel concludes that it is based on these reasons and authorities that the court should to decline to exercise its jurisdiction under section 19 of the Charter and dismiss that aspect of the claimant's claim as an abuse of process.

THE ATTORNEY GENERAL'S SUBMISSIONS

[201] Miss Jarrett, QC, for the Attorney General submitted that a long line of judicial authority has established that the right to commence a claim for constitutional redress is one that should not be misused and ought to be exercised and entertained only in exceptional circumstances. To support this submission, the Queens Counsel cites the trilogy of cases emanating from **Trinidad and Tobago of Harrikissoon v Attorney General and Tobago**, **Thakur Persad Jaroo v the Attorney General of Trinidad and Tobago** and **Attorney General of Trinidad and Tobago v Ramanoop**.

[202] She also cites the Jamaican case of **Deborah Chen v The University of the West Indies**[71] where the court had to grapple with the same issue as the Privy Council as to whether the proceedings under the Constitution ought to be invoked in cases where there is an obvious available recourse at common law and ultimately arrived at the same conclusion as the Board in the Trinidadian cases.

[71] (supra)

[203] The Attorney General submits that the instant claim is distinguishable from the foregoing authorities in that it is a claim in private law involving a private corporate entity and not the State. Therefore, in the exercise of its discretion under section 19(4) of the Charter, the court must consider whether there are adequate remedies in the law of employment contract that can provide redress for the alleged contraventions of the claimant's constitutional rights. She highlights that Full Court decisions such as **Maurice Tomlinson v Jamaica Broadcasting Corporation**[72] and **Brendan Bain v University of the West Indies**[73] have firmly established that the Charter has horizontal application.

[204] Queen's Counsel cited the case of **Addis v Gramophone**[74] for the proposition that at common law, the remedy for a breach of an express term in a contract of employment is damages, applying the ordinary rules of contract. Since the decision in **Addis v Gramophone**, exceptions to the rule against recovery for non-pecuniary losses have emerged. One such exception is the concept of an implied term of mutual trust and confidence in the employment contract to circumscribe the operation of the employer's power to dismiss and provides for the potential recovery for non-pecuniary losses.

[205] She states that the Full Court in **Brendan Bain** considered the concept of the implied term of mutual trust and confidence in a contract of employment and in doing so had regard to the court of appeal decision in **United General Insurance Company Limited v Marilyn Hamilton.**[75] The implied term of mutual trust and confidence places an obligation on both the employer and the employee "not without reasonable and proper cause to act in such a way as

[72] [2020] JMCA Civ 52
[73] (supra)
[74] (supra)
[75] SCCA 88/08 (delivered 15th May 2009)

would be calculated or likely to destroy or seriously damage the relationship of trust and confidence existing between the employer and the employee."[76]

[206] The instant case does not concern a dismissal as the claimant's contract of employment with the defendant is extant. It is his contention that the defendant's vaccination policy is inconsistent with the express terms of his contract and in contravention of several of his Charter rights. In that regard, there ought to be no impediment to reading into his contract of employment an implied term of mutual trust and confidence.

[207] She asserts that in determining whether an employer has breached the implied term of mutual trust and confidence, the courts should consider the employer's conduct as a whole to see if it is such that "judged reasonably and sensibly, the employee cannot be expected to put up with it".[77]

[208] Queen's counsel submitted that the term is also at times referred to as an obligation of good faith and fairness but courts when deciding whether the term has been breached, will consider whether the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust.[78] She further states that it therefore follows that an employer who treats an employee in a manner that is objectively likely to destroy the implied term of trust and confidence, will not be found to have breached the term, if his conduct can be justified by reasonable and proper cause.

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[76] The Attorney General cited the cases of Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84 and Malik v BCCI [1998] AC 20 to explain and define the implied term of mutual trust and confidence.
[77] See Woods v WM Car Services (Peterborough) Ltd [1981] ICR666
[78] See Hilton v Shiner Ltd Builders Merchants [2001] IRLR 727

[209] As a consequence, the Attorney Generally submits that in determining the preliminary issue in the instant claim, the court is entitled to consider whether the implied term of mutual trust and confidence in the claimant's contract of employment can provide adequate means of redress for the defendant's alleged constitutional breaches.

[210] Furthermore, she posits that having regard to the scope of the implied term of mutual trust and confidence as expressed in **Malik v BCCI**[79], arguably, the contravention of a Charter right may amount to a breach of the implied term thereby making it a potentially effective tool for protecting Charter rights. This is the application of the proportionality test in **R v Oakes**[80], which was applied by the Full Court in **Julian Robinson v The Attorney General**[81].

[211] The proportionality test requires the contravener to show that there is a pressing objective to be achieved by the interference with the right, the interference is rationally connected to the objective, there is minimal interference with the Charter right, there is no other means of achieving the objective and the interference is proportionate to the objective.

[212] In contrast, she asserts that the reasonable and probable cause test for determining whether there has been a breach of the implied term of mutual trust and confidence is arguably a test with a lower threshold.

[213] She notes that in **IBM v Dalgleish**[82], the English Court of Appeal held that the Wednesbury test of reasonableness is to be applied in determining whether an employer has breached the implied term of mutual trust and confidence. This involves looking at whether the employer took into account all relevant considerations, disregarded all irrelevant considerations and acted in a matter

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[79] (supra)
[80] [1986] 1 SCR 103
[81] [2019] JMFC Full 04
[82] [2017] EWCA Civ 1212

that is not absurd or in defiance of logic or in which no reasonable employer would act. As a consequence, it is not inconceivable that an employer may act reasonably in the Wednesbury sense, and therefore his conduct does not breach the implied term of mutual trust and confidence, yet his actions constitute a breach of a Charter right.

[214] Section 2 of the Constitution provides that the Constitution is the supreme law of Jamaica and section 13(1)(c) of the Charter provides that all persons have a responsibility to uphold and respect the Charter rights of others. As a consequence, it is an implied term in the claimant's contract of employment that the defendant will uphold and recognise his Charter rights unless interference with those rights is demonstrably justified in a free and democratic society, would provide an adequate alternate remedy for the constitutional breaches being alleged in this claim.

The Charter of Fundamental Rights and Freedoms

13. – (3) The rights and freedoms referred to in subsection (2) are as follows:

(a) the right to liberty and security of the person and the right not to be deprived thereof, except in the execution of a sentence of a court in respect of a criminal offence of which the person has been convicted;

(b) the right to freedom of conscience, thought, belief and the observance of political doctrines;

…

(j) the right of everyone to -

(ii) the right of everyone to respect for and protection of private and family life, and privacy of the home, section 13(3)(j)(ii); and

(p) the right to freedom of the person as provided in section 14, section 13(3)(p);

(s) the right to freedom of religion as provided in section 17.

The right to life – Article 2 of the European Convention on Human Rights provides:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The right to life – Article 21 of the Constitution of India provides:

21. Protection of life and personal liberty — No person shall be deprived of his life or personal liberty except according to procedure established by law.

The Canadian Charter of Fundamental Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Constitution of Malaysia 1957

Article 5

(1) No person shall be deprived of his life or personal liberty save in accordance with law.

[215] The claimant has cited the right to life as set out in several constitutions around the world. This is with a view to equating the right to life with the right to work and to earn a livelihood. The constitution of India has been interpreted by the Supreme Court of India to mean that the right to life includes the right to livelihood. The claimant has submitted that in interpreting the constitutionally guaranteed right under this head, this court should employ the reasoning of the courts in India and Malaysia. He relies on the case of **Olga Tellis et al v Bombay Municipal Corporation et al**,[83] in which the Supreme Court of India said as follows[84]:

> *"CHANDRACHUD,CJ.:*
>
> *These Writ Petitions portray the plight of lakhs of persons who live on pavements and in slums in the city of Bombay. They constitute nearly half the population of the city. The first group of petitions relates to pavement dwellers while the second group relates to both pavement and Basti or Slum dwellers. Those who have made pavements their homes exist in the midst of filth and squalor, which has to be seen to be believed. Rabid dogs in search of stinking meat and cats in search of hungry rats keep them company. They cook and sleep where they ease, for no conveniences are available to them. Their daughters, come of age, bathe under the nosy gaze of passersby, unmindful of the feminine sense of bashfulness. The cooking and washing over, women pick lice from each other's hair. The boys beg. Menfolk, without occupation, snatch chains with the connivance of the defenders of law and order; when caught, if at all, they say: "Who doesn't commit crimes in this city?"*

[83] 1986 AIR 180, p.23
[84]

It is these men and women who have come to this Court to ask for a judgment that they cannot be evicted from their squalid shelters without being offered alternative accommodation. They rely for their rights on Article 21 of the Constitution which guarantees that no person shall be deprived of his life except according to procedure established by law. They do not contend that they have a right to live on the pavements. Their contention is that they have a right to live, a right which cannot be exercised without the means of livelihood. They have no option but to flock to big cities like Bombay, which provide the means of bare subsistence. They only choose a pavement or a slum which is nearest to their place of work. In a word, their plea is that the right to life is illusory without a right to the protection of the means by which alone life can be Lived. And, the right to life can only be taken away or abridged by a procedure established by law, which has to be fair and reasonable, not fanciful or arbitrary …

…On behalf of the Government of Maharashtra, a counter-affidavit has been filed by V.S. Munje, Under Secretary in the Department of Housing. The counter-affidavit meets the case of the petitioners thus. The Government of Maharashtra neither proposed to deport any pavement dweller out of the city of Bombay nor did it, in fact, deport anyone. Such of the pavement dwellers, who expressed their desire in writing, that they wanted to return to their home towns and who sought assistance from the Government in that behalf were offered transport facilities up to the nearest rail head and were also paid railway fare or bus fare and incidental expenses for the onward journey. …

…The counter-affidavit says that no person has any legal right to encroach upon or to construct any structure on a footpath, public street or on any place over which the public has a right of way. …

…

As we have stated while summing up the petitioners' case, the-main plank of their argument is that the right to life which is guaranteed by Article 21 includes the right to livelihood and since, they will be deprived of their livelihood if they are evicted from their slum and. pavement dwellings, their eviction is tantamount to deprivation of their life and is hence unconstitutional. For purposes of argument, we will assume the factual correctness of the premise that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. Upon that assumption, the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life. Indeed, that explains the massive migration of the rural population to big cities. They migrate because they have no means of livelihood in the villages. The motive force which people their desertion of their hearths and homes in the villages that struggle for

survival, that is, the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live: Only a handful can afford the luxury of living to eat. That they can do, namely, eat, only if they have the means of livelihood. That is the context in which it was said by Douglas, J in Baksey that the right to work is the most precious liberty because, it sustains and enables a man to live and the right to life is a precious freedom. "Life", as observed by Field, J in Munn v Illinois, (1877) 94 U.S. 113, means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed.

…Article 39(a) of the Constitution, which is a Directive Principle of State Policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Article 41, which is another Directive Principle, provides, inter alia, that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. Article 37 provides that the Directive Principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country. The Principles contained in Articles 39 (a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21. …

*Turning to the factual situation, how far is it true to say that if the petitioners are evicted from their slum and pavement dwellings, they will be deprived of their means of livelihood? It is impossible, in the very nature of things, together reliable data on this subject in regard to each individual petitioner and, none has been furnished to us in that form. That the eviction of a person from a pavement or slum will inevitably lead to the deprivation of his means of livelihood, is a proposition which does not have to be established in each individual case. That is an inference which can be drawn from acceptable data. …**The writ petitions before us undoubtedly involve a question relating to dwelling houses but, they cannot be equated with a suit for the possession of a house by one private person against another. In a case of the latter kind, evidence has to be led to establish the cause of action and justify the claim**… (emphasis mine)*

…Two conclusions emerge from this discussion, one, that the right to life which is conferred by Article 21 is the Bombay Municipal Corporation Act, 1888, the relevant provisions of which are contained in sections 312(1), 313(1)(a) and 314…

…These provisions, which are clear and specific, empower the Municipal Commissioner to cause to be removed encroachments on footpaths or pavements over which the public have a right of passage or access. It is undeniable that, in these cases, wherever constructions have been put up on the pavements, the public have a right of passage or access over those pavements. The argument: of the petitioners is that the procedure prescribed by section 314 for the removal of, encroachments from pavements is arbitrary and unreasonable since, not only does it not provide for the giving of a notice before the removal of an encroachment but, it provides expressly that the Municipal

Commissioner may cause the encroachment to be removed "without notice"…

Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right, in this case the right to life, must confirm to the norms of justice and fair play. Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards: The action must be within the scope of the authority conferred by law and secondly, it must be reasonable. If any action, within the scope of the authority conferred by law, is found to be unreasonable, it must [be] that the procedure established by law under which that action is taken is itself unreasonable. …

Having given our anxious and solicitous consideration to this question, we are of the opinion that the procedure prescribed by Section 314 of the Bombay Municipal Corporation Act for removal of encroachments on the footpaths or pavements over which the public has the right of passage or access, cannot be regarded as unreasonable, unfair or unjust. …

…in the first place, footpaths or pavements are public properties(sic) which are intended to serve the convenience of the general public. They are not laid for private use and indeed, their use for a private purpose frustrates the very object for which they are carved out from portions of public streets. The main reason for laying out pavements is to ensure that the pedestrians are able to go about their daily affairs with a reasonable measure of safety and security. That facility, which has

matured into a right of pedestrians, cannot be set at naught by allowing encroachments to be made on the pavements. There is no substance in the argument advanced on behalf of the petitioners that the claim of the pavement dwellers to put up constructions on pavements and that of the pedestrians to make use of the pavements for passing and repassing, are competing claims and that the former should be preferred to the latter…Putting up a dwelling on the pavement is a case which is clearly on one side of the line showing that it is an act of trespass.

…To summarise, we hold that no person has the right to encroach, by erecting a structure or otherwise, on footpaths, pavements or any other place reserved or ear-marked for a public purpose like, for example, a garden or a playground; that the provision contained in section 314 of the Bombay Municipal Corporation Act is not unreasonable in the circumstances of the case; and that, the Kamraj Nagar Basti is situated on an accessory road leading to the Western Express Highway."

[216] **Tellis** was a case of the vertical application of the constitution in a judicial review matter, this is entirely different from the case at bar. The Indian Supreme Court found that the right to livelihood in their constitution was a component part of the right to life as there were other provisions in the constitution which qualified the right to life and they had to be read together with Article 21.

[217] That court concluded that the right to a livelihood, for the poorest and most marginalized of its citizens gave way to the statute governing the public use of the pavement. This suggests that in the balancing exercise, the court had to consider the rights of one category of the society as against all of the society. The right was found to be both capable of qualification and limited in application.

[218] The right to life is a guaranteed right, fiercely guarded by the courts in Jamaica, it is an absolute and unqualified right. The right to a livelihood is interpreted by

the Supreme Court of India as a qualified right which must be balanced against the rights of the wider society in order to achieve a just and fair disposition.

[219] The courts in Jamaica have not read the right to livelihood into the right to life. Counsel for the claimant did not cite any authority to show that this was so. Therefore, the right to life remains unqualified and the right to liberty as interpreted by our Court of Appeal is dealt with later on.

The right to work at common law

[220] The claimant submitted that the right to life and a livelihood includes the common law right to work which is connected to the right to liberty. Counsel cited the case of **Nagle v Feilden et al,**[85] in which the appellant was refused a licence by the Stewards of the Jockey Club. They had a monopoly over horse racing on the flat in Great Britain and an unwritten practice of refusing to licence women as trainers. They granted a licence to the appellant's head male trainer, but not to her.

[221] On appeal against the striking out of her claim as disclosing no cause of action, the Court of Appeal held that there was an arguable case that by the common law of England there was a right to work at one's trade or profession without being arbitrarily or unreasonably excluded by anyone having the governance of it. The exclusion of the appellant was viewed as capricious and unreasonable and the practice of the Stewards was contrary to public policy. The claim had therefore been wrongly struck out.

[222] The case of **Nagle** refers to the jurisdiction of the court in matters of judicial review where the concern of the court is the exercise of a discretion and whether the decision-maker acted capriciously or arbitrarily. The right to work was emphasised by Lord Denning who said that *"a man's right to work at his trade*

[85] [1966] 1 All E.R. 689

or profession is just as important to him as, perhaps more important than, his rights of property. Just as the courts will intervene to protect his rights of property, so they will also intervene to protect his right to work."

[223] In the dictum of Lord Salmon at page 699, he states that:

> *"The courts use their powers in the interests of the individual and of the public to safeguard the individual's right to earn his living as he wills and the public's right to the benefit of his labours. The classic exposition of this branch of the law is to be found in Lord McNaughten's speech in Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co., Ltd:*[86]
>
> *All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions. Restraints of trade and interference with individual liberty of action, may be justified by the special circumstances of the case. It is a sufficient justification, and indeed, it is the only justification, and indeed, it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and … of the public."*
>
> *In the days when this doctrine was evolved, the sanctity of contract was certainly no less regarded than it is today. The courts then afforded protection to a man against an unreasonable restraint on his right to work even though he had bargained that right away. I should be sorry to think that we have grown so supine that today the courts are powerless to protect a man against an unreasonable restraint on his right to work to which he has in no way agreed and which a group with no authority, save that which it has conferred on itself seeks to capriciously to impose on*

[86] [1891-94] All E.R. 1 at 18

him. I certainly refuse to believe that it is not even arguable that in such circumstances that the courts have power to protect the individual citizen."

[224] The claimant has cited the Universal Declaration of Human Rights adopted by the United Nations on December 10, 1948, article 23 of which provides that:

"*Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."*

[225] He relies also on the United Nation's Covenant on Economic, Social and Cultural Rights, 1966, to which Jamaica is a signatory. This treaty was ratified on October 3, 1975 and Part III, Article 6 provides that:

"The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."

[226] There is no doubt that there is a right to work which the courts will protect on behalf of the worker at common law. In the view of this court, not only has there been no right to a livelihood in the jurisprudence of this jurisdiction, there is no need to read the right to a livelihood into the Charter to obtain this protection. In fact, Jamaica has had in place for many years, a statutory scheme to address the right to work pursuant to the Labour Relations and Industrial Disputes Act and the Labour Relations Code as antiquated as they may be.

[227] Counsel for the claimant has further submitted that there is a significant overlap between the right to liberty, the right to freedom of the person and the right to security of the person. For this proposition he cited several authorities outside of this jurisdiction. He specifically, argued that authorities could not be found

for the right to freedom of the person so he submitted that they may be dealt with together under the liberty provision.

[228] Our Court of Appeal has dealt extensively with personal liberty and its connection to the right to freedom of movement. The court reviewed the two distinct liberty rights secured by section 13(3)(a) as well as the close connection between section 13(3)(a) and sections 13(3)(p) and 14, of the Charter in the case of **The Jamaican Bar Association v The Attorney General and The General Legal Council**.[87]

[229] In looking at personal liberty under section 13(3)(a), the learned judge of appeal, McDonald-Bishop, JA writing for the court said:

> *"[310] A thorough reading of the Charter reveals that section 13(3)(a) not only protects the right not to be deprived of liberty but also the fundamental rights to life, liberty and security of the person. It is well-established that along with the right to life, the right to liberty is one of the most valued of all human rights. In Maneka Gandhi v Union of India 1978 AIR 597, the Supreme Court of India, in discussing the expression, "personal liberty", within the ambit of Article 21 of the Constitution of India, explained that personal liberty is of the "widest amplitude" and covers "a variety of rights which go to constitute the personal liberty of man". Hence, the right to liberty should be twinned with the right not to be deprived of it.*
>
> *[311] By focusing only on the right not to be deprived of liberty and the qualifier in section 13(3)(a), the Full Court excluded from its contemplation the simple and fundamental right to be free from impositions on one's personal liberty. One need not be deprived of one's liberty for there to be a violation or threatened violation of one's basic but*

[87] [2020] JMCA Civ 37

fundamental right to be free from restraints. Hence the need to view each right separately and distinctly from each other, albeit that they are intertwined.

[312] Furthermore, the right to liberty and the right not to be deprived of it, guaranteed by section 13(3)(a), are, in my view, close 'siblings' of the right to freedom of the person, which is protected under section 13(3)(p) of the Charter. They may, in my view, be appropriately regarded as the "triplet liberty rights". The appellant did not rely on section 13(3)(p), however, given the intricate connection between it and section 13(3)(a), it ought not to have been overlooked.

[313] The right to freedom of the person guaranteed by section 13(3)(p) does not have an identical counterpart in the Convention and is not in the same wording as Article 5 of the Convention or section (13(3)(a). It comprises a liberty right, which is explicitly made subject to section 14 of the Charter. It, therefore, provides a direct "gateway" to section 14, which as will be seen, is directly related to section 13(3)(a).

[314] Section 14(1) states, in part, in so far as is immediately relevant to these proceedings: "14.-(1) No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances - (a) in consequence of his unfitness to plead to a criminal charge; (b) in execution of the sentence or order of a court whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted; (c) in execution of an order of the Supreme Court or of the Court of Appeal or such other court as may be prescribed by Parliament on the grounds of his contempt of any such court or of another court or tribunal; (d) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed on him by law; (e) for the purpose of bringing him before a court in execution of the order of a court; (f) the arrest or detention of a person – (i) for the purpose of bringing him before the

competent legal authority on reasonable suspicion of his having committed an offence; or (ii) where it is reasonably necessary to prevent his committing an offence; (g) ... ;" (Emphasis added)

[315] The underlined portion in bold in the excerpt above shows explicit reference to the right not to be deprived of liberty provided for in section 13(3)(a). The Charter does not expressly provide the basis for the distinction between the liberty rights under section 13(3)(a), and the right to freedom of the person, under section 13(3)(p). Neither does it expressly provide the basis for not making section 13(3)(a) directly subject to section 14, as in the case of section 13(3)(p). That notwithstanding, it is evident, on a reading of section 14, that although section 13(3)(a) is not made directly subject to it, the provisions are intimately connected and should be read in the light of each other. I would adopt the words of the GLC in its written submissions that, "[t]he general liberty right stated in s13(3)(a) receives more detailed articulation in s14 (dealing with liberty of the subject) and s16 (dealing with due process)".

[316] Section 14 treats with the right of a person not to be deprived of his liberty as expressed under section 13(3)(a). It is in section 14 that the right not to be deprived of one's liberty is reinforced but made subject to additional qualifiers not mentioned in section 13(3)(a). Section 14 states that the rights may be limited on other grounds other than that stated in section 13(3)(a), provided that the grounds for doing so are reasonable and are in accordance with fair procedures laid down by law.

[317] One circumstance in which a person may be deprived of his liberty, subject to the qualifier in section 14, is in the execution of an order of a court in respect of a criminal offence of which he has been convicted (the same qualifier stated in section 13(3)(a)). He may also be deprived of his liberty upon his arrest or detention for the purpose of bringing him

before the competent legal authority on reasonable suspicion of his having committed an offence.

[318] Section 14(2) and (3) also provides for certain procedural safeguards to be observed where a person is deprived of his liberty under the prescribed circumstances. Some of the safeguards governing the deprivation of the liberty of a person include: i. the right to communicate with and be visited by specified persons; ii. the right to be informed at the time of arrest or detention or as soon as is reasonably practicable in a language which he understands, the reasons for his arrest or detention; iii. the right to be informed in language which he understands of the nature of the charge; iv. the right to communicate with and retain an attorney-at-law and the entitlements to be tried within a reasonable time; v. the right to be brought before the court or an officer authorised by law without delay upon detention or as soon as is reasonably practicable; and vi. the right to be released on bail either unconditionally or upon reasonable conditions.

[319] Section 14(5) also states that any person deprived of his liberty shall be treated humanely and with respect for his inherent dignity.

[320] ***There is also section 13(9), of the Charter, which allows for deprivation of liberty in other circumstances, such as during a period of public emergency or public disaster, which are not immediately relevant to this analysis. It is only raised to show that in treating with section 13(3)(a), the Charter must be read as a whole because there are other provisions which affect the right to liberty and the right not to be deprived of liberty and there are qualifiers other than the one specified in section 13(3)(a).*** *(Emphasis mine.)*

[321] ***The various provisions of the Charter relating to the right to liberty have established, beyond question, that the liberty rights***

that are guaranteed by section 13(3)(a) are not at all absolute, as limitations may justifiably be placed on them in accordance with the Charter. *For this reason, the appellant's contention that a proper analysis of the rights under the Canadian and Jamaican Charters "...result in the conclusion that our Constitution grants unqualified rights not subject to the vague test of reasonableness or in any way restricted as concluded by the Court" (ground (u)), lacks merit. The rights to liberty are specifically qualified by the Charter. Had that not been so, no one could be detained or arrested prior to conviction for a criminal offence or for any other reason. (Emphasis mine.)*

[322] To make good sense of the Charter and to give full protection to the rights it seeks to guarantee, while also giving effect to the right of the state to limit these rights, section 13(3)(a) must, of necessity, be read in conjunction with sections 13(3)(p), 14 and 16. It should also be recognised that the section 13(3)(a) qualifier, employed by the Full Court in its analysis, is also listed in section 14. It is made subject to the overriding conditionality of "except on reasonable grounds and in accordance with fair procedures established by law".

[323] In examining the issues pertinent to section 13(3)(a), the Full Court did not explicitly focus on section 14 (section 13(3)(p), or other related provisions) of the Charter. Instead, it had regard to Article 5 of the Convention on the basis that it is similar to section 13(3)(a) of the Charter and that there is no local precedent on the respective Charter provision. Article 5 of the Convention provides, among other things, that: "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: …"

[324] The circumstances listed in Article 5 in which there may be deprivation of the liberty of a person are similar (if not identical) to those enumerated under section 14(1) of the Charter. The safeguards to be

observed under Article 5 are, more or less, similar to those listed in sections 14(2) and (3) of the Charter. Article 5 of the Convention is, therefore, in effect, a combination of sections 13(3)(a) and 14 of the Charter. It also would reflect the intent of section 13(3)(p), treating with freedom of the person but it carries no identical corresponding provision to that section.

[325] In Secretary of State for the Home Department v JJ and others [2007] UKHL 45, it was established that the word "liberty" has a range of meanings. In a narrow sense, it may mean physical freedom to move, so that deprivation of liberty would be physical incarceration or restraint. In a wider sense, it may mean the freedom to behave as one chooses. The words deprivation of liberty, it said, should be interpreted in the narrow sense of physical incarceration or restraint. This is the sense adopted in the Strasbourg jurisprudence and applied by the Full Court.

[326] In the light of section 13(3)(p) of the Charter, providing for the right to freedom of the person, as distinct from the right to liberty, the question arises as to whether the scope of section 13(3)(a) is so broad as to extend to more than physical restraint of the person and to encompass other types of restraint on personal liberties. The inclusion of a consideration of the concept of liberty other than being confined to physical liberty would be in keeping with the views of the Supreme Court of the United States of America (the "US Supreme Court") as declared in such cases as Poe v Ullman 367 US 497 (1961). In speaking to the right to liberty under the Fourteenth Amendment, Justice Harlan, stated at page 367, that: "...[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures

and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognises, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the State needs asserted to justify their abridgement....” (Emphasis added)

*[327] If this court were to adopt this broader meaning adopted by the US Supreme Court to the liberty rights guaranteed by section 13(3)(a) to its analysis, undoubtedly, it would be found that the Regime has encroached substantially on the liberty rights of regulated attorneys-at-law. A close examination of the impugned provisions of the Regime reveals a substantial imposition on the freedom of regulated attorneys-at-law to make their own choices and to relate to others within the context of their business operations, which is central to their autonomy. But, as the Supreme Court of Canada, stated in R v Edwards Books and Art Ltd [1986] 2 SCR 713, 717, the word “liberty” as used in section 7 of the Canadian Charter is not synonymous with unconstrained freedom... whatever be its precise contours, "[it] does not extend to an unconstrained right to transact business whenever one wishes". **Liberty in our Charter, therefore, must not be viewed as unconstrained freedom to do whatever one pleases, even if it is not to be restricted to physical restraint of the person.*** (Emphasis mine.)

*[328] However, even if the liberty rights under section 13(3)(a) should not be given a broader connotation beyond physical restraint of the person, as the Full Court opined, there must, nevertheless, be a broad and purposive approach to the interpretation of the Charter. **This is necessary to give full effect to the liberty rights as guaranteed. This approach would be in keeping with the intention of its framers. In Minister of Home Affairs and another v Fisher, Lord Wilberforce pointed to the need for a, “generous interpretation” that is suitable***

to give to individuals the full measure of the fundamental rights and freedoms guaranteed to them by the Constitution. (Emphasis mine.)

[329] Accordingly, the Full Court, in adopting the narrow sense of the word liberty as meaning incarceration or physical restraint, ought to have construed section 13(3)(a) by an examination of the actual words used in that section, while having regard to the provisions of the Charter, read as a whole. Had the Full Court employed that broad and purposive approach, it would have recognised the two distinct liberty rights secured by section 13(3)(a) as well as the intimate connection between section 13(3)(a) and sections 13(3)(p) and 14. With that recognition, the even more significant similarity between Article 5 of the Convention and the Charter, would have become more evident. Similarly, the Full Court would have recognised that the Charter in treating with liberty rights is not as fundamentally different, in terms and effect, from section 7 of the Canadian Charter, as it had opined. This similarity arises from the fact that the specific qualifier in section 14 of the Charter "except on reasonable grounds and in accordance with fair procedures established by law", is not so far removed, if, at all it is, from the qualifier in section 7 of the Canadian Charter, "except in accordance with the principles of fundamental justice". Principles of fundamental justice must include reasonableness as well as substantive and procedural fairness, which is recognised by the Charter.

[330] Our constitutional framework offers no less protection to the liberty rights of persons in Jamaica than the Canadian Charter. ***Restriction on liberty in Jamaica must be on reasonable grounds and in accordance with fair procedures, established by law,*** *just as it must be in accordance with principles of fundamental justice in Canada.* ***In both jurisdictions, any deviation from those standards must be demonstrably justified in a free democracy to be constitutional."***

[230] In another case cited by the claimant, **Carter v Canada (Attorney General)**,[88] the Supreme Court of Canada considered the right to life, liberty and security of the person in the context of an individual's choice when suffering from an incurable, degenerative, terminal illness, to choose the end of his/her life. The protection of individual autonomy and dignity were said to be the foundation of the rights to liberty and security of the person which affirmed the following principle laid down in **Blencoe v Britsh Columbia (Human Rights Commission**:[89]

> *"Liberty protects the right to make fundamental personal choices free from state interference*."

[231] In **Carter**, the court concluded that the prohibition on assisted dying limited Ms. Taylor's section 7 right to liberty and security of the person, by interfering with *"fundamentally important and personal medical decision-making" imposing pain and psychological stress and depriving her of control over her bodily integrity. She found that the prohibition left people like Ms. Taylor to suffer physical or psychological pain and imposed stress due to the unavailability of physician-assisted dying, impinging on her security of the person…. We agree with the trial judge. An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request a physician's assistance in dying. This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty. And, by leaving people like Ms. Taylor to endure intolerable suffering, it impinges on their security of the person*."

[232] The claimant in the case at bar is raising issues of dignity and bodily autonomy as personal liberty. In the view of this court, those issues cannot be elevated

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[88] 2015 SCC 5

[89] [2000] 2 S.C.R. 307 at para. 54

to the level of decision-making for medical decisions as contravening the right to personal liberty in **Carter** for the taking of a PCR test.

[233] The interpretation of personal liberty by the Court of Appeal in the **Jamaica Bar Association** case means that when the burden is shifted to the defendant then it is for them to discharge that evidential burden by showing that the restriction of the right was reasonable and in accordance with fair procedures established in law. But, before this burden is shifted it is upon the shoulders of the claimant who must raise a prima facie case on the evidence. If the claimant fails to do this at the early stage, then what would there be to convene a sitting of the Constitutional court to hear? This gatekeeping function of the court is set out in section 19 of the Charter by the use of the word "apply" in section 19(1). This application may either be granted or refused.

[234] There is no evidence before this court that the taking of a PCR test is a medical procedure for which a medical decision has to be made. There is also no impending interference with the bodily integrity of the individual demonstrated as likely to occur on the evidence as there again is no evidence to connect the PCR test with affecting the autonomy of the individual of his or her own body. It is true that an individual has to consent to the taking of the test and to submit to the procedure. There is no testing against his/her will. Therefore, if the claimant is to be tested it would have to be with his consent.

[235] The affidavit of the claimant says that the cost of testing is prohibitive. Counsel for the claimant submitted that any consent would be obtained by coercion, he argues that the test is too expensive and that it is also unnecessary given that he works remotely.

[236] The claimant says in his affidavit[90] that:

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[90] Paragraph 40

"On the other hand, the Defendant company is an entity valued over billions of United States Dollars, which can afford to pay me my salary pending the resolution of these court proceedings and also undertake the cost of testing if this court were to find the requirement for PCR testing reasonable in the interim."

[237] Should the defendant pay the cost, then the claimant would subject himself to the insertion of an instrument into his body to take the test. Based on this alternative positon the court can infer that the right to personal liberty, to be free from restraint, of bodily integrity and autonomy would be readily surrendered or rather exchanged, for payment.

[238] It would be highly irregular for a court to be asked to overlook the alleged contravention of a Charter right simply because the claimant was willing to accept payment in exchange for his declared rights to dignity and bodily autonomy. This means that the real concern of the claimant is the financial burden being imposed on him by the policy.

[239] In the Canadian case of **R v Morgentaler**[91] security of the person is defined as a person's right to control his/her own bodily integrity. *"State interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitutes a breach of security of the person."*

[240] The evidence does not disclose that there is or will be any interference with the body of the claimant by the state or that there will be such interference by the defendant.

Risk of death v right to life

[241] *"I believe that I must be allowed to make my own decision to take on the risk of death – no matter how large or small that risk may appear."* The claimant has

[91] [1988] 1 S.C.R. 30 at 56

cited a willingness to risk death from COVID-19 and this has to be weighed against the right to life. If the claimant is willing to risk death from the virus how has the right to a livelihood or personal liberty been engaged? The claimant is willingly surrendering his right to life having elected the risk of contracting the virus over the risk of vaccine, this is his choice. This also is not the choice of the defendant. The defendant would prefer that the claimant not take the risk as he is a member of their staff. Therefore, the right to life, a livelihood, personal liberty and freedom of movement must all yield to the claimant's stated decision to take on the risk of death.

[242] There is no evidence of psychological stress before the court. The submissions on this point are not evidence. The claimant has said he does not wish to be tested, this is different than saying there is interference by the defendant in the sense meant by a contravention of a protected right. There is no engagement of this right on the evidence.

The right to freedom of, thought, conscience, belief and the observance of political doctrines – section 13(3)(b)

[243] The Full Court in the case of Brendan **Courtney Bain v The University of the West Indies**[92] in considering section 13(3)(b) of the Charter stated that:

> "*The freedoms protected by Section 13(3)(b) of the Charter guarantees each Jamaican citizen the right to think and believe what they choose, the freedom to consider and hold a particular viewpoint independent of another's viewpoint and the freedom to hold opinions without interference."*

[244] It is accepted that this right is tied to the freedom of religion. The Jamaica Constitution Order in Council, 1962 provided in section 21(1):

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[92] (supra) [2017] JMFC FULL 3

"Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion, or belief, and freedom, either alone or in community with others, and both in public and in private to manifest and propagate his religion or belief in worship, teaching, practice and observance."

[245] The Charter now provides for the freedom of religion separately from freedom of thought, conscience and belief to which has been added the observance of political doctrine. It is the view of this court that the right to freedom of thought, conscience, belief and the observance of political doctrine is simply that view which is held by the ordinary Jamaican on the street every day when engaging with fellow citizens. These views are the product of thoughts and beliefs held on any given subject and are transmitted by and through our interactions with one another in the form of creative expression, which has and continues to shape our ever-evolving culture. These views are expressed in our own patois language, music, dance, style, sports, folklore, food, art and so on. These cultural mores go with us into all the world and proclaim us as Jamaicans. Our people have never been afraid to illustrate in vivid colour our national identity and being Jamaican is a unique identifier in the world. In this proud nation, we think and believe whatever we wish, we argue and oppose in argument at every level without fear and our opinions are uncensored. These thoughts are my own.

[246] The case of **Bain** was cited by the claimant for the interplay between guaranteed constitutional rights held by an employee and the common law rights and obligations of an employer. This was also a decision concerning the termination of an employee. In **Bain** it was argued for the claimant that the defendant had interfered with his opinions, thought, conscience and belief in that he had been warned not to testify although summoned to do so by a court in Belize. The fact that the claimant was a professing Christian was said to be

the reason that the content of his expert report was as it was and also that he had made no gesture to the gay community despite the many requests of the defendant for him to do so.

[247] The Full Court in looking at the freedom of thought, conscience, belief and observance of political doctrines observed that it was closely linked to the freedom of religion and quoted the learned author of the text, Dr. Lloyd Barnett who said in his treatise, The Constitutional Law of Jamaica:

> *"This guarantee applies not only to religious belief but also to all types of philosophies and doctrines. Thus it protects the atheist as well as the communist. The enjoyment of the right of freedom of conscience involves the right to carry out the external practices of one's creed, to endeavour to persuade others to adopt one's beliefs as well as the right to organize and manage its activities and ceremonies."*

[248] The freedom of religion is set out in section 17(1) of the Charter which provides:

> *"Every person shall have the right to freedom of religion including the freedom to change his religion and the right, either alone or in community with others and both in public and in private, to manifest and propagate his religion in worship, teaching, practice and observance."*

[249] The claimant asserts a religious exemption for taking the vaccine and relies on the decision of the Supreme Court of Canada in the case of **Big M Drug Mart Ltd**. where the court stated as follows:[93]

> *"95. Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be*

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[93] 18 DLR (4th) 321, 354 at para. 95, per Dickson, J (as he then was)

truly free. One of the major purposes of the Charter is to protect within reason from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."

[250] The claimant has given this court his reasons for not being tested. There is no religious exemption with regard to testing. The process of testing or a stated lack of desire to take the test itself does not discharge the evidential burden which has been placed on the claimant.

[251] In order to determine the content of the right and then to decide whether the right applies to the defendant, again the court must look at the evidence. The claimant's evidence assumes that in the face of the policy, he has a prima facie right to work remotely without having to access defendant's head office in person. It is these assumptions which the claimant must show to be correct by establishing the existence of this right which he asserts. In a court of law, he who asserts must prove. If he has no such right, then clearly any refusal by the defendant cannot make it liable for any alleged breach of these Charter rights. There is a factual insufficiency on this aspect of the case presented by the claimant.

[252] A mere statement that one's rights are being or are likely to be infringed is not sufficient to invoke the constitutional jurisdiction of the Supreme Court. (see **Banton**). Furthermore, any claimant seeking to invoke this jurisdiction must appreciate that this is a court of law and therefore the evidence must meet the

required standard of proof, without which no claim for redress can succeed under the Charter for the reason that without this, no finding can be made that a Charter violation has occurred, is occurring, or is likely to occur.

[253] The Court is aware that as a result of the global pandemic of COVID-19, governments, employees and private citizens will seek the decisions of the court in matters of a similar nature. It is therefore important that the court carefully examines each case presented.

[254] Additionally, this court is of the view that the private citizen who happens to run a company or the company as a separate legal person, both enjoy the right to thoughts about the thoughts and rights of others. The defendant also enjoys the right to its own thoughts so far as it can have them through those who run its operations, conscience, belief and political opinions, in addition to the other rights set out in the Charter, such as to privacy and property.

[255] It is the duty of the one asserting the right not to exercise it to the prejudice of the private citizen and to respect and uphold the latter's rights. To find otherwise would be to open the gates to anarchy, chaos and disorder in the application of rights to the ordinary citizen who happens to also own or possess a commercial enterprise of whatever size. This right is honoured as a prohibition rather than as a positive duty.

[256] The claimant has failed to adduce evidence to show that this right has been engaged. There is no evidence that he has registered any objections to the policy whether verbally or in writing at the town hall meetings or to anyone in a supervisory or managerial capacity.

[257] Moreover, there is no evidence of any actions on the part of the defendant which could constitute an interference with this right and as a consequence it cannot be said that there has been a breach of it.

The right to freedom of religion, as provided in section 17 of the Charter

[258] Section 17 (1) of the Charter states as follows: -

> *17-(1) Every person shall have the right to freedom of religion including the freedom to change his religion and the right, either alone or in community with others and both in public and private, to manifest and propagate his religion in worship, teaching, practice and observance.*

[259] The claimant's counsel cited the case of **R (Williamson) v Secretary of State**,[94] in which the House of Lords considered a claim brought by teachers and parents at Christian independent schools whose fundamental beliefs included a belief that part of the duty of education in the Christian context was that teachers should be able to stand in place of parents and administer physical punishment to children who were guilty of indiscipline.

[260] The court was concerned with proceedings for judicial review of the Education Act, 1996 which provided that corporal punishment could not be justified in any proceedings on the ground that it was given in pursuance of a right exercisable by a member of staff. The court stated as follows:

> *"The claimants' principal claim was that the extended statutory ban is incompatible with their Convention right to freedom of religion and freedom to manifest their religion in practice, a right guaranteed under article 9 of the Convention on Human Rights… The claimants' beliefs regarding the use of corporal punishment by both parents and teachers are based on their interpretation of certain passages in the Bible. For instance, 'He who spares the rod hates his son, but he who loves him is diligent to discipline him': Proverbs 13:24. They say the use of 'loving corporal correction' in the upbringing of children is an essential of their*

[94] [2005] UKHL 15

faith. They believe these biblical sources justify, and require, their practices. Religious liberty, they say, requires that parents should be able to delegate to schools the ability to train children according to biblical principles. In practice the corporal punishment of boys takes the form of administering a thin, broad flat 'paddle' to both buttocks simultaneously in a firm controlled manner. Girls may be strapped upon the hand. The child is then comforted by a member of the staff and encouraged to pray. The child is given time to compose himself before returning to class. There is no question of 'beating' in the traditional sense. 'Smacking' would be closer to the mark: see Elias J [2002] ELR 214, 216-217, para 4. In practice the schools rarely resort to corporal punishment."

The court said that *"I turn to the claims based on the claimants' Convention rights. Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other's beliefs. This enables them to live in harmony. This is one of the hallmarks of a civilised society. Unhappily, all too often this hallmark has been noticeable by its absence. Mutual tolerance has had a chequered history even in recent times. The history of most countries, if not all, has been marred by the evil consequences of religious and other intolerance.*

…

It is against this background that article 9 of the European Convention on Human Rights safeguards freedom of religion. This freedom is not confined to freedom to hold a religious belief. It includes the right to express and practise one's beliefs. Without this, freedom of religion would be emasculated. Invariably religious faiths call for more than belief. To a greater or lesser extent adherents are required or encouraged to act in certain ways, most obviously and directly in forms

of communal or personal worship, supplication and meditation. ***But under article 9 there is a difference between freedom to hold a belief and freedom to express or 'manifest' a belief. The former right, freedom of belief, is absolute. The latter right, freedom to manifest belief, is qualified****…. (emphasis mine.)*

…

This is to be expected, because the way a belief is expressed in practice may impact on others. Familiar instances of conduct shaped by particular religious beliefs are the days or times when worship is prescribed or encouraged, the need to abstain from work on certain days, forms of dress, rituals connected with the preparation of food, the need for total abstinence from certain types of food or drink, and the need for abstinence from all or some types of food at certain times. In a more generalised and non-specific form the tenets of a religion may affect the entirety of a believer's way of life: for example, 'thou shalt love thy neighbour as thyself'. The manner in which children should be brought up is another subject on which religious teachings are not silent. So in a pluralist society a balance has to be held between freedom to practise one's own beliefs and the interests of others affected by those practices.

Article 9 provides:

Everyone has the right to freedom of thought, conscience and religion; this right includes ... freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order,

health or morals, or for the protection of the rights and freedoms of others.'

…

In the present case there is no to doubt that the claimant holds the beliefs he professes. This is absolute and it also has not been challenged. It is the freedom to manifest and propagate this belief which is qualified. However, even the qualified right does not protect every act motivated or inspired by a religion or belief. If the belief takes the form of a perceived obligation to act in a specific way, then, in principle, doing that act pursuant to that belief is itself a manifestation of that belief in practice. In such cases the act is 'intimately linked' to the belief.

…

In the present case the essence of the parents' beliefs is that, as part of their proper upbringing, when necessary children should be disciplined in a particular way at home and at school. It follows that when parents administer corporal punishment to their children in accordance with these beliefs they are manifesting these beliefs. Similarly, they are manifesting their beliefs when they authorise a child's school to administer corporal punishment. Or, put more broadly, the claimant parents manifest their beliefs on corporal punishment when they place their children in a school where corporal punishment is practised. Article 9 is therefore engaged in the present case in respect of the claimant parents…. The next step is to consider whether section 548 constitutes an interference with the claimant parents' manifestation of their beliefs. What constitutes interference depends on all the circumstances of the case, including the extent to which in the circumstances an individual can reasonably expect to be at liberty to manifest his beliefs in practice.

…In the present case the Secretary of State contended that section 548 did not interfere materially with the claimant parents' manifestation of

their beliefs. He submitted that section 548 left open to the parents several adequate, alternative courses of action: the parents could attend school on request and themselves administer the corporal punishment to the child; or the parents could administer the desired corporal punishment when the child comes home after school; or, if the need for immediate punishment is part of the claimants' beliefs, they could educate their children at home.

…

I cannot accept these suggested alternatives would be adequate. That a parent should make himself available on call to attend school to administer corporal punishment should his child be guilty of indiscipline deserving of such punishment strikes me as unrealistic for many parents. Parental administration of corporal punishment at home at the end of the day would be significantly different from immediate teacher administration of corporal punishment at school. As to home education, there is no reason to suppose that in general the claimant parents, or other parents with like beliefs, have the personal skills needed to educate their children at home or the financial means needed to employ home tutors. I consider section 548 does interfere materially with the claimant parents' rights under article 9 and article 2 of the First Protocol."

[261] The claimants in **R(Williamson)**, acted on their beliefs which were capable of articulation and the foundation of their belief was disclosed to the court. While belief may not always be capable of articulation or explanation such that it can be measured or weighed, it certainly would have greatly assisted the court if the claimant in the case at bar had based his decision to refuse to be vaccinated on his belief rather than his research. It would have at least provided some evidence that the right under this head was at least engaged.

[262] This is a conclusion that can be arrived at, based on the policy which does not mandate vaccination and the absence of evidence tying the claimant's desire

not to be tested to a belief, religion or conscientious objection. The claimant ought to have no expectations that the court will assist him by inventing hypotheses of fact, to quote Slade, J.

[263] In terms of evidence led by the claimant, he makes the following assertion about vaccines:

> *"Based on research I have conducted into the available COVD-19 vaccines I concluded that "part of the research and development into the vaccines involved the use of cell tissues from aborted fetuses. The concept of abortion runs contrary to my Christian faith, as my faith and the tenets of my religion believe in the sanctity of life."*

[264] There is not one scintilla of evidence before this court to support this 'research.' It is the opinion of the claimant. His 'research' has not been shared with the court. The claimant does not have the qualifications to speak to this assertion in his own right and he has not produced any evidence to bolster the assertion or to assist this court which finds itself most highly unqualified in the area of vaccine manufacture.

[265] Based on the claimant's assertion it would appear that the use of the remains of aborted foetuses is as great an issue as COVID-19, for the sheer amount which would have been required to vaccinate the global population thus far.

[266] The claimant has simply thrown this statement out with the expectation that it will attract the constitutional protection to which Christians are entitled. This does not absolve the claimant of proof, nor can such a statement attract the attention of the court in an application for constitutional redress. This is pure conjecture and not a basis for a court to act.

[267] This court fails to see how this research or the claimant's religious faith has a nexus to PCR tests or the decision not to be tested. This right cannot be said to have been engaged moreover contravened.

[268] In the case at bar, there is no legislation in place which mandates vaccination or testing. Any such enactment would attract the scrutiny of section 13(2) of the Charter, in which the law would have to be shown to be demonstrably justified in a free and democratic society.

[269] On the evidence, there has not been shown to be any interference by the defendant with the manifestation of the claimant's religious faith or beliefs.

The right to respect for private and family life – section 13(3)(j)(ii) of the Charter of Fundamental Rights and Freedoms

[270] The claimant has adduced no evidence for the court to consider under this head. Counsel for the claimant has made submissions on this right in respect of the privacy of medical information and that the claimant takes care of his elderly mother, however these submissions are not evidence. It would seem that this ground has been abandoned.

What is the true nature of the right allegedly contravened

[271] It is the prerogative of an applicant under section 19(1) of the Charter to present his case on any limb of a Charter right which he sees fit. The court bases its findings on the evidence adduced which goes to an alleged contravention of the right as presented. In other words, in section 13(3)(a) the right to life is usually enforced against the state, however if the applicant chooses to argue that it is personal liberty which is at stake, then the court will look at the right as a whole, but it is for the applicant to demonstrate by evidence, what is the true nature of the right allegedly contravened. Without this, a mere statement of the right will not suffice. The authorities are replete with examples of the citing of mere statements of the right which have been held to be an abuse of process.

[272] Whether or not a right has been contravened is a question of fact. This is why it is of particular importance that an applicant for constitutional redress adduce evidence to show the nature, and content of the right, the conduct of the

respondent, the response by the applicant to the breach if any and the circumstances surrounding the breach. The applicant must adduce evidence sufficient to make out a prima facie case. The applicant's evidential burden of proof is at the lower end of the balance of probabilities. It is for the claimant to show the true nature of the right allegedly contravened as articulated in **Julian Robinson v The Attorney General of Jamaica.**[95] The court will then find facts and apply the law. The true nature of the right has not been addressed by the claimant. There is therefore a factual insufficiency in the affidavit filed on behalf of the claimant.

When and against whom can the claimant enforce his fundamental rights under the Charter of Fundamental Rights and Freedoms?

[273] Section 19 (1) of the Charter provides that any person can apply to the Supreme Court for constitutional relief if he or she is of the view that any of its provisions has been, is being or is likely to be contravened in relation to him/her. This means that the claimant, like any other citizen/s regardless of 'race, place of origin, social class' or political opinion who alleges that his or her 'constitutional rights have been, are being or are likely to be infringed' may bring a claim before the Supreme Court.

[274] In order to succeed, the claimant must show that:

(1) he has sufficient standing to bring this claim, that is, he must show that a Charter right has been, is being or is likely to be infringed in relation to him;

(2) the act/s he wishes to do or have done is/are protected by the Charter, that is, the conduct must be within one or more of the provisions of the Charter;

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[95] [2019] JMFC FULL 04

(3) the defendant is bound by the right(s) claimed;

(4) the defendant's conduct infringed his Charter rights; and

(5) there are no other adequate means of redress.[96]

[275] The claimant has established his standing to have brought the claim; in that he has satisfied the requirements of section 19(1) and (2) of the Charter. There is no dispute that he is a Jamaican citizen who has been, is being or is likely to be, directly affected by the actions of the defendants.

[276] In the case of **Maurice Tomlinson v Television Jamaica Limited and others**[97], the Full Court set out what is the starting point in relation to fundamental rights cases as it is for the claimant who seek redress to allege infringement 'in relation to himself,'.

[277] Section 19 (1) therefore gives to an applicant for constitutional relief, a 'threshold question' which must be answered. The dicta of the Full Court of the Supreme Court of Jamaica in the case of **Banton and others v Alcoa Minerals of Jamaica and others**[98] bears repeating here given its importance:

> *"the mere allegation that a fundamental right of freedom has been or is likely to be contravened is not enough. There must be facts to support it. The framers of the Constitution appear to have had a careful and long look at several systems operating in other countries before they finally agreed to Chapter III as it now stands. It seems to me that the position may be summarized as follows: Before an aggrieved person is likely to succeed with his claim before the Constitutional Court, he should be able to show: (1) that he has a justiciable complaint that is to say that a right*

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[96] Stu Woolman and Henk Botha, 'Limitations' in Stuart Woolman, Michael Bishop, Jason Brickhill (eds), Constitutional Law of South Africa, (2nd edn, JutaLaw 2008) Part 2, Ch. 34, p 2.
[97] [2013] JMFC Full 5
[98] (1971) 17 WIR 207 as stated by Parnell J, at page 305

personal to him and guaranteed under Chap. III of the Constitution has been or is likely to be contravened. For example, what is nothing more than naked politics dressed up in the form of a right is not justiciable and cannot be entertained: (2) that he has standing to bring the action; that is to say, he is the proper person to bring it and that he is not being used as the tool of another who is unable or unwilling to appear as the litigant. (3) that his complaint is substantial and adequate and has not been waived or otherwise weakened by consent, comprise or lapse of time. (4) that there is no other avenue available whereby adequate means of redress may be obtained. In this connection, if the complaint is against a private person, it is difficult if not impossible, to argue that adequate means of redress are not available in the ordinary court of the land. But if the complaint is directed against the State or an agent of the State it could be argued that the matter of the contravention alleged may only be effectively redressible in the Constitutional Court. (5) that the controversy or dispute which has prompted the proceedings is real and that which is sought is redress for the contravention of the guaranteed right and not merely seeking the advisory opinion of the court on some controversial arid or spent dispute."[99]

[278] When the court looks at the requirements for bringing a valid claim for constitutional redress as outlined in **Banton**, it cannot be said that these proceedings involve issues which are frivolous, vexatious or insubstantial, given the evidence and the context in which the issues have been raised. The authorities are clear as to when an application may be made under section 19(1) of the Charter.

Adequate Remedy

[99] This case discussed Chapter III of the Constitution, Order in Council, 1962 which has since been repealed.

[279] In section 19 of the Charter, there is an express recognition of the supremacy of the constitution. Section 19(1) however, does not deny the existence of any other rights recognised by the common law. This is the reason for the inclusion of the words *"without prejudice to any other action with respect to the same subject matter which is lawfully available…"* in the text of subsection one (1).

[280] The authorities all say that the approach of the claimant must be to demonstrate by evidence, the true nature of the right allegedly contravened and how the Charter right has been engaged. This is necessary before the court can move on determine whether there is an adequate parallel remedy.

[281] The defendant relied on the cases of **Harrikisson v The Attorney General of Trinidad and Tobago**, **Thakur Persad Jaroo v The Attorney General of Trinidad and Tobago** and **Attorney General of Trinidad and Tobago v Siewchand Ramanoop,** a trilogy of Privy Council decisions out of our sister jurisdiction which all deal with this point.[100]

[282] In **Dawn Satterswaite v Assets Recovery Agency**[101], our Court of Appeal having reviewed the Trinidadian trilogy said:

> *"100. The Board noted that litigants generally pursue the original motion for constitutional redress as they are less costly and lead to an expedited hearing, than the proceedings which have been brought by writ. But Lord Nicholls pointed out that that was not a good ground for invoking the constitutional jurisdiction, nor merely to state that a parallel remedy was inappropriate.*
>
> *101. The Board then embarked on an analysis as to how the litigant ought to proceed. If in the constitutional proceedings there appears to*

[100] The text and analysis of these cases has been reproduced from the decision of the Court of Appeal in Dawn Satterswaite v the Asset Recovery Agency, supra.
[101] [2021] JMCA Civ 28

be a substantial dispute as to fact, it would then be an abuse, and the litigant should then apply for the proceedings to continue as if begun by writ. It was clarified that, if after having commenced the action, it also became clear that the decision to commence by constitutional motion was entirely inappropriate, it would also be an abuse to continue the matter in that way. The motion should either be withdrawn or directions obtained with regard to the matter continuing as if it had been begun by writ. There may have to be an amendment to the claim for constitutional relief, to seek a claim for a parallel remedy. It would be for the court to examine the situation and give the appropriate directions in all the circumstances.

102.The Board advised that it may be prudent and in everyone's interest for the litigant to consider and decide what is the appropriate procedure before he commences proceedings or as soon thereafter as possible.

103. Ramanoop, in our view, also does not assist the appellants. The ratio is exhorting the litigant to pursue the appropriate procedure, be it the parallel remedy pursuant to statute or by the common law action, or by motion for constitutional redress."

[283] The Court of Appeal then reviewed the trilogy of cases and I have reproduced that entire analysis here:

[284] **Harrikissoon v Attorney General of Trinidad and Tobago**,[102] was a Privy Council case on appeal from the Court of Appeal of Trinidad and Tobago. In that case, the applicant claimed a declaration that certain human rights guaranteed to him under the Trinidad and Tobago Constitution had been contravened, and so, he sought redress in the High Court. The Board found his appeal to be wholly misconceived. His complaint was that he had been a class

[102] (supra) (1979) 31 W.I.R. 348

1 teacher at Penal Government Primary School, and he had been unlawfully transferred, by the Teaching Service Commission, to a similar post at Palo Seco Government Primary School. Aggrieved, he stated that he was, as a holder of a public office, being transferred from one place to another against his will. But that was not a human right or fundamental freedom specified in the Constitution. Nor did it fall into a right of equality before the law requiring special protection under the Constitution. However, instead of pursuing the parallel remedy provided by legislation, he pursued an application for redress under the Constitution.

[285] Lord Diplock, on behalf of the Board, warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action. Lord Diplock said, at page 349, that:

> *"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.*
>
> *He also said that the mere allegation that a human right had been infringed or likely to be, was not by itself sufficient to invoke the section under the Constitution, especially if:… it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful*

administrative action which involves no contravention of any human right or fundamental freedom."

[286] Lord Diplock also stated that there was a remedy open for the appellant to apply to the court for a breach of the regulations. However, he chose deliberately not to avail himself of that remedy. His decision to pursue a claim for a declaration for breach of his human right, Lord Diplock said, as previously indicated, was "wholly misconceived".

[287] The defendant submitted that the authorities are replete with examples of the warnings against abuse of the right to apply for constitutional relief. In the case of **Jaroo v The Attorney General of Trinidad and Tobago**[103] Chapter 1 of the Constitution of the Republic of Trinidad and Tobago of 1 August 1976 provides:

> *"4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely –*
>
> > *(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;*
> >
> > *(b) the right of the individual to equality before the law and the protection of the law …*
>
> *5.(1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgement or infringement of any of the rights and freedoms hereinbefore recognised and declared. …*

[103] [2002] UKPC 5

14.(1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.)[104]

[288] This section mirrors the provision in our Charter at section 19(1) which provides:

"19-(1) If any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

[289] In this case, the Board again referred to the abuse of process in filing a constitutional motion as against a common law action. The matter related to a motor car purchased by Mr. Jaroo, which he purchased in good faith, but which was suspected by the police authorities as being a stolen vehicle. The police requested that Mr. Jaroo submit the vehicle to them for investigation. He did so voluntarily but was unable to obtain the return of the same subsequently despite numerous requests.

[290] Mr Jaroo filed a motion seeking damages for contravention of his rights under section 4(a) and (b) of the Trinidad and Tobago Constitution. He relied on the right to enjoyment of property, and the right not to be deprived thereof except by due process of law. Mr. Jaroo was unaware of the detailed basis the police had for the detention of his vehicle until they filed an affidavit in response to his constitutional motion. Up until then, Mr. Jaroo had a right to possession of the motor vehicle. His constitutional right to enjoyment of property and the right not

to be deprived thereof, was based on his possession of the motor vehicle and not his ownership thereof. The police, in their affidavit, claimed that the chassis and the engine numbers of the vehicle had been tampered with. In the absence of any explanation from him, the certification of ownership on which Mr. Jaroo relied was insufficient to prove that the motor vehicle was his property.

[291] On the basis of that claim by the police, the judge at first instance accepted that it was reasonable for the police to believe that the car was stolen, and for them to seize it in order to conduct further inquiries. The judge thought that the detention was lawful. There was no mention though, that the claim ought to have been brought by a common law action and not by way of a constitutional motion. The Court of Appeal rejected Mr. Jaroo's argument under section 4(a) of the Trinidad and Tobago Constitution and indicated that the constitutional route was not appropriate. There was another obvious available recourse under the common law.

[292] Lord Hope of Craighead, on behalf of the Board, endorsed Lord Diplock's speech in **Harrikissoon**. Before the Board, the issues related to: (1) the extent of Mr. Jaroo's constitutional rights under section 4(a) of the Trinidad and Tobago Constitution; (2) whether his resort to the use of the constitutional motion was an abuse of process; and (3) if not, whether his constitutional rights under section 4(a) were infringed.

[293] The discussion before the Board related to whether Mr. Jaroo had a claim for breach of a constitutional right. The first instance judge found that, based on the tampering with the chassis and engine numbers, Mr. Jaroo could not establish any claim that the vehicle was his property, and that he was entitled to possession of it. The Court of Appeal agreed that Mr. Jaroo had failed to show a good paper title to the vehicle entitling him to claim deprivation of property without due process. The vehicle could not be returned to him as he would be using it contrary to the provisions of the Road Traffic Act. Lord Hope, on behalf of the Board, said that it was not necessary to show ownership. It was

sufficient for Mr. Jaroo to show that, at the relevant time, he was in possession of the vehicle. He stated clearly "[t]he rights which are protected by section 4(a) include the right to possession, which vests a possessory title in the possessor, as well as the right of ownership".

[294] Lord Hope then discussed the court's exercise of its discretion under section 14 of the Trinidad and Tobago Constitution. The Board concluded that there was no doubt that there was a parallel remedy available to Mr. Jaroo to enable him to enforce his right to the return of the vehicle. The Court of Appeal held that that was an appropriate remedy. So, the question was, was the Court of Appeal correct in stating that in the circumstances it was clearly inappropriate for Mr Jaroo to pursue the originating motion under section 14? The Board held that whereas there might have been reason to file a constitutional motion at the outset, after the information from the police had been presented, which remained unchallenged, "it would not have been open to the court to hold that they were acting unlawfully". And so, it was plainly no longer suitable to continue the action in that way. Once facts became in dispute, in relation to the detention of the vehicle, it would require, inter alia, amendment of the pleadings to pursue the common law remedy which had always been open to him. He should have done that, but he continued to pursue the constitutional claim which had then become unsuitable and an inappropriate procedure.

[295] Lord Hope confirmed the views expressed in **Harrikissoon** and **Ramanoop**, that it behoved Mr. Jaroo to consider the true nature of his right which had allegedly been contravened, and whether another procedure could be conveniently invoked. If it could, then resort to the procedure by way of originating motion would be inappropriate and an abuse of process. It had become clear after the motion had been filed, that the procedure was no longer appropriate, and so steps should have been taken to withdraw the matter from the High Court without delay, "as its continued use in such circumstances will also be an abuse". The Board refused the declarations prayed for in the proceedings.

[296] The Board made it clear that, the originating motion procedure under section 14(1)[105] is appropriate for use in cases where the facts are not in dispute and the only questions to be answered by the court are matters of law. It is wholly unsuitable in cases which depend for their decision, on the resolution of disputes as to fact. Disputes of that kind must be resolved by using the procedures which are available in the ordinary courts under the common law.

[297] In the case of **The Attorney General of Trinidad and Tobago v Ramanoop**,[106] Mr. Ramanoop was assaulted by a police constable during arrest and subsequent interview at the police station. He sued the Attorney General seeking declarations that the arrest, detention, and assault by the police officer were breaches of his constitutional rights under section 4(a) of the Trinidad and Tobago Constitution. He also claimed damages, aggravated and exemplary damages. At first instance, with the consent of the parties, he was granted damages in the amount of Eighteen Thousand Dollars ($18,000.00) for deprivation of liberty, and Thirty-Five Thousand Dollars ($35,000.00) for the assaults. The judge refused to make an award for exemplary and aggravated damages saying that he had no jurisdiction to grant them. The Court of Appeal overturned that decision and remitted the matter to the Supreme Court for assessment of damages. The Attorney General appealed to the Privy Council.

[298] The Board dismissed the appeal and held that the court had the jurisdiction and the power to award remedies for contravention of human rights, and that specifically involved damages related to misuse or abuse of power. Such an award was particularly to assuage the damage suffered, and to go towards vindicating the infringement of the constitutional right. The award was also needed to reflect the sense of public outrage, indeed, it was “to emphasize the importance of the constitutional right and the gravity of the breach”.

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[105] section 19(1) in Jamaica
[106] (supra), [2005] UKPC 15

[299] Bereaux J, at first instance, thought that in spite of the egregious behaviour of the police officer, exemplary damages were inappropriate and superfluous in proceedings brought under section 14 of the Trinidad and Tobago Constitution (section 19 of the Jamaican Constitution). Sharma CJ, on the other hand, in the Court of Appeal, was of the opinion that section 14 of the Trinidad and Tobago Constitution "contains no limit on the forms of redress the court may direct".

[300] The issue was could the court award exemplary damages under section 14, or ought the court only to award compensatory damages. The argument was that the State ought not to be punished. The Board felt that compensation awards may go some distance toward vindicating the infringed constitutional rights but may not in particular circumstances, suffice. In their view, the judge at first instance stated the jurisdiction too narrowly.

[301] However, for these purposes, the Board noted that the action had started by original motion for constitutional relief, as opposed to a common law action. The Attorney General had not objected, correctly, the Board commented, as the case involved a "shameful misuse of [police] coercive power". Had the facts been in dispute, it may have been more appropriate for the court to have directed that it be pursued as if it had begun by writ, which is not a summary procedure, and one more suited for substantial factual disputes, which would require pleadings, discovery, and evidence.

[302] The Board, in referring to **Harrikissoon**, noted the dissimilar provisions in the Trinidad and Tobago Constitution in relation to section 14 and in the different countries in the Caribbean. They noted that the Trinidad and Tobago Constitution contains no provision "precluding the exercise by the court of its power to grant constitutional redress if satisfied that adequate means of legal redress are otherwise available". There is such a provision in the Constitution of the Commonwealth of the Bahamas. In Grenada, there is a provision in that country's Constitution empowering the court to decline to grant constitutional relief. None of those provisions was stated in the Trinidad and Tobago

Constitution, which provides (as in section 19 of the Jamaican Constitution) that on a constitutional application under section 14, the court may make such orders as it considers appropriate for enforcing a constitutional right.

[303] The Board, yet again, made reference to **Harrikissoon**, where, as indicated previously, Lord Diplock had given guidance as to how the discretion ought to be exercised if a parallel remedy was available. Lord Nicholls said that Lord Diplock had warned against using applications for constitutional relief as a substitute for normal procedures invoking judicial control of administrative action and endorsed the position taken by Lord Diplock saying that:

> *"In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse*, or *abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power."*

[304] The Board, however, warned that that caution was not to be intended as a deterrent to litigants for seeking constitutional redress, where they are acting in good faith and believing that the case contains features that make it appropriate. In these circumstances, the court should be vigilant to protect that approach to it for redress. Frivolous, vexatious, or contrived invocations of constitutional redress should be repelled. However, the court maintained that bona fide resort to protect rights under the Constitution should not be discouraged.

[305] The Board noted that litigants generally pursue the original motion for constitutional redress as they are less costly and lead to an expedited hearing,

than the proceedings which have been brought by writ. But Lord Nicholls pointed out that that was not a good ground for invoking the constitutional jurisdiction, nor merely to state that a parallel remedy was inappropriate.

[306] The Board then embarked on an analysis as to how the litigant ought to proceed. If in the constitutional proceedings there appears to be a substantial dispute as to fact, it would then be an abuse, and the litigant should then apply for the proceedings to continue as if begun by writ. It was clarified that, if after having commenced the action, it also became clear that the decision to commence by constitutional motion was entirely inappropriate, it would also be an abuse to continue the matter in that way. The motion should either be withdrawn or directions obtained with regard to the matter continuing as if it had been begun by writ. There may have to be an amendment to the claim for constitutional relief, to seek a claim for a parallel remedy. It would be for the court to examine the situation and give the appropriate directions in all the circumstances.

[307] The Board advised that it may be prudent and in everyone's interest for the litigant to consider and decide what the appropriate procedure is before he commences proceedings or as soon thereafter as possible. In **Ramanoop** the applicant failed to adopt the appropriate procedure, whether by a parallel remedy pursuant to statute, common law, or by motion for constitutional redress.

[308] In respect of the redress provisions of the constitution of Trinidad and Tobago, Lord Nicholls said as follows:

> *"The starting point is the established principle adumbrated in Harrikissoon v Attorney-General of Trinidad and Tobago [1980] AC 265. Unlike the constitutions of some other Caribbean countries, the Constitution of Trinidad and Tobago contains no provision precluding the exercise by the court of its power to grant constitutional redress if*

satisfied that adequate means of legal redress are otherwise available. The Constitution of the Bahamas is an example of this. Nor does the Constitution of Trinidad and Tobago include an express provision empowering the court to decline to grant constitutional relief if so satisfied. The Constitution of Grenada is an instance of this. Despite this, a discretion to decline to grant constitutional relief is built into the Constitution of Trinidad and Tobago. Section 14(2) provides that the court "may" make such orders, etc., as it may consider appropriate for the purpose of enforcing a constitutional right.

In Harrikissoon the Board gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant. Speaking in the context of judicial review as a parallel remedy, Lord Diplock warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action. Permitting such use of applications for constitutional redress would diminish the value of the safeguard such applications are intended to have. Lord Diplock observed that an allegation of contravention of a human right or fundamental freedom does not of itself entitle an applicant to invoke the section 14 procedure if it is apparent this allegation is an abuse of process because it is made "solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right": [1981] AC 265, 268 (emphasis added).

In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available

would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.

That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But "bona fide resort to rights under the Constitution ought not to be discouraged": Lord Steyn in Ahnee v Director of Public Prosecutions [1999] 2 AC 294, 307, and see Lord Cooke of Thorndon in Observer Publications Ltd v Matthew (2001) 58 WIR 188, 206.

[309] In **Jaroo,** the Privy Council used what this court views as arresting language in the opening sentence of paragraph 36 which were the words: "***Their Lordships wish to emphasise*** …". This means that courts below are expected to take notice of the words which follow the word **"*emphasise***" … This court now sets out its understanding of that which is being emphasised by the Privy Council in paragraph 36, adopting and applying the reasoning of the Board, this court will summarise the approach to be taken in this matter as follows:

The role of the applicant's counsel before the hearing

i.) An applicant must make an informed decision prior to initiating proceedings as to whether the rights being infringed are common law or constitutional rights.

ii.) The applicant must consider the true nature of the right contravened as not every application will be appropriate for constitutional relief nor is constitutional relief automatic once it is raised.

iii.) Applicants must recognize that constitutional remedies are to be sparingly used and only to assert genuine constitutional rights. The court will not permit the cloaking of a common law action in the garb of constitutional redress. It is settled law that frivolous, vexatious or contrived applications for constitutional redress are to be refused.

iv.) There is also a role for counsel for the applicant, after the matter has been filed, as should it become apparent that the application for constitutional redress pursuant to section 19(1) of the Charter is no longer appropriate, steps should be taken **without delay** to withdraw the constitutional claim from the Supreme Court as its continued use in such circumstances will constitute an abuse.

v.) For these reasons, there is an onus on counsel for the respondent to bring to the attention of the applicant as soon as is practicable, the grounds upon which it intends to oppose the applicant's claim for redress under section 19(1) of the Charter. This is to allow counsel for the applicant the opportunity to properly assess his claim and to make an informed choice as to his procedural options.

vi.) This court places reliance on two passages from the decision of the Court of Appeal (Criminal Division) in the United Kingdom ("UK") in the case of **R v Munir Ahmed Farooqi et al**.[107] There, the court was led to comment on the conduct of counsel representing Mr. Farooqi at his trial by a jury on a ten count indictment involving the criminal offences of acts of terrorism, soliciting to murder, dissemination of terrorist publications inter alia. The Court of Appeal said this in relation to defence counsel's strategy at trial:

[107] [2013] EWCA Crim 1649

"107. The question was raised whether Mr McNulty discussed his proposed forensic strategy with his client. However, whether he did or not, and even assuming that his client agreed or encouraged it, the client's "instructions" were irrelevant. The client does not conduct the case: that is the responsibility of the trial advocate. The client's instructions which bind the advocate and which form the basis for the defence case at trial, are his account of the relevant facts: in short, the instructions are what the client says happened and what he asserts the truth to be. These bind the advocate: he does not invent or suggest a different account of the facts which may provide the client with a better defence.

108. Something of a myth about the meaning of the client's "instructions" has developed. As we have said, the client does not conduct the case. The advocate is not the client's mouthpiece, obliged to conduct the case in accordance with whatever the client, or when the advocate is a barrister, the solicitor "instructs" him. In short, the advocate is bound to advance the defendant's case on the basis that what his client tells him is the truth, but save for well-established principles, like the personal responsibility of the defendant to enter his own plea, and to make his own decision whether to give evidence, and perhaps whether a witness who appears to be able to give relevant admissible evidence favourable to the defendant should or should not be called, the advocate, and the advocate alone remains responsible for the forensic decisions and strategy. That is the foundation for the right to appear as an advocate, with the privileges and responsibilities of advocates and as an advocate, burdened with twin responsibilities, both to the client and to the court.[108]

[310] This court concurs with the dicta from the UK Court of Appeal in **Farooqi**.

[108] Supra paras. 107 and 108

The role of all counsel at the hearing

vii.) If counsel presses ahead with the claim for constitutional redress, the court should expect to have placed before it, submissions and evidence by counsel for the applicant which demonstrate a consideration of *'the true nature of the right allegedly contravened'.*

viii.) Furthermore, both sides should, in submitting on the appropriateness of the procedure to be used by the applicant, set out whether in all the circumstances of the case, some other procedure either under the common law or pursuant to statute might or might not more conveniently be invoked.

The role of the court

ix.) The court must examine the evidence being placed before it to see whether or not in the case at bar, there are factual disputes which require resolution before a decision can be made. In other words, for general application, each case must be taken on its own merits and is fact sensitive.

x.) In the instant case, this court has to examine the appropriateness of a constitutional remedy based on the allegation of an infringement of rights under the Charter.

xi.) The court has to also consider whether there are any procedures which would provide a remedy in the alternative.

xii.) If the court should so find that another such procedure is available, resort to the constitutional claim will be inappropriate and it will be considered an abuse of the process.

xiii.) Where there is a parallel remedy available which may be appropriate the right to apply for constitutional relief should be exercised only in exceptional circumstances.

xiv.) If the true nature of the right allegedly contravened is a common law right (in that a parallel remedy exists) yet the right is also one which is protected by the Constitution, the applicant must demonstrate some

exceptional feature of his case that would make resort to the constitutional procedure more appropriate. Such features will include an absence of a dispute of facts, the arbitrary use of state power, a fundamental violation of the rule of law or what could be viewed as a mixed claim which sets out breaches of common law rights as well as breaches of rights only capable of constitutional redress.

xv.) Where there are disputes of fact, the commencement of a claim by Fixed Date Claim Form may not be appropriate. A section 19(4) application should not be used as a device to circumvent the normal route to trial, in circumstances where the alleged facts, if proved would call for constitutional relief. In such a case, the court may give directions converting the Fixed Date Claim Form to a Claim Form and give orders for the filing of the Particulars of Claim and Defence as well as for a trial to proceed as though the proceedings had commenced by way of Claim Form. However, where on the face of the application there is an arguable case for constitutional relief, a litigant ought not to be deprived of utilizing the procedure where the factual disputes are insubstantial.

xvi.) Where it subsequently emerges that a claim for constitutional relief is no longer appropriate, the Court can make directions that the proceedings continue as though begun by Claim Form with the necessary amendments to the relief sought to pursue the parallel remedy. However before doing so, a Court must be satisfied that the constitutional motion was properly pursued in the first place.

[311] The defendant also relied on the case of **Deborah Chen v The University of the West Indies**[109] in which my learned sister, Henry-McKenzie, J decided the question as to whether, the dispute between the claimant and defendant as to the appropriate procedure to be adopted where clause 6 of its Royal Charter,

[109] (supra) [2021] JMSC Civ. 1

provides for the authority of the visitor to decide disputes arising under the internal laws of the University of the West Indies, she said:

> *"It is incontestable that, as established by the authorities, the visitorial capacity embraces all aspects of governance which fall to be considered under the domestic laws of the university. There can also be no doubt, that where the visitorial jurisdiction exists; it is an exclusive jurisdiction which cannot run concurrent with the court's jurisdiction."*

[312] In **Deborah Chen** the learned judge relied on **Harrikisson** and **Ramanoop** to find that where there is a parallel remedy then the constitutional jurisdiction of the court should not have been invoked as the visitorial jurisdiction was exclusive and subject to judicial review. The claimant therefore had an adequate remedy in judicial review. In the application at bar there is no issue as to concurrent jurisdiction, nor has this issue been raised.

[313] It is therefore imperative for the claimant, before resorting to seeking redress under section 19 of the Charter, to consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resorting to the procedure by way of section 19 will be inappropriate and will be considered an abuse of process.[110]

[314] It is of note that the trilogy of cases from Trinidad and Tobago all involve claims against the state. In the case at bar, the claim is against a private entity. The question for the court is whether there are adequate remedies in the law of

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[110] Lord Hope in Jaroo v Attorney-General of Trinidad and Tobago [2003] UKPC 5 at 39

contract (the parallel remedy) which can provide an adequate remedy for the alleged contraventions of the claimant's constitutional rights.

[315] In **Brendan Bain v The University of the West Indies**,[111] F. Williams, J (as he then was), the learned judge of appeal dealt with the submissions made regarding the adequacy of common law damages where there is an alleged breach of constitutional rights at paragraphs 254 to 259 which are set out below:

> *"[254] The defendant relied on this case from the South African courts to support its contention that a claimant can claim common law damages for proved loss to vindicate a constitutional right and that there are no reason why common law damages that vindicates constitutionally infringed rights should not provide appropriate relief. The defendant urged that the court look carefully at whether there is an existing appropriate remedy of damages for breach of the constitutional rights complained of, since constitutional damages are not there for the asking.*
>
> *[255] In responding to this authority in the submissions made on behalf of the claimant, it was contended that the case was of more assistance to the claimant's case. It was opined that in the case, the Court of Appeal had declined from upholding an award of vindicatory damages in circumstances where facts had not been presented to the court to establish that a right under the constitution has been breached. It was therefore contended that where such facts have been presented, constitutional damages ought to be awarded where it is just and equitable for the court to do so. It was ultimately submitted that the instant case was distinguishable from the MBoweni case in that there is sufficient evidence before this court in this matter that support the*

[111] [2017] JMFC FULL 3

claimant's claim of breaches of his constitutional rights of freedom of expression and thought and conscience.

[256] It must be firstly recognised that the case, whilst from South Africa where admittedly the horizontal application of constitutional rights is now accepted, is still ultimately involving a claim against organs of the state – the vertical application. The court did, as noted in the submissions for the claimant, find that the paucity of the facts on which the claim was based would prevent a determination of whether the breaches of constitutional rights warranted an award of constitutional damages. The court identified previous cases in which damages had been awarded for the breach of constitutional rights namely: Fose v Minister of Safety and Security [1997] (3) SA 786; Modderfontein Squatters; Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd. et al [2004] (6) SA 40, and MEC, Department of Welfare, Eastern Cape v Kate [2006] (4) SA 478.

[257] At paragraph 6 of the judgment, Wallis JA, writing on behalf of the court had this to say: - "Those three cases demonstrate that the question of remedy can only arise after the relevant right has been properly identified and the pleaded or admitted facts show that the right has been infringed. To start with the appropriateness of remedy is to invert the enquiry. But that is what occurred in the present case."

[258] In further submissions made in reply on behalf of the defendant in the instant case, it was acknowledged that the paucity of facts was noted but that Wallis JA at paragraph 20 stated: - "Even if those issues could be and had been determined in favour of the respondents there remained the further issue of whether constitutional damages were the appropriate constitutional remedy for that breach."

[259] It is also useful to note that the court acknowledged the section of their constitution, section 8 (2), which equates with section 13(5) of the Charter in the Jamaican Constitution which has been found to introduce

the horizontal application of the bill of rights. At paragraph 18 Wallis JA commented: - - 93 - "A further issue was whether the actions, or more accurately inaction, of the police in failing to safeguard and care for Mr. Mahlati while in police custody, constituted a wrongful act in relation to the children. It was clearly wrongful in relation to Mr. Mahlati himself but whether it constitutes a wrongful breach of the children's constitutional right is a different matter. The court needed first to decide whether the right operates horizontally in terms of section 8 (2) of the Constitution so as to extend to the policemen in the present situation or whether, if it does not, the position of employees is different, by virtue of section 8 (1) of the Constitution. It also required the court to decide whether the police owed a legal duty to the children to avoid or prevent them from suffering a loss of parental care. Not every breach of constitutional duty is equivalent to unlawfulness in the delicutal sense and therefore not every breach of a constitutional obligation constitutes unlawful conduct in relation to everyone affected by it."

[316] F. Williams, J quoted from the decision of the Supreme Court of Appeal of South Africa in which the learned judge, M J D Wallis, JA said in **The Minister of Police** v **Mboweni**, [112]at paragraph 6 that:

"…the question of remedy can only arise after the relevant right has been properly identified and the pleaded or admitted facts show that the right has been infringed. To start with the appropriateness of the remedy is to invert the enquiry."

[317] In looking at the material which had been placed before the trial judge, Wallis, JA found that there was virtually no detail in relation to the subject matter of the

[112] [2014] ZASCA 107 (5 September 2014]

claim. He said there had been a bald statement of an entitlement to constitutional damages and nothing more. It is the same in the case at bar.

[318] The courts have attempted to provide some guidelines in assessing the requirement of adequacy. One of these is that where there is a parallel remedy, constitutional relief is only appropriate where some additional "feature" exists[113]. The learned authors refer to additional features such as the arbitrary use of state power or breaches of multiple rights. They go on to set out that an alternative remedy is not inadequate merely because it is slower or costlier than constitutional proceedings, however the court should not lose sight of the need for effective relief which may include the factors of cost and speed and depend on a range of both substantive and procedural factors. The learned authors encourage the court to consider whether the alternative action can in fact deal with the constitutional point and grant the appropriate remedy.

[319] In the instant case, there is an adequate parallel remedy in the law of contract. The next step is to look at the claim to see whether there are any special features.

Special features

Non-pecuniary loss – shame, hurt feelings, indignity

[320] The claimant further submits, that an award of damages for breach of contract cannot compensate him for distress and despair, having to be tested weekly, the unwelcomed physical violation of his body, the disclosure of his private medical information, the loss of his vacation leave under force of the policy; the social, financial and mental harm that naturally flows from the loss of income from employment and the indignity of treatment for which he complains. The claimant states that the law of contract cannot avail a claimant who requires a

[113] Tracy Robinson, Arif Balkan, Adrian Saunders, Fundamentals of Caribbean Constitutional Law, 2015, para 9-037

declaration that his constitutional rights have been violated by the defendant's implementation of the policy.

[321] The case of **Bain** points out that a paucity of evidence will prevent a determination of whether the alleged breaches of Charter rights warrant redress under the constitution. In **Bain** the claimant's feelings were hurt and the Full court declined to award vindicatory damages. **Bain** had been terminated by his employer. For the invocation of the court's constitutional jurisdiction the question of the adequacy of a remedy will only arise after the true nature of the right has been properly pleaded and evidence adduced in support of the allegation of a contravention of the right. In the instant case, vindicatory damages have not been pleaded nor is it being suggested that it is an issue for determination. The non-pecuniary loss being claimed is not necessarily going to flow from a claim decided after a trial. In the instant case, the employee retains his contract of employment, the relationship of employer and employee subsists. There has been no termination.

The Claimant's submissions - Special Features

[322] The claimant submits that there is a common law right to work, it is the right to a dignified life, his livelihood is a part of his dignity. The parties are not on an equal footing; this power imbalance is the reason that the defendant could have implemented the policy.

[323] He submits that this power imbalance is a special feature. The claimant is being asked to be tested without any signs or symptoms, with no evidence to justify why he is so great a risk that he should incur the expense of testing bi-weekly out of his salary. The medically exempt are not put to this choice. The claimant is being treated differently because he exercised his choice in a particular way, therefore he is being punished for his choice, rather than there being an issue of safety at the workplace. Counsel submits that this makes it arguable, that there is a case for a breach of the claimant's fundamental rights and freedoms.

[324] Further, that the policy amounts to bodily coercion in order to prevent the loss of employment and the court ought to reject the policy as unconstitutional. There has been no evidence offered in support of these submissions.

The Defendant's submissions - Special Features

[325] The defendant submits that its employees have not been vaccinated against their will. The Board in **Harrikissoon** expressed that the jurisdiction of the court to grant constitutional redress was to be engaged in cases containing some special feature which render them appropriate for the exercise of the jurisdiction. The jurisdiction was not to be exercised where it is open to the claimant to seek alternative adequate redress and his claim does not include any such special feature.

The Attorney General's submissions - Special Features

[326] The Attorney General submits that the claim comes at the intersection of the following unprecedented events in our history: -

1. The COVID 19 pandemic.
2. The development of COVID 19 vaccinations.
3. Vaccination hesitancy locally, regionally and internationally among some members of the public.
4. Vaccination policies and mandates by some States, and by some private entities, locally, regionally and internationally.
5. The question locally, regionally and internationally, whether these vaccination mandates and policies are consistent with various constitutional instruments.

[327] Queen's counsel states that in the circumstances, the question of whether vaccination mandates and policies are in conformity with the Charter is novel as the courts have not yet decided the issue. Therefore, she asserts that it is arguable, that these are 'special features' which, as highlighted in **Ramanoop**,

"at least arguably indicate that the means of legal redress otherwise available would not be adequate".

[328] In this regard, she cites the case of **National Solid Waste Management Authority v Louis Johnson, Joya J Hylton, Lamoy Malabre (Sues by his mother and next friend Phyllipa Blake) and Ernest Sandcroft**[114] to support her submission. She states that in **National Solid Waste Management Authority**, the Court of Appeal dismissed an appeal from the decision of the trial judge in which she refused to strike out a claim pursuant to section 19(4) of the Charter on the appellant's contention that adequate remedies were available to the respondents in the law of nuisance.

[329] This was a case in which the respondents who were residents in the vicinity of Riverton City sought constitutional redress against the National Solid Waste Management Authority (NSWMA) on the basis that their constitutional rights to a healthy and productive environment free from the threat of injury or damage from environmental abuse guaranteed by section 13(3)(l) of the Charter, had been contravened by the emission of smoke and fumes from a fire at the Riverton City Dump.

[330] She further states that on appeal, the Court of Appeal agreed with the trial judge that the claim raised "novel and interesting issues" which were arguable. It is for these reasons that the court recognizing that section 19(4) of the Charter grants the Supreme Court a discretion, did not find that the trial judge was palpably wrong in the exercise of her discretion to refuse to strike out the claim.

[331] Consequently, the Attorney General, submits, having regard to the foregoing, that although the implied term of mutual trust and confidence in the claimant's contract of employment may not provide an adequate alternate remedy for him in the law of employment contract, an implied Charter rights term can provide a

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[114] [2018] JMCA App 22

parallel remedy. However, in determining whether to exercise its discretion under section 19(4), the court should consider whether the matters that intersect with the claim are the types of special features which at least arguably indicate that the law of contract would not provide the claimant with an adequate remedy.

ANALYSIS

The court's assessment of the effect of the vaccination policy

[332] The defendant's policy does not force employees to be vaccinated. What it does is it presents a choice for employees. An employee is free to exercise his/her free will to choose between two alternatives, produce proof of vaccination or produce proof of a negative PCR test every 14 days. If an employee does not like either of the choices presented to him/her, then there is a third choice and that is, to do nothing.

[333] However, this third choice has side effects. It will lead to the enforcement of the policy against the employee. This third choice will lead to the foregoing of the income that would have been earned or vacation days which would have accrued. If the employee, as he is entitled to do, chooses to do nothing then there is going to be a loss, whether it is the loss of income or the loss of vacation days, there will be a loss which is quantifiable and compensable in damages at common law as seen in **Addis v Gramophone**. It should not come as a surprise to an employee or to an employer that while each is free to contract, and to make choices, these choices have consequences, actions have reactions and rights go hand in hand with responsibilities, there are no absolutes.

[334] The decision of **National Solid Waste Management,** is distinguishable as it concerned an application for leave to appeal and therefore the test as to whether there was an arguable case is lower than the required test in the instant case. The Court of Appeal in that case noted but made no finding on the distinction between the word 'shall' in section 25(2) of the previous Bill of Rights and 'may' in section 19(4) of the Charter. Replacing the word 'shall' with the word 'may' does not replace the requirement for special features in order for a constitutional claim to proceed where there are alternative remedies available to the claimant.

[335] The case is not authority for the point that s. 19(4) should not be exercised because a case may have novel points and those comments of the learned judge may be viewed as obiter. The special feature must be some impugned conduct on the part of the defendant which is related to the engagement of the right allegedly breached.

[336] In the case of **Harrikissoon** at paragraphs 24 and 25, the Board indicated that an example of a special feature would be an arbitrary use of state power. The defendant has provided its plans for dealing with the safety concerns during the pandemic none of which could be described as capricious, arbitrary or without thought for the employees. If the claimant had thought so, he has not said so in his affidavit.

[337] Moreover, the claimant has not said there was anything arbitrary or unfair in the process employed by the defendant to institute the policy, which suggests that the defendant employed a consultative approach with which the claimant was satisfied (town hall meetings for staff, etc.) There cannot be said to have been impugned conduct on the part of the defendant on the state of the evidence.

[338] The only risk of loss faced by the claimant is compensable in damages. As a consequence, the only issue that arises for the court's determination is whether the defendant has a contractual right to require the claimant to present negative

COVID-19 test results bi-weekly as a condition of his employment. This issue cannot be countered by the unsustainable submission by the claimant that the policy has placed an obligation on him to submit bi-weekly PCR test results which amounts to a sanction.

[339] The evidence of the defendant is that they have been scrupulous concerning the enforcement of mask wearing, sensitization and social distancing, the evidence is that many employees nevertheless contracted COVID-19. It is against this background that the defendant submits that requiring an employee who has opted not to become vaccinated against COVID-19 to prove that he has not contracted the virus with sufficient regularity is not a sanction but a reasonable measure by an employer in response to their legal obligations to their employees.

[340] The claimant's submission that an action in contract cannot be maintained and therefore the imbalance of power complained of amounts to a special feature which merits constitutional redress is flawed reasoning when the available parallel remedy is examined.

[341] In addition, in the case of **Brendan Bain**, the Full Court was prepared to hold that "a situation may arise where a natural of juristic person can seek to influence the thoughts and beliefs of another. The invasion may take the form of deliberately seeking to restrict how one is encouraged to think about a matter and penalising one from practising one's belief in certain circumstances." However, having said that, the Full Court did not agree that there had been a breach of section 13(3)(b) of the Charter as the content of the expert report was without interference from the defendant. While the termination of the employment contract was declared to have been a punishment for the claimant exercising his freedom of expression, it was not equally viewed as a punishment for exercising his right to freedom of thought, conscience, belief and observance of political doctrines under section 13(3)(b) of the Charter.

[342] In **Bain**, the court had been provided with extensive material setting out the correspondence and circumstances surrounding the matter, there was ample evidence before the Full Court on which the court could have made its determination. The behaviour of the defendant of which F. Williams, J (as he then was) spoke of in **Bain** could be readily seen on the evidence.

[343] In the instant case, there is no such evidence before this court. There is no evidence of any interference on the part of the defendant with the claimant's free exercise of his rights. There is therefore no impugned conduct referable to the substance of the claim. The court cannot therefore view the policy as a sanction or punishment against the claimant. The submission that the power imbalance is a special feature is summarily dismissed.

[344] Furthermore, the Prime Minister of Jamaica has declared the island a disaster area pursuant to the Disaster Risk Management Act ("DRMA") and there is no gainsaying that COVID-19 presents a real and present threat to life, health and public safety. In the circumstances, the defendant has a legal duty to take the steps that a reasonable and prudent employer would take to ensure that their place of work is reasonably safe. All of the cases cited by the claimant show that rights and freedoms may be limited in order to protect the public.

[345] Finally, the need for special features is necessary to prevent misuse of the constitutional redress provisions of the constitution. In contrast, the claimant is still an employee of the defendant and is permitted to work provided that he complies with the policy. In light of the continuing relationship, Queen's Counsel, Ms. Jarrett's submission is well founded, in that it is arguable that there is an implied term of mutual trust and confidence in the subsisting contract of employment.

[346] The claimant has raised issues of perceived discrimination in what ought to be an argument about an adequate alternate remedy. Discrimination in a general sense is being asserted, however, discrimination whether actual or perceived

has not been pleaded, and neither the court nor the defendant has been put on notice that this was an issue to be addressed. Again, the conclusions raised as special features require more than mere assertion, they must be tied to the evidence and to the case itself.

[347] In all the circumstances of the case, the court agrees with the defendant's submission that there are no special features in the claim.

Horizontal Application - Against whom can the claimant enforce his fundamental rights

[348] Section 13 (5) of the Charter makes it clear that it is to be applied between persons natural or juristic. It is not in dispute that the defendant is a juristic person within the meaning of section 13(5) of the Charter. Therefore, Charter rights apply to both the claimant and defendant in this action. This means that Section 13(1)(c) of the Charter which provides that persons are under a responsibility to respect and uphold the rights of others recognized in this Chapter, is an enforceable provision, the breach of which may lead to constitutional redress.

[349] It is settled law that the defendant as a private entity is a juristic person who is bound by the constitution to respect the rights and freedoms of others, including the claimant's.

[350] The next step in the event of error in the previous finding, is whether the rights sought to be enforced by the claimant is capable of being applied to the defendant as a juristic person, taking into account the nature of these rights and the nature of any duty imposed by these rights.

Section 13(1)(c) of the Charter

[351] It is important to remember that citizens of Jamaica are each endowed with the same rights. Therefore, the court must consider the claimant's rights as well as

the rights of the defendant, for the manifestation or enforcement of any right is to be balanced against the same right held by other citizens.

[352] It is the view of this court that the position of the claimant is that the balance should be tilted to one side without regard for the provisions of the Charter which give equal rights to both parties. There is an equal duty which is attendant upon any right, the duty which falls upon the claimant is that he too must respect and uphold the rights of the defendant. Any other conclusion would be based on the flawed premise that the rights of one person or group are to be considered greater/lesser than the other, while all are equal. It is noteworthy, that the claimant has not addressed this duty in either his evidence or acknowledged that it exists in his submissions.

[353] It is for these reasons that this court has formed the view that the claimant has not shown the nature of and extent of the rights he alleges have been or are likely to be contravened by the defendant. While the global pandemic of COVID-19 is a new phenomenon the pandemic has not removed the provisions of the constitution which govern us all. The Charter rights remain subject to section 13(1)(c) for their enforcement.

> "13. ---(1) Whereas –
>
> …..
>
> *(c) all persons are under a responsibility to respect and uphold the rights of others recognized in this Chapter, the following provisions of this Chapter shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.*

[354] There is no doubt that the law has been settled in relation to the horizontal application of the rights protected under the Charter to private entities based on

section 13(5).[115] However, section 13 (1)(c) provides that persons are under a responsibility to respect and uphold the rights of others recognized in this Chapter, and this section has been elevated to the level of enforceable rights, the breach of which may lead to constitutional redress.[116] The defendants as private entities are therefore juristic persons who are bound by the constitution to respect the rights and freedoms of others, to include the claimants '*to the extent that, it is applicable.*' Section 13(5) provides that the rights under the Charter are binding on all private citizens *to the extent that they are applicable*. Therefore, once the content of the right has been determined, the court then moves to decide whether the right is capable of binding the private citizen and if so, to what extent.

[355] *"It is evident to me that those words as set out in section 13(5) of the Charter also embrace a determination of whether the right alleged to be infringed is applicable, and if it is, the extent to which it is applicable, having regard to the nature of it, and the duty imposed by it. It is not the same as the protection of the fundamental rights of a person which are guaranteed against infringement by the State and which binds the State, as expressed in section 13(4) of the Charter.* This was the view of the Court of Appeal in **Maurice Tomlinson v Television Jamaica Limited and others**.[117] It means that the vertical application of the protected fundamental rights and freedoms of citizens against the state is by means of section 13(4) of the Charter in any claim brought against the state.

[356] However, in any application under section 13(5), the court must determine whether the right allegedly infringed is applicable to the defendant. The court must look at the nature of the right and the duty imposed by it in considering, to

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[115] See Maurice Tomlinson v Jamaica Broadcasting Corporation et al [2013] JMFC Full 5 and Brendan Bain v The University of the West Indies [2017] JMFC Full 3

[116] supra

[117] (supra)

what extent an applicable right should bind the defendant. The court must also bear in mind that the application of the rights set out under the Charter is to all citizens. Further, the Charter states that the protection of the rights and freedoms are to the extent that they do not prejudice the rights and freedoms of others. With rights come duties and with freedoms come responsibilities.

[357] This court has to carefully consider the Charter rights that the claimant alleges have been or are likely to be contravened, in order to ascertain whether they are enforceable against the defendants. This must be considered bearing in mind the circumstances of, the nature and extent of the guaranteed rights of each parties and the attendant duties, as well as the common law right of freedom to contract as employer and employee.

[358] This court will state categorically that the defendant is entitled under the Charter to hold its own views as to how to operate its businesses, with the same guaranteed and protected rights under the Charter as do all Jamaican citizens. Whether they believe in vaccination is as much their right as much as it is the right of the claimant not to believe in it.

[359] The court finds that in a matter which concerns a workplace policy devised as a response to the COVID-19 pandemic, the claimant has failed to show that these rights are applicable to the defendant. In other words, he has not proven the assertions made in his affidavit. There is no evidence that the claimant is qualified to give the scientific or medical evidence which he has sought to give in an effort to buttress his claims. He who asserts must prove, not fail to prove or prove as he sees fit, but prove to the standard required in a court of law, it is for the claimant to prove the truth of his assertions. This he has failed to do.

[360] Further, the claimant's case is that the court should strike down the defendants' policy and/or it should be declared that he is exempt from its provisions. As the case was presented, the claimant has said the PCR tests are expensive and would strain his budgetary resources as well as that he does not wish to have

any instrument inserted into his body. This may be described as the defence in which the accused says I was not at the scene, but if you find that I was, then I was acting in self-defence. It is therefore unclear what the claimant is asking the court to find, is it that he is saying no matter the cost whether $1 or $100,000, I will not be tested as no instrument will be inserted into my body. While also saying I would be tested if the defendant will pay for it, not I will be tested if I could afford it. Is it that he is arguing that the frequency of testing is too great coupled with the cost of testing which will be onerous or is he contending that I would be tested if it were more infrequent. There is also the claimant's submission that he is seeking declaratory relief under the Charter in that he is constitutionally entitled to resist the defendant's policy. The combination of these different positions have served to weaken the case presented by the claimant considerably. They cannot be raised to the standard of proof required under the Charter however.

[361] Further, the **Bain** case says that for there to be horizontal application of Charter rights to private entities the claimants must show:

1. that there was some interference with their protected rights by the defendant and

2. that there was some objectionable behaviour on the part of the defendant which demands some compensation.

[362] The defendant stated that it undertook consultations with its staff and this has not been challenged. The claimant states that he was permitted to work from home. This can be viewed as a reasonable accommodation given the context of the Disaster Risk Management Act ("DRMA") and the spread of the COVID-19 virus.

[363] There is therefore no question of the arbitrary exercise of power or coercion on the evidence. In fact, there is evidence of the defendant's conduct which shows a balance between allowing for the exercise of the claimants' views and the

defendants' legal duty to provide a safe place of work as well as the legal duty to implement the provisions of the DRMA where applicable.

[364] The consultation with staff also demonstrates that the defendant took the views of its employees into account, there would have been views other than the claimant's as well as interests and expectations on the part of other members of staff which also had to be factored into the operations of the defendant's companies. The claimant has not addressed the views and concerns held by other members of staff within the defendant's companies which he has a similar duty to respect and uphold, such as those who suffer from comorbidities or those who do not wish to be put at risk.

[365] The defendant's submissions state that their policy is in compliance with the Labour Relations Code made pursuant to the Labour Relations and Industrial Disputes Act. The claimant has failed to answer these issues. Nowhere in the evidence is there a recognition by the claimant that his Charter rights as set out in his claim are equal in nature and quality to the rights of the defendant.

[366] The policy implemented by the defendant has to be viewed with its purpose in mind against the backdrop of the COVID-19 pandemic and its legal duty to provide a safe place of work. This gives rise to the consideration of other rights which have to be balanced against the decision made by the defendant when it implemented the policy.

[367] In considering the application of section 13(5), to the defendant, the court recalls that the parties have the same rights but competing interests and each party has to duty to respect and uphold the rights of the other. It bears noting again here that the language of the Charter is clear, it says that the rights are protected to the extent that they do not cause prejudice to the rights of others. There is therefore a duty on both parties not to cause prejudice to the other. To what extent do the claimants Charter rights bind the defendants in the context of the reason for the policy? The parties are both in the unprecedented climate

of a global pandemic of COVID-19. However, the real subject of the claim before the court is the employment contract and as private citizens and private entities, they each enjoy contractual freedom.

[368] The approach to horizontal application is to determine the content of the right and then to decide whether the content of the right applies to the defendant. Having failed to demonstrate the nature and extent of the duty of the protected rights to the defendant and based on the evidence presented, in the totality of the circumstances, it would seem to this court that the rights set out in this section of the Charter are not of horizontal application to the defendant.

[369] To make a declaration against the defendant in favour of the claimant could have only been accomplished by prejudicing its rights and freedoms. Such a proposition, could not have been the intention of the framers of section 13(5) of the Charter.

[370] This court should not lightly strike out claims alleging the contravention of the constitutional rights of any citizen of this country. However, rights are tied to responsibilities and the court must always strike a balance between the rights of the individual as against the rights of other citizens.

[371] There is also the mechanism set out by the LRIDA for disputes between employer and employee through a process of conciliation and an unjustifiable dismissal may be referred to the Industrial Disputes Tribunal by the Minister of Labour. In addition, the employer and employee relationship has been codified pursuant to the LRIDA in the Labour Relations Code. The code applies to all employers and employees, workers, organisations representing workers and its provisions are "as near to law as you can get."[118]

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[118] Jamaica Flour Mills Limited v Industrial Disputes Tribunal and anor [2005] UKPC 16, at paras 6 and 7.

[372] In **Edward Gabbidon v Sagicor Bank Jamaica Limited**[119], the court considered a claim for wrongful dismissal arising out a technical operations error which led to a net loss of Eleven Million Dollars ($11,000,000) to the bank. The claimant at that time was the Assistant General Manager, Information Technology. He was paid in lieu of one month's notice and terminated as was provided for in the employment contract. The claimant's dismissal came in the wake of disciplinary proceedings which had been instituted by bank executives against him. The claimant was dissatisfied with the disciplinary process which he viewed as unfair and he wrote to the bank's chairman requesting his intervention. There was then in place a policy known as "ESP" which allowed employees to confidentially comment on bank policy and procedure and request intervention without fear of repercussions.

[373] The termination of Mr. Gabbidon was without reasons and with immediate effect. He sued for damages for wrongful dismissal claiming breaches of the confidentiality aspect of the policy and that the bank had breached the mutual duty of trust and confidence implied in the contract of employment. The learned judge at first instance gave judgment for the bank.

[374] On appeal, having comprehensively reviewed and set out the law in the UK, the region, the common law and the statutory position in Jamaica. Brooks, JA, writing for the Court of Appeal held that in the law of wrongful and unfair dismissal in the **Addis v Gramophone** is still the law in this jurisdiction. It was also settled that the implied term of mutual trust and confidence constitutes a part of the law of this country, relating to the contract of employment:

"[142] An examination of the law in relation to the termination of the contract of employment had demonstrated that despite its antiquity, the Addis principle that damages are awarded for breach of contract and not for

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[119] [2020] JMCA Civ 9

the manner of the breach remains the law in this country. It has been happily supplemented by the introduction of the implied principle of mutual trust and confidence into the contract of employment.

[143] That implied term, however, has its limitations, Firstly, it cannot trump an express term of the contract that allows either party to terminate the contract upon notice or that allows the employer to make a payment in lieu of notice or that allows the employer to make a payment in lieu of notice. Secondly, in the absence of an express term, stipulating the means by which the contract may be terminated, the implied term does not apply if the breach of it is what leads to the dismissal.

[144] The latter principle describes the so-called Johnson exclusion area. It is based on the existence of the alternative statutory regime which deals with unfair dismissals. The alternative statutory regime in Jamaica lies in the LRIDA, the code and the regulations."

[375] The case at bar is not one in which the claimant has been dismissed. In fact, the submissions of the claimant on the existence of a parallel remedy have centred on damages and compensation for non-pecuniary loss at common law. As it stands, based on the decision in **Edwards**, damages can be awarded in a claim for breach of contract, and the implied term of trust and confidence would persist in what is a continuing employment relationship. The learned judge of appeal continued:

"…there is a comprehensive alternative statutory scheme for providing a remedy where an employee is unfairly dismissed. The Addis principle and the Johnson v Unisys approach should be followed, namely, that there is no right of action for damages for an alleged breach of trust and confidence, where that breach is what led to the dismissal, or for loss, which flows from the manner of dismissal. It is for the IDT, in an

appropriate case, to determine if such a dismissal, is unfair, and worthy of compensation."[120]

[376] Consequently, the question of, what is the extent and nature of the right claimed, the duty imposed by that right, in order to ascertain whether the natural or juristic person is bound by the said specific right has not been answered.

How to proceed where there are substantial disputes of fact

[377] This case also involves substantial disputes of fact which will require cross-examination to resolve. Once facts are in dispute, it would require, inter alia, an amendment of the pleadings to pursue the common law remedy which had always been open to the claimant. He could have gone that route based on the affidavit in response, but rather, has continued to pursue the constitutional claim which given the factual disputes is an unsuitable and an inappropriate procedure.

[378] In what is a mixed question of fact and law, this court finds that the claim for constitutional redress in the circumstances is "wholly unsuitable" (to use Lord Hope's words in **Jaroo,** where the Board made it clear that in these circumstances, resort to the procedure by way of originating motion would be inappropriate and an abuse of process. Once it had become clear after the claim had been filed, that the procedure was no longer appropriate, steps should have been taken to withdraw the matter from the High Court without delay, "as its continued use in such circumstances will also be an abuse".

Conclusion on the constitutional claim in light of the serious issue to be tried

[379] This court finds that the true nature of the rights allegedly contravened have not been demonstrated on the evidence, that there is an adequate parallel remedy

[120] Supra para 90

in the law of contract and that the claim raises no special features. There is also no horizontal application on the evidence. As a consequence, the declaration sought by the claimant pursuant to the constitutional redress provisions under section 19 is refused. There is a serious issue to be tried in the law of contract.

The claim will therefore proceed without the inclusion of constitutional relief pursuant to section 19 of the Charter of Fundamental Rights and Freedoms.

THE APPLICATION FOR INJUNCTIVE RELIEF CONTINUED

Are Damages an adequate remedy?

[380] The claimant's counsel submits that it is not. The right to work is a right protected by the courts and by statute in the LRIDA and the Labour Relations Code. This right is unquantifiable and is to be coupled with non-pecuniary loss for the violation of his constitutional rights to the autonomy of his body by having to be vaccinated or take a PCR test.

[381] The defendant submits that the authorities show that a court will generally decline to grant an injunction if damages would be an adequate remedy for the claimant.

[382] The submissions of the defendant on this point are accepted by the court. The authorities show that a court will generally decline to grant an injunction if damages would be an adequate remedy for the claimant. For example, in **Olint v National Commercial Bank Jamaica Limited**[121] Lord Hoffman applied the American Cyanamid guidelines and explained the general rule regarding the adequacy of damages. He said [122]:

[121] [2009] UKPC 16
[122] At paragraph 16

It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. … As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] AC 396 that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction.

[383] This is the general rule regardless of the strength of a claimant's claim. The learned author of **Commercial Litigation: Pre-emptive Remedies,** Iain S. Goldrein writes:

"If damages in the measure recoverable at common law would be an adequate remedy and the respondent would be in a financial position to pay them, no interim injunction should normally be granted, however strong the applicant's claim appeared to be at that stage.[123]

[384] In **Polaroid Corporation v Eastman Kodak Co.**[124] Buckley LJ also pointed out that it is only in exceptional cases that the court would restrain a defendant where the claimant can be compensated in damages. He said:

…but in every case of an application for an interlocutory injunction until trial the court must, in my judgment, approach the case with the object of making whatever order will be likely best to enable the trial judge to do justice between the parties, whichever way the decision goes at the trial. Their freedom of action should only be interfered with to an extent

[123] Page 25, A1-058
[124] [1977] F.S.R. 25

necessary to this end. This, as I understand the decision in the case of American Cyanamid Company v. Ethicon Limited …. is the reasoning underlying the decision of the House of Lords in that case. Accordingly, if the plaintiff can be compensated in damages for anything he may wrongfully suffer between the date of the application and the trial, the defendant should be restrained, save in exceptional circumstances. There seem to me to be no exceptional circumstances in the present case.[125]

[385] The case law has shown that exceptional circumstances can include where[126]:

a. there is a difficulty in estimating the damages;

b. the likely damage would be to the claimant's trade reputation or loss of goodwill; and

c. there is a cynical breach of contract by a Defendant who would prefer to pay damages rather than honor contractual obligations.

[386] None of these circumstances are present in the instant case and there are no exceptional circumstances which support an argument that damages are not an adequate remedy.

[387] The defendant has, by its policy, asked unvaccinated employees to produce a negative PCR test on a bi-weekly basis in order to physically attend work. The extent of the "loss" (if any) the claimant may suffer in complying with this request can be quantified and, by extension, can be remedied by an award in damages.

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[125] At page 34

[126] See Ansa McAL (Barbados Ltd v Banks Holdings and another – [2017] 3 LRC 103 paragraph 143

[388] Applications to restrain stricter vaccine policies have failed in Canada on this basis. For example, in **Amalgamated Transit Union, Local 113 et al v. Toronto Transit Commission and National Organized Workers Union v. Sinai Health System (**"TTC"**)**[127], the Toronto Transit Commission pronounced a policy requiring employees to get vaccinated against Covid-19 (subject to limited exceptions). Under the policy any employees who failed to prove that they were fully vaccinated by November 21, 2021 would be placed on unpaid leave. If they failed to provide confirmation of vaccination by December 31, 2021 they faced termination.

[389] There was no option of periodic testing. The applicants in that case made similar arguments to the one the claimant makes in this case. They argued:

a. Many will be compelled by the extreme economic duress imposed by the policy to undergo vaccination against their will, constituting an invasion of bodily autonomy and privacy;

b. All will suffer psychological stress and emotional harm which is not easily quantifiable or compensable through damages; and

c. Some will be forced into early retirement, resulting in a loss of self-esteem, fulfilment, and changes to their retirement plans and lifestyle that are not compensable by damages.

[390] The court held inter alia, that the loss the applicants would suffer was not irreparable and could be compensated in damages.

[391] A similar conclusion was reached in **Kotsopoulos v. North Bay General Hospital**[128]. In that case the applicant refused to comply with a requirement to be immunized for influenza and the respondent hospital suspended him. He

[127] 2021 ONSC 7658
[128] 2002 CarswellOnt 693

applied for an interlocutory mandatory injunction requiring his reinstatement until trial. The application failed on the basis that the loss he would suffer from the suspension could be remedied by damages. Karam J said:

> *"I am not satisfied that the applicant has demonstrated that he will suffer irreparable harm, by a failure to grant an interlocutory injunction. Despite my earlier comments with respect to the matter of jurisdiction, I find little that differentiates this situation from many other labour disputes… Every such employee would probably face a loss of income, loss of seniority, loss of the opportunity to practice his or her skills and could claim a loss of self-esteem, while awaiting the outcome of arbitration proceedings. However, lacking more convincing evidence of irreparable harm, I am satisfied that it would not be appropriate for a court to issue an interlocutory injunction in such a situation."*[129]

[392] In **Adam Wojdan v The Attorney General of Canada**,[130] a decision of the Federal Court of Ontario delivered on December 2, 2021, the court affirmed the **TTC** decision, refusing to grant an interlocutory injunction on grounds similar to that of the instant case.

[393] In the claimant's circumstances, he has neither been suspended nor dismissed, despite the defendant's contractual right to dismiss him by with notice. Instead, the policy provides for him to produce a negative PCR test result biweekly. He avers that compliance with that requirement would cost him to spend a portion of his salary every month.

[394] As the Canadian authorities indicate, even a total loss of salary can be compensated in damages. Any expenses resultant from PCR testing to which

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[129] At para 18
[130] 2021 FC 1341

the claimant objects and all the alleged losses he claims he will suffer can be remedied by an award in damages.

[395] Loss of income is capable of being compensated in damages. Expenses related to PCR testing or vacation days lost are all losses which are capable of being quantified and can be remedied by an award of damages. In all the circumstances, based on the evidence presented, this court finds that damages are an adequate remedy.

Undertaking as to Damages

[396] The author of **Commercial Litigation: Pre-emptive Remedies,** Iain S. Goldrein explains that where an applicant for an injunction does not produce evidence that he can satisfy an undertaking as to damages, his application is severely weakened. They write:

> *"It cannot be emphasized too strongly that the court will in almost all cases expect to see cogent evidence from the applicant that it has sufficient assets to enable it to comply with the undertaking as to damages. Failure to provide such evidence will fundamentally weaken any application for interim injunctive relief.*[131]

[397] The claimant admittedly cannot provide the usual undertaking as to damages. Therefore, any loss which the defendant may suffer because of an injunction nullifying its COVIDCovid-19 mitigation efforts and the resumption of its normal operations will likely be uncompensated.

[398] There is no gainsaying that the court understands the dictum of Lord Denning in **Allen v Jambo Holdings**[132] which was that a poor plaintiff should not be denied an injunction if her cross-undertaking in damages would be worth

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[132] [1980] 2 All ER 502 at 505

nothing against a rich plaintiff. A claimant of limited means is as equal in the eyes of the court as is a defendant of substantial means. The court will look at the matter broadly and the must balance one side against the other.

The balance of convenience

[399] Having found that damages are an adequate remedy, in the event of error, the court will go on to the balance of convenience. Employers are expected to adhere to the protocols put in place by the DRMA. It is the law in this jurisdiction that one has to wear a mask in a public place and it has become accepted practice that one's temperature is going to be checked and hands sprayed with sanitizer before entering a place of business in Jamaica. It is accepted that if these entry requirements are not met then entry will be refused. It is also expected that each business is actively engaged in protecting the health and safety of its staff and customers, and by so doing it is playing its part in the protection of the health and safety of the community it serves and by extension the society at large.

Prejudice to the employee

[400] The harm which the employee may suffer is being placed on unpaid leave, or being terminated from employment, if he remains unvaccinated. He is not being forced to get vaccinated; he is being forced to choose between getting vaccinated and continuing to have an income on the one hand, or remaining unvaccinated and losing his income on the other. An employee would naturally be concerned about this unwelcome intrusion into his financial affairs. However, this concern does not translate in to a loss which cannot be compensated by a court. Damages have been found to be an adequate remedy for any loss suffered as a result of the implementation of the policy.

Prejudice to the employer

[401] If the injunction is granted there would be negative and far-reaching consequences for the defendant, its other employees and their families. In fact, the defendant may suffer harm which could not be compensated in damages. The workforce in any organisation is its greatest asset and the human resource is to be protected by the employer.

[402] The effectiveness of the policy depends on uniform application. If the defendant is forced to permit the claimant to attend work without providing a negative PCR test, it will likely cause human resources challenges for the employer. If the Policy is made unenforceable against the claimant, other employees may follow his lead and insist that they too be allowed to attend work without PCR tests. The defendant's efforts to protect its employees and to resume normal operations would be severely curtailed. Without a return to normal operations, a business will suffer harm which will ultimately impact the jobs of all the employees. The jobs of all the employees will be put a risk as costs of compliance with COVID-19 protocols increases. The claimant cannot make compensation to the defendant for any loss suffered as a result.

[403] The claimant suggests that the defendant should pay for his PCR tests. This would be imposing a mandatory injunction on the defendant in circumstances where the claimant admittedly cannot give a sufficient undertaking in damages and where there is no strong argument in favour of his claim. If the defendant is forced to pay for the claimant's PCR tests it will be required to do the same for its other unvaccinated employees. Such an order would go against the failure of the claimant to provide an adequate undertaking as to damages. This means that the defendant would not recover those sums.

[404] Finally, if the claimant is allowed to return to work without providing a negative PCR test there will be an increased risk to the safety of the defendant's staff, suppliers and customers. The defendant's objectives of ensuring the safety of its employees and returning to normal operations would be adversely affected in a way that damages could not compensate.

CONCLUSION

[405] I agree with counsel for the Defendant that the rights being articulated in this application are capable of redress by means of a parallel remedy under the law of contract which is adequate to compensate the claimant for the abuse of any rights possessed under the contract of employment. An injunction and damages are both remedies that may be issued by the court on a claim for breach of contract.

[406] The application for injunction is refused for the reasons aforestated.

[407] It is therefore with this in mind that the claimant's presentation of this application is viewed by the court as the left behind glass slipper with the court expected to go traversing the countryside to solve the mystery. This court prefers that its 'constitutionals' not be annexed to its travails on matters of the constitution.

[408] This aspect of the claim is viewed as an abuse falling squarely within the warnings of the Privy Council in the trilogy of Trinidadian authorities and the court of appeal in **Satterswaite**. For the reasons set out herein, the court will dismiss the constitutional aspects of this claim as an abuse of process. It follows that the court will refuse to make a declaration that the constitutional rights of the claimant has been infringed.

Orders:

1. The court declines to exercise its powers pursuant to section 19(4) of the Charter of Fundamental Rights and Freedoms.

2. Pursuant to Rule 26.1(1)(k) of the Civil Procedure Rules, the court hereby excludes from determination any issue involving breaches of the Constitution as it would constitute an abuse of process.

3. The declaration sought at paragraph one of the fixed date claim form filed on the 2nd day of November, 2021 pursuant to the Charter of Fundamental Rights and Freedoms application for interim injunction is refused.

4. The application for interim injunction is refused.

5. Costs to the defendants to be taxed if not agreed.

6. The defendant's attorney is to prepare, file and serve the orders made herein.