



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2021 CV 04366

BETWEEN	KADIAN PARKINS	1ST CLAIMANT
AND	TASHANA DAVIS	2ND CLAIMANT
AND	SHERINE HEMMINGS	3RD CLAIMANT
AND	RACQUEL ROBERTSON	4TH CLAIMANT
AND	KENNESHA DALE	5TH CLAIMANT
AND	CARI-MED GROUP LIMITED	1ST DEFENDANT
AND	KIRK-FP LIMITED	2ND DEFENDANT

IN CHAMBERS

Messrs. Jerome Spencer, Mark Ramsay and Yakum Fitz-Henley instructed by Ramsay Smith, Attorneys-at-law for the Claimants

Messrs. Gavin Goffe, Matthew Royal and Jahmar Clarke instructed by Myers, Fletcher & Gordon, Attorneys-at-law for the Defendants

Heard: October 27, November 5, 12, 17, December 3 and 10, 2021

Injunction – Constitutional claim - COVID-19 vaccine policy – claimants are employees of defendants – whether Polymerase Chain Reaction (PCR) testing

breaches contract of employment – whether breach of constitutional rights under Charter of Fundamental Rights and Freedoms - whether court should exercise or decline jurisdiction under section 19 of the Charter of Fundamental Rights and Freedoms – whether law of contract can provide an adequate alternate remedy – whether Charter rights are of horizontal application - Civil Procedure Rules – Rule 26.1(1)(k), sections 13 and 19 of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011.

WINT-BLAIR, J

What then where there is no direct precedent and no helpful analogy? As even Lord Esher accepted, judges have often to consider what or whether a common law rule applies to a particular, perhaps novel situation. The common law tends to develop incrementally and cautiously, to that extent perhaps even experimentally in a scientific way. The process has been attractively compared by Professor Ronald Dworkin¹ with the production of a chain novel by a series of different novelists, each adding a chapter, with the task of achieving as much overall coherence as possible and, one might add, with the final chapters perhaps providing some generalised key to all that preceded.²

INTRODUCTION

[1] Judges determine the issues raised in the case before them on the evidence presented to the court by applying the substantive and procedural law. In this regard, having examined all of the evidence, law and submissions presented to the court, reference in this decision will be made only to that which has been used to determine the issues raised by this application. While the court is aware of the significance of the decision to the public, this decision is based solely upon what was presented to it by the parties and their attorneys-at-law. It is here that I will

¹ In Law's Empire.

² The Role of Judges in a Representative Democracy Lecture given during the Judicial Committee of the Privy Council's Fourth Sitting in The Bahamas, Lord Mance 24 February 2017.

acknowledge the invaluable assistance of all counsel appearing in this case and of Ms. Camenia Roberts and Ms. Tassja Mitchell, Judicial Clerks, in what is a novel claim involving the constitutional provisions of this nation and which is without precedent.

BACKGROUND

- [2]** The 1st Defendant is a limited liability company duly incorporated under the laws of Jamaica.
- [3]** The 2nd Defendant is a subsidiary of the 1st Defendant.
- [4]** The Claimants are employees of the 2nd Defendant.
- [5]** On September 20, 2021, the 1st Defendants issued a written COVID-19 Vaccination Policy (“the policy”) for all companies within its group of companies to be implemented on October 4, 2021. An addendum to the policy was issued on October 4, 2021 and took effect on that date. The policy requires, inter alia, that all employees present proof of vaccination from COVID-19 or such other diseases as may be designated by the 1st Defendant by October 4, 2021 unless a reasonable accommodation is approved.
- [6]** The policy further states that employees who fail to comply with its terms will be required to present a negative polymerase chain reaction test (“PCR test”) result every two (2) weeks or fourteen (14) calendar days at the employee’s expense from a Ministry of Health and Wellness approved laboratory site for COVID-19 testing.
- [7]** On October 19, 2021 the claimants initiated a claim against the defendants claiming a breach and/or anticipatory breach of their respective employment contracts and violation of their constitutional rights under sections 13(3)(a), (b),(g) and (j)(ii) and (iii) of the Constitution of Jamaica

[8] This matter began as an application for an interim injunction. The court was later presented with a second application. The first, was a notice of application for injunctive relief filed on October 19, 2021 by the claimants. The second³ application was filed by the defendants and was a notice of application for the court to decline to grant constitutional redress pursuant to section 19(4) of the Constitution; and to exclude from determination issues involving breaches of the Constitution and in the alternative to strike out the declarations sought in the claim⁴ pursuant to the Charter of Fundamental Rights and Freedoms, (Constitutional Amendment) Act, 2011, (“the Charter”).

JUDGE-DRIVEN CASE MANAGEMENT

[9] 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 the second application filed by the defendants was to be heard first as the outcome of that application would in the view of this court, shape the hearing of the first application for interim injunction. To this end, this decision on the application brought by the defendants is to be handed down first on the date fixed for hearing, thereafter the court will hear the application for injunctive relief.

[10] This court is aware of the dicta of the Court of Appeal in **Dawn Satterswaite v The Asset Recovery Agency**⁵ at paragraph 138 which sets out the powers of the single judge to deal with at an early stage questions relating to constitutional relief:

“[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

³ Filed by counsel for the defendants on October 28, 2021.

⁴ Claim form filed October 19, 2021

⁵ [2021] JMCA Civ 28

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.”

- [11] As a consequence of this court’s procedural stance, orders were made for the filing of written submissions on the application with any further oral submissions in reply to be made at the hearing of the application.

THE DEFENDANTS’ SUBMISSIONS

- [12] The gravamen of the defendants’ submission is that there are alternative remedies which are available to the claimants and as a consequence, the court should decline to exercise its powers in regards to the constitutional claim.
- [13] The defendants’ submit that the true nature of the alleged constitutional contravention from the claimant’s point of view is that the defendants have violated their right to attend work and receive pay without complying with the defendants’ written COVID-19 vaccination policy (“the policy”).
- [14] They submit that the remedies which the claimants’ seek in respect of the claim are an injunction to restrain the enforcement of the policy and damages to compensate them for any loss which they may have suffered as a result of the implementation of that policy. An injunction and damages are both remedies that may be issued by the court on a claim for breach of contract if the court is satisfied that the claimants are so entitled. They argue that there is no authority which equates adequate remedy with desired remedy.

- [15]** The defendants submit that the claimants have pleaded that the enforcement of the policy is a breach of their respective contracts of employment. In this regard, the adequate parallel remedy to prevent the further enforcement of the policy against the Claimants as well as to compensate them for any loss incurred from the prior enforcement of the policy are available in a claim for breach of contract. It therefore cannot be said that that the private law remedies are inadequate in order to justify embarking on a constitutional claim.
- [16]** Furthermore, the defendants argue that the policy does not mandate that the claimants are to be vaccinated against COVID-19 or any other disease and, that forcible injection of COVID-19 vaccines is not a potential result of the refusal to grant the injunctions sought by the claimants. Instead, they submit that the policy presents each employee with one of two alternatives; the employee may either take one of the vaccines which are available or present a negative polymerase chain reaction test (“PCR”) test result bi-weekly. The policy provides a graduated approach to addressing the issue of employees who refuse to take the vaccine without a medical exemption and it provides the employer with a discretion to suspend or terminate the unwilling employee in the limited circumstances specified by the policy.
- [17]** The evidence of Petra-Ann Williams for the defendants indicates that employees who declined to take the vaccine have been permitted to attend work by reason of their compliance with the alternative requirement to submit PCR test results. She says that there is no evidence of an employee being sanctioned for employing this alternative.
- [18]** It is for this reason that the defendants submit that there are no special features to justify the inclusion of a constitutional claim. It is their submission that the only risk of loss faced by the claimants is being required by the policy to take biweekly PCR tests at their own expense. As a consequence, the defendants submit that the only issue that arises for the court’s determination is whether they have a contractual right to require the claimants to present negative COVID-19 test results

bi-weekly as a condition of their employment. This issue they contend is a matter of private law and cannot be countered by the unsustainable submission by the claimants that the policy has placed an obligation on them to submit bi-weekly PCR test results which amounts to a sanction.

[19] The defendants posit that the Prime Minister of Jamaica has declared the island a disaster area pursuant to the Disaster Risk Management Act (“DRMA”) and that there is no doubt that COVID-19 presents a real and present threat to life, health and public safety. In the circumstances, the defendants submit that they are under 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.

[20] They state that while 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 defendants submit 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 punitive but a reasonable measure by an employer in response to their legal obligations to their employees.

[21] The defendants also examined the authorities relied on by the claimants and sought to distinguish them from the instant case on the basis of the points of law raised and determined and the factual circumstances. They argue that the claimants’ reliance on the Full Court decision of **Brendan Courtney Bain v the University of the West Indies**⁶ is both misconceived and unhelpful to the court in that **Bain** and the instant case raise different points of law. They posit that in **Bain**, the Full court was not confronted with an application pursuant to section 19(4) of the Charter and therefore did not consider the language nor the jurisprudence relevant to an application of that nature.

⁶ [2017] JMFC FULL 3

- [22] They also argue that the factual circumstances of **Bain** and the instant case are different. In **Bain**, the issue raised by the claimant was that his termination was as a direct result of his providing an expert report in court proceedings in Belize. In contrast, they state that the instant case concerns a contention by the claimants that mandatory vaccination is a breach of their constitutional rights. They argue that this is based on the claimant's misapprehension of the policy and is the proper subject matter of their claim. The policy does not mandate vaccination and therefore the constitutional claim is irrelevant.
- [23] Moreover, the defendants argue that in the instant matter, the claimants seek to be excluded from the application of the policy and to be granted immunity from any possible sanctions as a consequence of their non-compliance. The defendants submit that there is no direct link between the matters which the claimants are claiming to be unconstitutional and the prevention of the claimants from attending work as a result of their refusal to present negative PCR test results bi-weekly as stipulated by the policy. The claimants are not being forced to become vaccinated against COVID-19 and are permitted by the policy to attend work upon the provision of a negative PCR test result bi-weekly.
- [24] They submit that the claimants' reliance on **Bain** to support their position that a claim for breach of contract is inadequate is wrong in law. The court in its determination of a claim for breach of contract is entitled to find that any implied or express term of a contract relied upon by the defendants is *void ab initio* where that provision is illegal or contrary to public policy. Therefore, the defendants contend that the claimants' interest may be fully ventilated in a claim for breach of contract.
- [25] Finally, the defendants submit that that the special features requirement is necessary to prevent this sort of whimsical invocation of the constitution and that an alleged breach of contract resulting in hurt feelings does not give rise to a constitutional remedy. In **Bain** the claimant's feelings were hurt and the Full court declined to award vindictory damages. They argue that the claimant in **Bain** was

in a far worse position than the claimants in the instant matter as he was terminated by his employer. In contrast, the claimants are still employees of the Defendants and are permitted to work provided that they comply with the policy.

[26] The claimants' also relied on **Clement Wade v Maria Roches**⁷ for the proposition that vindicatory damages are available to them on the constitutional claim and that they would be deprived of this remedy if the constitutional claim is excluded. The defendants argue that the Supreme Court of Belize made no statement of principle to indicate the basis of an award for vindicatory damages. The relevant principles on this point of law can be found in the authority of **Bain**.

[27] The Full court in **Bain** stated that vindicatory damages must be explicitly pleaded and the facts justifying its entitlement must be set out. The defendants submit that in the instant case, the claimants have not pleaded an entitlement to vindicatory damages. Instead, they have pleaded the grant of a declaration as a remedy for the alleged violation of their constitutional rights. Even if the claimants sought to amend their claim to reflect a plea for vindicatory damages, it is evident based on the authorities that such a claim is not made out on the facts presented. Although in **Bain** the claimant was terminated from his job as a direct consequence of the exercise of his free speech, the Full Court determined that his claim did not meet the threshold for the award of vindicatory damages and that a declaration was sufficient. Consequently, the defendants submit that it cannot be properly said that the claimants will be deprived of access to vindicatory damages if the court refused to hear the constitutional claim as their pleadings and the facts of the case do not support an award of vindicatory damages.

[28] They also submit that the claimants have not joined issue concerning whether certain aspects of the claim for breach of contract meet the threshold of a serious issue to be tried. They state that the claimants have relied on **Andrews v Law**

⁷ Action No. 132 of 2004

Society of British Columbia⁸ to support their proposition that there is a serious issue arising on the claim for equality before the law. The defendants contend that this decision is wholly inapposite to the instant claim. It is their submission that **Andrews** concerns whether the requirement for Canadian citizenship for admission to the bar in British Columbia was unconstitutional and has no relevance to a claim vis-a-vis employer and employee in the context of a global pandemic.

[29] The defendants submit that the authority of **Hills v CA Parsons**⁹ relied on by the Claimants is helpful to the court for two reasons. Firstly, the case confirms that equitable relief will not usually be issued to compel parties to a contract for services to remain in a master/servant relationship where either party does not consent to it. Secondly, this general rule is subject to exceptions in rare cases. These include cases where an employee is terminated with short notice to avoid him benefitting from a pension fund which requires a certain duration of employment. In **Hill**, the special feature was that the employee would lose the right to benefit from industrial relations legislation that would come into force during his employment but for the short notice of terminating his services. In the instant case, the rare case or special circumstances standard for the granting of an injunction to restrain the termination of employment has not been met and the evidence is bereft any details that would satisfy that standard.

[30] The defendants further submit that the authority of **Dahl v Board of Trustee of Western Michigan University**¹⁰ is not useful to the resolution of the issues before the court as it was determined in the context of a foreign constitutional regime dissimilar in comparison to the Jamaican constitution. The decision is unhelpful to the claimants as the district court in **Dahl** which enjoined the enforcement of a

⁸ [1989] 1 SCR 143

⁹ [1972] Ch 305

¹⁰ [1989] 1 SCR 143

vaccination requirement allowed the requirement for participants to take tests to participate in athletic events.

- [31] They contend that the claimants' submission that **Addis v Gramophone Co Ltd**¹¹ and **Edward Gabbidon v Sagicor Bank Jamaica Limited**¹² state that non-pecuniary loss for hurt feelings cannot be remedied at common law and can only be addressed by a constitutional claim is wrong. If this is correct then every breach of contract which involves hurt feelings would give rise to a constitutional remedy and that this is the overbroad invocation of constitutional authority that section 19(4) is designed to protect against.
- [32] The defendants rely on **Jaroo v The Attorney General of Trinidad and Tobago**¹³, in which the court indicated that it is necessary and sensible that the application to determine whether the court ought to invoke its constitutional jurisdiction where there are available alternative remedies and to strike out a party's statement of case on that basis should be made early in the proceedings. They also submit that such an application cannot be made after the trial of the action as it would be discordant with the overriding objective.
- [33] The defendants cite **Deborah Chen v The University Hospital of the West Indies**¹⁴ to illustrate how this application ought to be brought as in that case, the defendant's application to strike out the claimant's statement of case was made as soon as the defendant was served with the claim. The defendant's first response was therefore to apply to have the constitutional remedy disallowed in the face of the alternative remedy of judicial review being available to the claimant.

¹¹ [1909] AC 488

¹² [2020] JMCA Civ 9

¹³ [2002] UKPC 5

¹⁴ [2021] JMCA Civ 1

[34] The defendants agree with the claimants that the constitution of Trinidad and Tobago does not have the equivalent of section 19(4) or section 25(2). However, they argue that this distinction is explained in **The Attorney General of Trinidad and Tobago Appellant v Siewchand Ramanoop**¹⁵, where the Board assessed the older decision of **Kemrajh Harrikissoon v The Attorney General of Trinidad and Tobago**¹⁶ and noted that unlike several other Caribbean jurisdictions, Trinidad and Tobago does not have such a provision but it was recognized that it was part of the inherent powers of the court to exercise its discretion to prevent the hearing of frivolous claims.

[35] They submit that the claimants' reliance on the case of **National Solid Waste Management v Louie Johnson and others**¹⁷ 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. They contend that replacing the word 'shall' for 'may' does not replace the requirement for special features for a constitutional claim to proceed where there are alternative remedies available to the claimant. Consequently, they submit that the court must still exercise its discretion in reference to some limited principle as illustrated in **Deborah Chen v The University of the West Indies**¹⁸.

[36] The defendants further submit that if the court permits claims for constitutional remedies to proceed even where there are alternative remedies then the special features requirement is even more important. Therefore, there must be some

¹⁵ [2005] UKPC 15

¹⁶ (1979) 31 WIR 348

¹⁷ [2018] JMCA App 22

¹⁸ [2021] JMSC Civ. 01

extreme and aggravating factors that merit the invocation of the constitutional jurisdiction of the court to prevent the watering down of the test.

- [37] They submit that the case of **Julian Robinson v The Attorney General of Jamaica**¹⁹ relied on by the Claimants concerned the use of state power. They aver that all questions of the right of an employer to set requirements for the conduct of its employees are determinable with reference to the employer's contractual authority based on the contract of employment. In every contract of employment, the employee places himself under the authority of the employer and therefore the issue of coercion does not arise. As a consequence, the defendants submit that the only issue for the court's determination is whether the employer has exceeded the scope of the powers ceded to them by the employee under the contract of employment when they implemented the policy.
- [38] The defendants contend that while the pandemic is novel, nothing about the instant case is new. They further contend that the pandemic is a mere smoke screen as the substance of the claimants' claim concerns their contracts of employment. In this regard, they posit that the court need not look further than to the promulgation of the policy, and whether it is within the scope of the express or implied, authority of the employer given to them under the contract of employment. As the relationship of the parties is established and defined by a contract of employment, no issue of coercion or excess of power, particularly state power arises.
- [39] The only issue is whether the contract of employment entitles the employer to do what they have done. Should the court find that the policy exceeds the employer's contractual authority then that is the end of the matter. However, should the court determine that the policy is within the scope of the employer's contractual authority, it would therefore find that the employer had exercised the powers given to them or ceded to them by the contract of employment. The issue of coercion therefore could not arise, because the contract of employment is an instrument freely

¹⁹ [2019] JMFC Full 04

entered into by both parties. It regulates, defines and limits the authority and rights of both parties based on what both parties have agreed to.

THE CLAIMANTS' SUBMISSIONS

The Powers of the Court

- [40] The claimants submit that in relation to the application to the Supreme Court, the court has vast powers as set out in section 19(3). Notwithstanding section 19(3) the constitution conferred jurisdiction to decline the grant of constitutional redress if satisfied that adequate means of redress exist under some other law. Section 19(4) has two significant components. The first requires the court to consider whether there are adequate means of redress, the second follows only upon the first being established, the court is given a discretion to decline the grant of constitutional redress.
- [41] They rely on **National Solid Waste Management Authority v Louie Johnson and Others**²⁰ at paragraphs [51] and [52] in which the former section 25(2) of the Bill of Rights did not allow the discretion which section 19(4) of the Charter allows.
- [42] They argue that a right is infringed simply when it is engaged and the court should reserve the question of whether the right is unjustifiable for trial. All that is required at the interlocutory stage is whether the right is engaged, under section 13(1) of the Charter. The claimants are alleging an infringement of their constitutional rights and therefore, it is for the Full Court to find whether there has been a contravention at trial. The pleadings simply need to say that the right has been infringed or engaged. They agree with the defendants' submission that the court would have to find that there is no real chance of success for the claimants to argue that their rights have not been infringed. The point is that the claimants present a case which is clearly arguable based on the authorities cited.

²⁰ (supra)

Adequate means of redress

- [43] The claimants submit that where the parties differ is that defendants are of the view that any adverse consequences as a result of the implementation of the vaccine policy in relation to these claimants can be adequately remedied by the award of damages and injunctive relief for breach of contract. The difficulty which that position presents is that it ignores the deficiency at common law in respect of breach of contract claims and the non-existence of compensation for non-pecuniary loss.
- [44] A significant aspect of the claimants' case is the impact that the vaccine mandate policy has had on them as humans and as individuals, the injured feelings and indignity suffered by the claimants. Non-pecuniary loss includes damages for injured feelings, whereas damages for the manner in which a particular breach of contract has occurred are non-existent under our common law. They state that the case of **Addis v Gramophone Co Ltd**²¹ concerned the dismissal of an employee and in **Edward Gabbidon v Sagicor Bank Jamaica Limited**,²² the question of adequacy of redress in relation to the non-pecuniary loss, was discussed and a claim for breach of contract offers no recourse.

Section 19(3)- The jurisdiction of the Supreme Court

The claimants submit that a reading of section 19(4) indicates that the court should consider its powers under section 19(3) when the matter comes to be determined whether at trial or the final determination of the claim. It is when the breach of the claimants' Charter rights has been proven that the powers of this court in section 19(3) will be exercisable, therefore this application is premature. They further

²¹ (supra)

²² (supra)

submit that the court can remit the matter to the appropriate court only upon the trial of the matter²³.

The Inapplicability of the Trinidadian Trilogy

- [45] The claimants took aim at the trilogy of Trinidadian authorities (**Harrikissoon**, **Ramanoop** and **Jaroo**) relied on by the defendants in their written submissions. They argue that the constitutional framework of Trinidad and Tobago at the time when these cases were decided differs from our Charter. He added that section 19(4) of our Charter is also completely different from what obtained in section 25 of the constitution before the promulgation of the Charter. Consequently, they submit that the Trinidadian authorities cited by the defendants are distinguishable as the authorities are premised on a different constitutional framework than what currently exists in Jamaica.
- [46] The claimants' argue that in **Harrikissoon**, the court regarded the constitutional claim as untenable and stated that it concerned only the right of a public officer not to be transferred, whereas in the instant case, the constitutional claims are tenable and will impact policies which the defendants have stated are being recommended by private sector organizations and by extension, many other employers and employees.
- [47] The claimants submit that in **Deborah Chen**, on the facts, the claimant was seeking a fair hearing which was possible by virtue of compelling the visitor to hear a claim in an area of law which was settled and within its exclusive jurisdiction, whereas the instant claim raises new issues which clearly impact various human rights.
- [48] They state that in **Careif Limited and another v The Financial Services Commission and other**²⁴ the constitutional claim was not genuine as the

²³ The court requested but received no authority for this proposition.

²⁴ [2016] JMSC Civ. 229

claimants did not in their claim form, seek relief for alleged violations of constitutional rights and its statement of case disclosed no basis for claiming violations under the Constitution.

[49] They argue that in **Jaroo**, the claimant only wished his car to be returned and could simply have challenged the right of the police to retain it, which if successful would have vindicated his rights to enjoyment of his property and due process (the constitutional rights pleaded), as opposed to the instant case where:

- a) even if the policy as currently mandated breaches the contractual rights of the claimants, there will be nothing preventing the defendants in the event of a restructuring or other employers from implementing a similar policy at the outset of employment and
- b) the claimants seek declaratory relief that they are constitutionally entitled to resist the Defendants' policy.

[50] The claimants submit that in **Ramanoop**, the Court recognized that the arbitrary use of state power was an acceptable special feature and the claimants have similarly claimed that their employers have arbitrarily implemented this policy. **Ramanoop** further recognizes that the special feature need only be arguable in order to be sufficient.

[51] They contend that there was no bar to the claimants seeking constitutional relief in the Trinidadian cases as there is no similar provision to our section 19(4) or a section similar to the repealed 25(2) in their constitution. They further contend that it appears that the continued reliance by the Jamaican courts on this point on those authorities from Trinidad and Tobago is misplaced.

[52] The claimants' submit that in the alternative, the nature of the claim arises out of a global pandemic in which the citizens of the earth have been affected and have had to make adjustments, some of those adjustments have involved attempts to not only encourage vaccination and testing but cases in which employers are

saying to employees, under the force of disciplinary proceedings, you must either take a vaccine or be subjected to regular PCR testing which involves the insertion of a foreign object into a bodily orifice.

[53] In the claimant's written submissions, the following were raised as special features of the claim:

- i. The only alternative to the vaccine is testing which will have unjustifiably unequal effects such as:
 - a. unvaccinated individuals are the only ones tested under the policy despite the fact that both vaccinated and unvaccinated individuals can contract and transmit Covid-19.
 - b. unvaccinated individuals are the only ones tested under the policy despite the fact that both vaccinated and unvaccinated individuals can remain asymptomatic while having Covid-19.
 - c. only unvaccinated individuals will be liable to be put on leave, including unpaid leave, in the event that they test positive despite the fact that both vaccinated and unvaccinated individuals can return positive tests.
- iii. the public interest in the litigation
- iv. The indivisibility of any policy requiring employees to submit to one of two medical procedures from not just their rights as contractual employees, but as citizens of Jamaica
- v. The possibility that any future employer may implement these measures as part of contracts from the outset.

The Insufficiency of pleadings

- [54] The claimants argue that this point is not a ground of the application brought by the defendants nor is it a bar to the court hearing the constitutional issues before it, the facts which are being alleged have not changed, it is the same policy which requires the claimants to present themselves for one of two ‘medical procedures.’
- [55] They stated that the defendants have said the policy is not a mandate, but in reference to the case of **Julian Robinson v The Attorney General of Jamaica**²⁵ freedoms are infringed when someone is required to do something or suffer something, section 13(5) says that natural and juristic persons have a right to respect the rights of others, the principle is the same. There is no established authority to say the standard for a juristic person should be different.

THE LAW

- [56] The Charter in the Jamaican Constitution codifies the rights and freedoms to which Jamaica citizens, by virtue of their inherent dignity as persons and as citizens of a free and democratic society are entitled. As a consequence, it places a responsibility on each citizen to respect and uphold the rights of others recognized by the Charter to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.
- [57] The Claimants’ claim that their constitutional rights under sections 13(3)(a), (b), (g), (j)(ii) and (j)(iii) of the Charter are being violated by the Defendants’ implementation of their COVID-19 Vaccination Policy (“the Policy”). The aforementioned sections of the Charter provide as follows: -

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

(a) the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a

²⁵ (supra)

court in respect of a criminal offence of which the person has been convicted;

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

...

(g) the right to equality before the law;”

...

(j) the right of everyone to-

(ii) respect for and protection of private and family life, and privacy of the home;

(iii) protection of privacy of other property and of communication;

[58] Section 19 of the Charter provides an avenue for redress to any person who alleges that his fundamental right(s) and freedom(s) is/are being or is/are likely to be infringed. The relevant sub sections provide as follows: -

“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.

(4) Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.”

The Constitutional Claim

[59] In the case of **Julian Robinson v The Attorney General of Jamaica**²⁶ at paragraph 203, the learned Chief Justice discussed the proper approach to adjudication on the constitutionality of legislation in the Charter. Although the case at bar concerns a workplace policy, I find some of the listed approaches applicable. They are as follows:

“(a) Section 13 (2) of the Jamaican Charter of Fundamental Rights and Freedoms guarantees the fundamental rights and freedoms set out in the Charter subject to the specific limitations as well as a general limitation. Where the statute in question does not fall within the specified limitations, the sole test is the general limitation of whether the law is demonstrably justified in a free and democratic society.

(b) In order for section 13 (2) to be invoked by way of a claim under section 19 of the Constitution of Jamaica, the claimant must show that his or her right has been violated, is being violated, or is likely to be violated. The burden of proof is on a balance of probabilities but at the lower end since this would enable any claimant to have the full and best possible protection guaranteed by the fundamental rights and freedoms. If the claimant fails to do this, then no claim for redress can possibly arise under the Charter for the reason that no Charter violation has occurred, is occurring, or is likely to occur.

(c) The court must determine the scope of the right or freedom in order to have an appreciation of the right or aspects of the right or freedom that are protected by the Charter.

²⁶ (supra)

(d) The starting point for the court is always that the fundamental rights and freedoms are not to be restricted and are to be given their fullest meaning having regard to the words used.

(e) The test of 'demonstrably justified in a free and democratic society' cannot be stated with greater precision because the concept of a free and democratic society is itself, based on values that are incapable of precise definition. The concept of a free and democratic society includes 'respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society'

(f) The absence of the word 'reasonable' from section 13 (2) of the Jamaican Charter does not mean that reasonableness is unimportant.

(g) The rights and freedoms guaranteed are not absolute. This is self-evident because the Charter has specified limitations and one general limitation.

(h) Since the rights and freedoms guaranteed by the Charter are at the core of the Jamaican society's foundation as a free and democratic society it necessarily means that a high standard of justification must be established before rights and freedoms are abrogated, modified, or trespassed on once the claimant shows, prima facie, that there has been a violation of his or her rights or freedoms.

(i) Once the claimant establishes that a right or freedom has been violated the burden of proof shifts to the violator and unless the violator can bring the law within the specific or general limitation then the claimant will succeed. The standard of proof on the claimant is a balance of probabilities but at the lower end.

This can be established by (i) producing evidence; (ii) a textual analysis of the statute, or (iii) analysis of the proposed law in order to show the likely effect it may have. This way of phrasing the matter is to take account of the wording of section 19 (1) of the Charter. Let us be reminded that section 19 (1) states that '[i]f any person alleges any of the provisions of this Charter 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' (emphasis added). This means that the claimant does not have to wait for the violation to occur. If he or she can show that a violation is likely then the Constitution of Jamaica authorises the claimant to seek redress.

(j) The standard of proof on the violator is on a balance of probabilities but at the higher end, closer to the fraud end of the spectrum of proof. The justification for this approach is that what is being dealt with are fundamental rights and freedoms which are to be enjoyed to their fullest extent subject only to necessary limitations. These rights and freedoms must never be lightly curtailed, or infringed, or abrogated. This way of looking at the matter guards against the tyranny of the majority....

(t) If the claimant discharges the burden of proof that a right or freedom has been, is being, or is likely to be violated then the burden, legal and evidential, shifts to the violator to establish that the statute can be saved by specific limitations found in sections 13 (9), (12), 18 or 49, or the general limitation, namely, the law is demonstrably justified in a free and democratic society. In the event that the court is left in a state of uncertainty of whether the violator has satisfied his burden then the claimant must succeed. In the event that the court is of the view that there is a tie, then the claimant must prevail for the reason that in constitutional litigation the attitude of the court must be that the right or freedom prevails unless the violation is clearly justified. This approach ensures that the guarantee given by the Charter is maintained."

THE EVIDENCE

- [60] The 1st Defendant is a limited liability company duly incorporated under the laws of Jamaica.
- [61] The 2nd Defendant is a subsidiary of the 1st Defendant.
- [62] The Claimants are employees of the 2nd Defendant.
- [63] On September 20, 2021, the 1st Defendant issued a written COVID-19 Vaccination Policy (“the policy”) for all companies within its group of companies to be implemented on October 4, 2021. An addendum to the policy was issued on October 4, 2021 and took effect on that date. The policy requires, inter alia, that all employees present proof of vaccination from COVID-19 or such other diseases as may be designated by the 1st Defendant by October 4, 2021 unless a reasonable accommodation is approved.
- [64] The policy further states that employees who fail to comply with its terms will be required to present a negative PCR test result every two (2) weeks or fourteen (14) calendar days at the employee’s expense from a Ministry of Health and Wellness approved laboratory site for COVID-19 testing.
- [65] On October 19, 2021, the claimants initiated a claim against the defendants claiming a breach and/or anticipatory breach of their respective employment contracts and violation of their constitutional rights under sections 13(3)(a), (b),(g) and (j)(ii) and (j)(iii) of the Constitution of Jamaica.

THE CLAIMANTS’ POSITION

- [66] The 1st claimant is employed to the 2nd defendant as a marketing manager. She was employed by Kirk Distributors Limited under a contract of employment dated July 4, 2013 and her employment contract commenced on August 12, 2013. As a marketing manager, the 1st claimant manages a multibillion dollar budget and

directly supervises two employees. Her duties involve supervising and directing the marketing of various products manufactured and sold by the 2nd defendant.

- [67]** The 2nd claimant, Tashana Davis is employed to the 2nd defendant as a portfolio manager. She was employed to Kirk Distributors Limited under a contract of employment dated July 5, 2010. As a portfolio manager, the 2nd claimant manages a multibillion dollar budget and directly supervises one employee. She also manages international brands which involve pre-planning marketing strategies.
- [68]** The 3rd claimant, Sherine Hemmings is employed to the 2nd defendant as a product manager. She was employed to Kirk Distributors Limited under a contract of employment in 2013. As a product manager, the 3rd claimant manages and markets a portfolio of products on behalf of the 2nd defendant.
- [69]** The 4th claimant, Racquel Robertson is employed to the 2nd defendant as a marketing coordinator. She was initially employed to Kirk Distributors Limited on a temporary basis under a contract of employment dated June 3, 2019. Thereafter, on June 1, 2020 she was appointed to the post of marketing coordinator under a contract of employment dated June 9, 2021. As a marketing coordinator, her duties include the management of a multimillion dollar budget and reporting to the 1st claimant.
- [70]** The 5th claimant, Kennesha Dale is employed to the 2nd defendant as a quality assurance analyst. She was initially employed to Federated Pharmaceuticals (2014) Limited on February 4, 2019 under a contract of employment dated February 13, 2019. As a quality assurance analyst, her duties include performing chemical testing, analysing raw materials and packaging materials before use in manufacturing and packaging and testing manufactured products before packaging. Her duties and the duties of her co-workers required them to wear extensive personal protective equipment even before the advent of COVID-19. This includes face masks, gloves, lab coats and hair nets.

- [71] In November 2019, the 1st defendant underwent restructuring and the claimants' contracts of employment were transferred to the 2nd defendant under the same terms and conditions.
- [72] In March 2020, as a consequence of the COVID-19 pandemic, the Government of Jamaica issued and implemented directives such as social distancing, mask wearing and sanitization for businesses under the DRMA. The defendants also implemented corresponding policies within their organization.
- [73] The claimants' assert that they have duly complied with the corresponding policies implemented by the defendants in response to the directives issued by the government and that to their knowledge; they have never been infected by COVID-19.
- [74] The claimants' state that in late 2020 early 2021, vaccines were developed against COVID-19 and Jamaica received its first shipment of vaccines in March 2021. Jamaica continues to receive various shipments of vaccines from time to time in tranches and offers these vaccines to members of the population who wish to receive them. They also state that the government has not issued orders under the DRMA requiring mandatory vaccination of the population.
- [75] The claimants assert that their duties as well as the duties of the employees that the 1st and 2nd claimants supervise do not require them to be regularly present at the office.
- [76] It was also asserted by the 1st and 2nd Claimants that they, along with the 3rd and 4th Claimants are not required to visit stores regularly and that they only visit the stores from time to time, sometimes once per quarter.
- [77] Moreover, they assert that during various periods of forced work-from-home arrangements as a result of the COVID-19 pandemic and from the period of March 2020 up until October 2021 they were able to efficiently and successfully complete their duties. During this time, they state that they have not received any complaints

about their job performance and the 1st, 2nd and 3rd claimants' and the defendants' performance has thrived. The 2nd claimant highlights that she was recently commended by her manager for her role in executing a major promotion, her ability to adapt to the needs of the organization and her level of commitment to its care packages.

[78] The 1st, 2nd, 3rd and 4th claimants submit that they have also been asked by the 2nd defendant to assist with duties outside of their job descriptions and that they have happily complied to support the organization.

[79] In this regard, the 1st, 2nd, 3rd and 4th claimants aver that in 2020 when the pandemic affected Jamaica for most of the year, the 2nd defendant managed to eclipse its financial performance for the previous year. They further aver that the defendants have experienced significant profitability across several product lines including the portfolios that they manage.

[80] Additionally, the claimants posit that the 2nd defendant has been very efficient in dealing with the COVID-19 pandemic. The 5th claimant notes that changes were made to ensure that efficiency was driven for manufactured products such as hand sanitizers, rubbing alcohol and other products which have been very profitable for the defendants. The 2nd defendant also instituted a twenty-four (24) hour production time and other measures to keep up with increased demand. The 5th claimant avers that as a result of this, she has participated in night shifts and other exercises.

[81] The 1st, 2nd, 3rd and 4th claimants state that they generally feel safe at their workplace and COVID-19 infections have been regularly monitored and remain low. The 1st and 2nd claimants assert that during a staff meeting that was held concerning vaccination, the Defendants indicated in a presentation that the COVID-19 contraction rate at the 2nd Defendant's company was very low. They further assert that the defendants also indicated that the cost to the company

during the period of the pandemic was only Two Million Seven Hundred Thousand Jamaican Dollars (J\$2,700,000.00).

The Claimants' personal reasons against COVID-19 vaccines

[82] It is the claimants' contention that as professionals in the pharmaceutical industry they have followed very closely and read extensively on the development of vaccines to combat the COVID-19 pandemic and are therefore unwilling to take the vaccine at this time for several personal reasons.

The 1st Claimant

[83] In a memorandum dated October 7, 2021 in response to the policy, the 1st claimant wrote to the 2nd defendant by way of an email detailing her reasons for not wishing to receive a COVID-19 vaccine at this time.

[84] She maintains that she is not opposed to vaccines especially when they completely prevent the contraction and spread of disease. She highlights that she is fully immunized and has even taken the Vaxigrip H1N1 Vaccine (Sanofi Pasteur) on March 23, 2016 at the 2nd defendant's request. However, she argues that the COVID-19 vaccines have only recently become available and that the 2nd defendant has had nearly a full year of learning how to operate under the threat of COVID-19 without the use of vaccines. Consequently she asserts that the 2nd defendant is well equipped to accommodate her in the workplace without undue hardship.

[85] Furthermore, she states that in an attempt to cooperate with the 2nd defendant, she enquired as to whether she could complete antigen testing instead of PCR testing as outlined in the policy but, her request was denied by her manager.

[86] The 1st claimant notes that she has been observing the impact of the Delta variant on the effectiveness of vaccinations worldwide and the recommendations of the

Centres for Disease Control and Prevention (“CDC”) in the United States of America regarding the delta variant and persons who are vaccinated.

[87] She states that due to her involvement in the pharmaceutical industry, she is aware that advancements in medical information changes rapidly including product recalls and more effective products. She highlights that some manufactures have announced that they are applying for approval for various antiviral drugs for COVID-19. This she asserts means that she may soon have the option of taking oral medication of her choosing instead of vaccination with an imperfect vaccine with new technology. She also asserts that she is aware of advancements locally to both early treatment and hospital care even though she has a very low risk of becoming seriously ill from COVID-19 based on her age.

The 2nd Claimant

[88] By way of an email dated October 5, 2021, in response to the defendants’ vaccination policy, the 2nd claimant provided the 2nd defendant with an email from her health care provider. The email stated that she is medically exempted from COVID-19 vaccines as she has a history of allergic reactions to vaccine components (due to a previous allergic reaction to the H1N1 H3N2 vaccines) and that she is pregnant and it would be unsafe for her and her unborn child to receive it at this time.

[89] The 2nd claimant also wrote to the 2nd defendant on October 7, 2021 by way of an email providing her reasons for not wishing to receive the vaccine at this time. She asserts that the Fact Sheet for Healthcare Providers Administering Vaccine (Vaccination Providers) Pfizer BioNTech COVID-19 Vaccine states that their vaccine should not be administered to persons who have had a previous allergic reaction. Consequently, she argues that she is being punished for her allergy by being forced to provide PCR tests or work without compensation.

The 3rd Claimant

- [90] In a memorandum dated October 7, 2021 addressed to the 2nd defendant in response to its vaccination policy, the 3rd claimant detailed her medical reasons for not wishing to receive the vaccine at this time.
- [91] These include being a woman of child bearing age with a history of and existing gynaecological issues as well as being diagnosed with anemia in 2018. She further asserts that her condition has become quite intense since the beginning of 2021 resulting in the depletion of her ten (10) days allotted sick leave for the year and, she is now in the process of making surgical arrangements. In the circumstances, she advised the 2nd Defendant that to receive the vaccine at this time would be considered unsafe.
- [92] The 3rd claimant maintains that she is fully capable of completing her duties from home.

The 4th Claimant

- [93] On October 6, 2021 by way of a memorandum to the 2nd defendant in response to its vaccination policy, the 4th claimant outlined her religious, moral and medical reasons for not wishing to receive the vaccine at that time.
- [94] She states that she has chronic asthma and has seen individuals who are asthmatic experience increased breathing issues after receiving the vaccine. She further states that she has not had issues with her asthma in the past two years and does not wish to trigger it. She avers that she is a woman of child bearing age and has a history of ovarian cysts and a family history of fibroids and anemia. She states that based on her reading on these medical conditions and COVID-19 vaccines, she believes that it is best to avoid the vaccine if she wants to produce children.
- [95] The 4th claimant contends that she has also decided against taking the vaccines based on her sincerely held religious beliefs and moral duty including certain

biblical commands and principled Christian teachings. It is her belief that there is a moral duty to refuse the use of medical products including certain vaccines that are created using human cells lines derived from abortion during any stage of the vaccine's development, including the testing phase. It is also her belief that the body is the temple of the Holy Spirit and as a Christian, she is compelled to protect it from defilement. Moreover, she contends that when it comes to receiving things into her body, compliance with God's law is required above all.

- [96] She admits that the COVID-19 vaccines do not consist of aborted foetal cells. However, she asserts that all COVID-19 vaccines utilized aborted foetal cells or cell cultures at some stage of the vaccine's development including the testing phase. She avers that manufacturers of COVID-19 vaccines such as Johnson & Johnson and Oxford Astra-Zeneca used a foetal cell line to produce and manufacture their vaccines and that Pfizer and Moderna used a foetal cell line in the early phase to confirm efficacy prior to the production and manufacturing of their vaccines.

The 5th Claimant

- [97] On September 24 and October 4, 2021 by way of memoranda to the 2nd Defendant in response to its vaccination policy, the 5th claimant provided her reasons for not wishing to receive the vaccine at this time.
- [98] She asserts that on September 24, 2021, she communicated with the 2nd defendant that she had an appointment with a doctor to seek a medical report on October 5, 2021. She further asserts that in response, she was informed to refrain from attending work until she could present her medical report. On September 7, 2021, she submitted her medical report to the 2nd defendant for review. Thereafter, she states that she was informed by the 2nd defendant that she was still required to submit a PCR test.

The Claimants' general reasons against COVID-19 vaccines

- [99]** The claimants argue that they are against vaccination at this time as mandatory COVID-19 vaccination is not presently supported by the World Health Organization (WHO) and that the vaccines that are available in Jamaica are not fully approved for use.
- [100]** In fact, they assert that these vaccines have only been given emergency authorisation by the Federal Drug Agency (“FDA”) in the United States of America and other countries. They also note that while the Pfizer vaccine has received a greater level of approval in the United States of America, it is listed on the WHO’s emergency use list and, in any event, is not readily available in Jamaica.
- [101]** The claimants also contend that that as a result of the emergency authorization, manufacturers of the available vaccines have been provided with immunity from lawsuits if the vaccines were to later cause harm to individuals. They state that there are known side effects of the vaccines and admit that while the number of persons who have died is small, they maintain that they must be allowed to make their own decisions to take on the risk of death, no matter how large or small that risk may appear. They also note that Jamaica does not have a domestic vaccine adverse event compensation scheme.
- [102]** The claimants argue that vaccination against COVID-19 does not prevent the contraction or transmission of the virus, the vaccines are not permanent and that based on their ages the risk of COVID-19 hospitalization is extremely low if they were to contract the virus. They also argue that that if they were to contract and recover from the virus, they would develop antibodies that will protect them from infection and illness in the future.
- [103]** As a consequence, the claimants submit that they must weigh the risks of COVID-19 against the possibility of harm and the long term risks that may arise from taking the vaccine.

[104] In the circumstances, the claimants assert that they have been singled out for different treatment as unvaccinated individuals even though a vaccinated individual in their position poses the same risk to other employees and the public that an unvaccinated individual does.

[105] They conclude that vaccination mainly reduces the risk to individuals who are vaccinated and that that the benefit is not worth the risk of taking an experimental vaccine, the results of which has not been seen over years of usage, especially since the virus has a lesser effect on people of their respective ages and state of health.

The effects of the policy on the Claimants

[106] The claimants submit that their contracts of employment and terms and conditions of work do not contain any requirements for vaccination or the presentation of proof of vaccination or negative testing for any diseases. In this regard, the policy is a modification of the terms of their employment.

[107] The 1st, 2nd, 3rd, and 5th claimants contend that they have tried to be cooperative with the organization while maintaining their “personal rights”. The claimants state that PCR testing costs from Twenty-three thousand dollars (\$23,000.00) and upwards and that they would incur an additional monthly financial burden of Forty-six-thousand dollars (\$46,000.00). They also state that repeatedly undergoing testing would pose an inconvenience to them if they do not wish to be vaccinated at this time.

[108] The 2nd claimant contends that due to the current and expected expenses of pregnancy it is difficult to make provisions for funds for PCR testing especially within the time provided for compliance by the 2nd defendant. The 5th claimant further contends that she has relayed her financial concerns in regards to the costs of PCR testing biweekly to the 2nd defendant.

- [109] Furthermore, the claimants state that the policy requires them to submit medical information which they had not previously been required to submit. They assert that they are opposed to being forced to pay for and provide biweekly disclosures in the manner prescribed by the 2nd defendant.
- [110] They further assert that the policy requires them to undergo one (1) of two (2) procedures that require the insertion of instruments and substances into their bodies which they do not wish to have inserted at all or with the frequency suggested by the 2nd defendant.
- [111] They maintain that the requirement to provide a negative PCR test for a disease which does not impair their mental faculties and does not necessarily affect their physical ability to complete their jobs is a new term of their employment. They view the introduction of this term to be unfair and unnecessary in circumstances where they are unable to fully control whether or not they contract the virus.
- [112] The claimants contend that it appears that the defendants require them to subscribe to their views on the developing data, and on the best measures to respond to COVID-19 or suffer financial consequences and ostracism at work. They point to an email sent by the defendants dated October 11, 2021 in which they contend that the Defendants provided statistics of persons who have complied with the policy and emphasized that four (4) unvaccinated employees had received positive PCR tests. In an organization that is not large, it is not unlikely that the identities of these individuals will not be discussed and the defendants have not provided them with any written policy on how the medical information provided from the tests will be protected.
- [113] The claimants therefore claim that their constitutional rights are being infringed by the institution and enforcement of the policy.
- [114] Additionally, the 1st, 2nd, 3rd and 4th Claimants state that the 2nd defendant has removed them as well as other colleagues who have not complied with the policy from email groups which are necessary for the completion of their duties. Despite

this restriction, they have continued to conduct their duties to the best of their abilities.

[115] The 1st claimant contends that on October 6, 2021 she attempted to enter the workplace but was barred from doing so as she had failed to comply with the terms of the policy. She states that this was embarrassing and discriminatory to her as while she stood there, other persons gained access to the Defendants' premises without submitting to the measures outlined in the policy.

[116] The 1st, 2nd, 3rd and 4th claimants were also barred from entering the workplace on October 11, 2021 for failing to comply with the policy. This they submit caused them a great deal of shame and embarrassment in front of their peers.

[117] The 5th claimant avers that on October 8, 2021, she went to meet with the Human Resources personnel at the 2nd defendant's office and that she was informed that senior human resources personnel were not available to meet with her. It was insisted that she would need to present a PCR test in order to work. As a consequence, she has not been to work in the last two (2) weeks.

[118] The claimants state that they have been disheartened to see the organization that they have served faithfully for all these years arbitrarily implement this policy and ostracize them for their noncompliance.

[119] They were also invited to a consultation meeting with the defendants where the policy was reiterated to them and they in turn reiterated their objections to the policy to the defendants.

[120] The 1st, 2nd, 3rd, and 4th claimants state that they were permitted to work from home for the month of September and successfully completed their duties. During that month, they received no deductions from their salaries.

[121] The claimants assert that on October 22, 2021 when they received their salaries for the month of October, they observed that their salaries were significantly reduced. The 1st, 2nd, 3rd and 4th claimants contend that the salaries they received

for the month of October represented an approximately fifty-eight (58) percent, thirteen (13) percent, fifty-six (56) percent and fifty-six (56) percent reduction respectively in their usual salaries. The 3rd and 4th claimants also received sales incentives for that month.

[122] They contend that despite their retention of available vacation dates and continued work, they have not been paid for the days since October 11, 2021 when they were refused entry to the workplace.

[123] The 1st 2nd and 4th claimants submit that the marketing department for another company in the 1st defendant's organization has been permitted to work from home since the start of the pandemic and to the best of their knowledge; no member of that department has received a deduction in their salary.

[124] The 2nd defendant asserts that this is the case despite having been granted six (6) days of paid sick leave during that month. She submits that she was informed by the commercial manager of the 2nd defendant that she should take three (3) paid vacation days and was deemed as absent from work despite continuing to work on those days. She has not been paid for those days and was only paid for three (3) days in the month of October despite the policy being implemented on October 4, 2021.

[125] The 5th claimants submits that she was only compensated for eight (8) hours of work. She also contends that despite her retention of available vacation days, she has not been paid for the days since September when she was refused access to the workplace.

[126] They also note that the software system that the 2nd defendant uses to track days absent from work does not reflect any updates in the days taken by them for unpaid leave.

[127] The claimants state that the deduction in their salaries will significantly affect their budgets and abilities to meet their expenses for the month of November. In

particular, the 1st claimant avers that she is the primary caregiver of her sixteen - month old son and the abrupt deduction in her salary will affect her ability to provide for him. She also states that she contributes to the upkeep of her mother, who is on early retirement as a result of a stroke, including paying her internet bill.

[128] The 2nd claimant further asserts that she is the primary provider of food in her household and that she also uses her salary to pay various bills including insurance. She states that her husband works free-lance, she has two (2) children aged six (6) and four (4) and has a child on the way. Additionally, her father is a sixty-five year old survivor of colon cancer and she contributes to his medical care. Finally, as her mother is retired and has a small pension she also contributes significantly to their household.

[129] The claimants argue that the 2nd defendant has unilaterally implemented the policy and has withheld the salaries due to them under their contracts of employment despite having been advised of their objections to complying with the policy and challenging it in court.

[130] It is also their assertion that the risk of their dismissal, requirement to take unpaid leave or the additional costs of the PCR test per month would significantly affect them and their families. They further assert that it appears that the 2nd defendant is relying on this pressure to force them to become vaccinated.

The 1st and 2nd Claimants' joint position

[131] The 1st and 2nd claimants contend in a joint affidavit that it appears that the Defendants have a target of one hundred percent (100%) vaccination and that they will not stop until this target has been met. They further contend that the policy seeks to put as much social and financial pressure as possible on the employees to ensure that that they are vaccinated.

[132] They aver that the defendants' indicated this target at a staff meeting discussing the policy and in a WhatsApp group message that was sent to a WhatsApp group

in which the 1st Claimant was a member. They also aver that the 1st claimant was removed from the group when it was discovered that she did not wish to become vaccinated.

[133] They claim that it was also highlighted at the staff meeting that the company represented two (2) of the companies that developed the vaccines and that it was his hope that PCR testing would continue. They therefore contend that this thought underpins the policy which only proposes undesirable and burdensome alternatives to vaccination.

[134] They state that they only removed some of their personal items from the defendants' workplace while working from home because they had need of them and that there are personal items of all the Claimants that still remain there.

[135] They assert that the defendants are misleading in suggesting that the claimants wish to be made redundant and that they are only aware of one instance when the topic of redundancy came up in dialogue with the Defendants. They state that this was in the context of a conversation between the 2nd claimant and the Human Resource Manager regarding the policy.

[136] The 2nd claimant denies that she instructed her subordinates to refuse to comply with the policy as those employees are adults and are capable of coming to a decision on their own. She also denies the defendants' allegation that she encouraged persons to not become vaccinated. She states that she made a statement regarding face masks in the privacy of her office and in any event, she continues to wear face masks in compliance with COVID-19 protection guidelines and during the execution of her duties. However, she notes that she experiences shortness of breath, dizziness and sinusitis after continuously wearing face masks.

[137] She admits that while she has shared her personal views on vaccination as many if not most employees have; she denies discouraging other employees from taking what they consider to be the best measures.

- [138]** The 2nd claimant asserts that she bears no ill will towards the company and that she is disappointed that a company which she has served for over a decade is now treating her in this manner and is refusing to consider her concerns which include the uncertain effects of the vaccine on her unborn child.
- [139]** The 1st and 2nd claimants assert that their attorneys-at-law contacted St Joseph's Hospital and were informed that the hospital only provided testing for asymptomatic persons and would not provide regular testing for employees.
- [140]** It was also asserted by the 1st and 2nd claimants that they, along with the 3rd and 4th claimants are not required to visit stores regularly and that they only visit the stores from time to time, sometimes once per quarter.
- [141]** They state that they are able to meet with all stakeholders as there is no vaccination requirement and have been meeting with stakeholders via Microsoft Team Meetings since the beginning of the pandemic. They also state that brand owners have resorted to online meetings and have reduced travel since March 2021. Meetings with customers have also been held via online formats and social distancing methods (including mask wearing) in compliance with the government's prohibition against unnecessary public gatherings.
- [142]** The 1st and 2nd claimants posit that the pandemic has not stopped the claimants from visiting trade shows as this is done with the team members visiting customers (including supermarkets and wholesalers island wide.) They also posit that they have never participated in stock taking exercises while they have been employed by the Defendants.
- [143]** They say that they have never travelled to Canada for work and have only been required to travel to the United States of America. They note that the last time that the 1st claimant travelled for work purposes was in November 2019. The 1st claimant notes that she has not travelled to the Private Label Manufacturers Association ("PLMA") trade show since 2019 and no discussions were held regarding travelling in January 2022. She states that the 2021 PLMA trade show

was held online and that the Defendants did not attend. That registration for the trade show is normally conducted months in advance and, in that regard, discussions would have to have been held. She asserts that as they have not received any major business at the last three (3) trade shows, the defendants stated that they will not return to the PLMA trade show but instead would try to attend the Angua Show in Germany.

[144] The 2nd claimant also contends that she has not been required nor was she asked to travel to represent the company in her capacity as senior brand manager in October 2019 to May 2021 or in her current role as portfolio manager since June 2021.

[145] The claimants submit that the urgency of their application is caused by the imminent measures taken by the 2nd Defendant to enforce the policy and potentially violate their constitutional rights including their dismissal at any time.

THE DEFENDANTS POSITION

[146] Conversely, the defendants' assert that in September 2021 when their vaccination policy was announced, the Claimants and in particular the 1st and 2nd claimants immediately set about rallying support within the company to thwart or undermine the policy. They state that the 1st and 2nd claimants made telephone calls and sent WhatsApp messages to their co-workers discouraging them from complying with the policy.

[147] The defendants posit that while the policy states that the PCR tests must be conducted at a government approved lab, tests conducted at government labs are also accepted.

[148] They aver that the South East Regional Health Authority's (SERHA) lab at St. Joseph's Hospital offers free PCR testing irrespective of whether a person is asymptomatic and that this information was communicated to the Claimants. They

further aver that other employees have been utilizing this service to submit their PCR test results to them in compliance with the policy.

[149] The defendants submit that they are not withholding portions of the claimants' salaries. They further assert that the claimants have chosen not to take the PCR tests which would permit them to enter the defendant's premises, carry out their duties and earn their salaries which far exceed Forty Thousand Dollars (\$40,000.00). They also submit the fact that the St. Joseph's Hospital performs free PCR testing was communicated to the claimants.

[150] They note that the 1st and 5th Claimants have twelve (12) and sixteen (16) days respectively of unused vacation leave that they have opted not to use. They also note that as at October 24, 2021, sixty-six (66) unvaccinated employees, representing eight percent of the group staff complement have submitted PCR tests and have either attended work or gone into isolation based on their test results. They therefore submit that these factors should be taken into consideration when the issue of the purported urgency of the application is being determined.

[151] It is also submitted on the defendants' behalf that as all the claimants are paid on or about the twenty fifth (25th) of each month, if the injunction were to be granted, they would not derive any benefit from it for nearly a month.

[152] Furthermore, the defendants object to the publication of their confidential information by the 1st and 2nd claimants in their Joint Affidavit which was filed on November 9, 2021 without their consent and in breach of their respective employment contracts and the defendants' Code of Business Ethics. They state that the 1st and 2nd claimants' actions render them liable to dismissal for cause and disciplinary proceedings will commence shortly.

[153] They assert that the 1st, 2nd, 3rd, and 4th claimant's job descriptions require them to visit stores regularly to implement and maintain an appropriate schedule for trade visits and to ensure that the needs of customers are addressed in a timely manner.

The 1st and 2nd claimants' duties require them to travel overseas and that virtual visits are only applicable to the Defendants' overseas vendors.

[154] The defendants state that as a result of the COVID-19 pandemic, the last in-person PLMA trade show was in 2019 and that PLMA sent out invitations to the 2022 trade show on October 26, 2021, since the commencement of this suit. They aver that they have not made a decision regarding returning to the PLMA and in any event, that decision would need to be taken in consultation with the 1st claimant. However, they contend that the 1st claimant is not in a position to provide an unbiased recommendation concerning the benefit of attending any overseas trade show at this point.

[155] Additionally, they contend that it is inaccurate for the claimants to say that they were only unaware of one instance of redundancy coming up in dialogue with them. They assert that the 2nd claimant contacted all senior managers asking them to consider redundancy for her and was advising other employees that they should receive redundancy if they are terminated because of non-compliance with the policy.

[156] Finally, the Defendants submit that the claimants have an adequate alternative remedy in contract law and on this basis; the court should decline to exercise its powers concerning the constitutional claims.

[157] Ms. Williamson, in her affidavit ²⁷ gave evidence in her capacity as the Director of Human Resource and Administration for the 1st defendant. This affidavit was in response to the claimant's affidavit in support of their Notice of Application for Court Orders and of Urgency filed on October 19 2021.

[158] According to Ms. Williamson on or about September 5, 2021, a document known as the *COVID-19 Measures in the Workplace: A Protocol Advisory for Businesses* was published by a joint working group comprising the Private Sector Organization

²⁷ filed on November 2, 2021

of Jamaica, the Jamaica Chamber of Commerce, the Jamaica Manufacturers and Exporters Association, the Jamaica Employers' Federation and the Jamaica Confederation of Trade Unions of which the defendants are members. The advisory purported to be a guide, and as a result of its publication, the defendants scrupulously followed all the recommendations set out therein.

[159] In discussing the risk of infection and the impact on the defendants' business, Ms Williamson averred that between March of 2020 and October of 2021, at least 70 employees across the Cari-Med group of companies contracted COVID-19. She went further to state that they all received full emoluments for the period of their absence. Over the stated period, 1 (one) contractor died, several staff members were critically ill and the defendants assisted with organizing hospital admittance and providing medication.

[160] In highlighting the ramifications to the business due to absenteeism when an employee tests positive for COVID-19, she stated that in June of 2021, 16 employees at the defendants' factory contracted the virus, forcing the closure of the plant for 8 days and causing estimated losses of Fifteen Million Jamaican Dollars (J\$15,400,000) to include production and salary.

[161] Ms Williamson stated that all of the cited instances of COVID-19 positive employees over the stated period occurred despite extensive measures taken to protect employees from contracting the virus. She further added that Personal Protective Equipment ("PPE") which costs approximately Ninety-four Million Jamaican Dollars (J\$94,000,000) is supplied monthly to the sales and merchandising teams (field team). The defendants' business includes manufacturing, distributing, merchandising, warehousing sales, marketing and trade promotional activities and the vast majority of employees are unable to effectively work from home.

[162] According to Ms. Williamson, during the month of August, 2021 one of the company's largest wholesale customers wrote to the company requesting that all

merchandisers associated with their account should be vaccinated by September 1, 2021. This customer falls under the portfolio of the 1st and 4th claimants.

Consultations and Access to Vaccines

[163] Ms Williamson stated that the defendants have conducted several employee surveys since 2020. In 2020, a survey was done on the Company's response to the pandemic and eighty-three percent (83%) of respondents indicated strong satisfaction with the measures implemented since the pandemic.

[164] In June 2021, the Defendants conducted a survey amongst its staff to gauge their willingness to be vaccinated. The results of the survey showed that forty-seven percent (47%) of respondents were ready to take the COVID-19 vaccine, twenty-two percent (22%) were not ready and thirty-one percent (31%) responded 'maybe'. Of note at that time, thirty-six percent (36%) of the staff indicated a preference for the Johnson & Johnson vaccine, twenty-seven percent (27%) preferred Astra Zeneca and twenty-six percent (26%) had a preference for Pfizer. Eleven percent of respondents (11%) were undecided and indicated no preference.

[165] According to Ms. Williamson the defendants held a vaccination blitz in collaboration with the Private Sector Vaccine Initiative. The blitz was held on September 13, 2021 and immediately thereafter the vaccination rate within the company increased from thirty percent (30%) in July 2021 to sixty percent (60%). Thereafter, the defendants' held a Zoom meeting on September 20, 2021 with all employees to indicate the company's intent to roll out the vaccination policy effective October 4, 2021. A medical practitioner was present in the meeting to address the employees' concerns and the policy directive was then shared with all employees on September 20, 2021.

[166] Ms. Williamson further averred that on September 27, 2021, the company received a letter from the 5th claimant stating her intention not to adhere to the policy. The

company again brought in a doctor from the Ministry of Health & Wellness to address staff on October 7, 2021.

- [167]** At the commencement of the implementation of the policy in 2021, the 1st and 3rd claimants' applied for vacation leave on October 2, 2021 for the period October 4 to 6, 2021 and October 4 to 7, 2021 respectively. On October 7, 2021, the 1st claimant applied for vacation leave for the period October 7 to 8, 2021 and the 3rd claimant applied for vacation leave for October 8, 2021. The 4th claimant applied for vacation leave on October 5, 2021 for the period October 4 to 7, 2021 and on October 8, 2021, she applied for a sick day for that day. The 2nd claimant applied for vacation leave on October 7, 2021 for one day and on October 8, 2021, she applied for sick leave for that day. On October 13, 2021, the 2nd claimant applied for sick leave for the period October 11 to 15, 2021. No further days were requested.
- [168]** On October 5, 2021, the 2nd claimant submitted a letter stating a medical exemption from the vaccine and requesting a mutually beneficial separation agreement. She also removed all her personal items from the office on September 28, 2021.
- [169]** On October 7, 2021, the defendants received letters from the 1st, 3rd and 4th claimants stating that they will not be complying with the policy. The claimants had removed their personal items from the office between September 21 and 24, 2021 after the announcement of the policy. On October 11, 2021, the 1st to 4th claimants attended the defendants' place of business in a convoy without proof of vaccination or a negative PCR test result in accordance with the policy and were denied entry.
- [170]** Subsequent to this incident, consultations were held with the claimants who verbally maintained their position not to comply with the policy. Some of the claimants enquired whether there was the option of voluntary redundancy which was considered by the defendants but ultimately rejected for three main reasons. Firstly, the circumstances would not qualify as a genuine redundancy under the Employment (Termination and Redundancy Payments) Act. Secondly, it would set

a bad precedent within the company where opportunistic employees could seek financial compensation whenever a new policy, whether on health and safety or otherwise, was implemented. Finally, the defendants were satisfied that they had made reasonable accommodations for the claimants, whom they felt were being unreasonable.

[171] According to Ms. Williamson, examples of the claimants' unreasonable and disruptive conduct are:-

- a. The 1st claimant, who is a marketing manager and supervises the 3rd and 4th Claimants, instructed her co-workers not to adhere to the policy. All employees whom she supervises on the marketing team who sit in the same general area have refused to comply with the policy.
- b. The 1st claimant has publicly commented that wearing face masks leads to illness because you are inhaling what you exhale and that the COVID-19 vaccine is 'poison' which she does not intend on putting into her body. Attached to the affidavit was a copy of a letter from another employee to this effect.
- c. The 1st claimant claimed COVID-19 was predicted by movies years ago.
- d. The 2nd claimant contributes to the misinformation and conspiracy theories surrounding the pandemic through the information she shares on her social media pages, including one post that ridicules people who wear face masks.
- e. The 2nd claimant shared with a co-worker, who had contracted COVID-19, that his misfortune was because he was targeted, as he was over-sanitized which had weakened his immune system coupled with the constant wearing of masks.

- f. The 2nd claimant repeatedly discouraged employees from other departments such as warehouse and merchandising team members from taking the vaccine. She told them they would be "fools" if they took the vaccine. The senior human resource manager met with her regarding her behaviour on September 24, 2021 and instructed her to desist from this practice which she denied.

The Claimants' reasons for non-compliance

[172] It was clear from the consultations and statements made by the claimants inside the workplace and on social media that they were determined to not comply with the defendants' vaccination policy, and nothing other than a redundancy payment would be acceptable to them. This was based on correspondence between the 2nd claimant and a co-worker encouraging that co-worker to continue to turn up for work and if asked to leave, to request a termination letter and a redundancy payment.

[173] Ms Williamson affirms that the defendants are unaware of the 2nd claimant having an allergic reaction to H1N1 and H3N2 vaccines and additionally that there is no record of the 2nd claimant having sought sick leave at the time she took those vaccines. Furthermore, although the 2nd claimant claims that her obstetrician recommended that she not take the vaccine, she has not given full disclosure of this. As far as the defendants are aware, the 2nd claimant's obstetrician is Dr. Rudolph Stevens. On or about October 1, 2021, in a WhatsApp exchange, which was given to the defendants by the 2nd claimant, Dr Stevens recommended that the 2nd claimant take the vaccine citing the CDC's guidance that said that "pregnant women with symptomatic COVID-19 have a 70% increased risk of death." The 2nd claimant responded to her doctor and stated, "Yes...thanks for your recommendation...however, it is not in my interest to take a (sic) experimental new drug at this time."

- [174] It is the defendants' belief that dissatisfied with her obstetrician's recommendation, the 2nd claimant then consulted Dr Campbell-Simpson who recommended that she "avoid taking the COVID- 19 vaccine at this time and for the duration of her pregnancy", in a document dated October 4, 2021. Thereafter, on October 11, 2021 she submitted a sick leave certificate from Dr. Stevens for seven (7) days sick leave.
- [175] The 2nd claimant does not require the defendants' permission to avoid taking the vaccine but is required to present a negative PCR test result in accordance with the policy to be able to attend the workplace. There is no medical reason that the 2nd claimant cannot be tested.
- [176] Ms. Williamson continued by stating that the 3rd and 4th claimants have not presented to the defendants any evidence that they have received medical advice that they should not take the available COVID-19 vaccines. The 5th claimant submitted a medical exemption letter on October 7, 2021 but that letter does not indicate the reason that she is claiming the exemption.
- [177] In response to the 4th claimant, Ms. Williamson states that she has not presented by way of any evidence to the defendants that it is a fundamental tenet of the Christian faith to refuse the vaccine. In any event, an exemption on religious grounds would not remove the need to present a negative PCR test result every 2 weeks to enter the defendants' premises. The allegation that COVID-19 vaccines are "created using human foetal cell lines derived from abortion" is false.

Reasonable Alternatives

- [178] The affiant states that PCR tests may be conducted free of cost at government laboratories, including St. Joseph's Hospital which is within 4.0 km of the 1st defendant's head office. This information has been brought to the claimants' attention and it represents a reasonable alternative to vaccination that would help to maintain a safe work environment without any additional financial cost to the claimants.

[179] According to Ms Williamson, contrary to the arguments put forward by the claimants, the Pfizer vaccine is no longer administered on an emergency use authorisation basis. On August 23, 2021, the United States Food and Drug Administration (FDA) granted full approval of the Pfizer-BioNTech COVID-19 vaccine for individuals aged 16 years and older. To the extent that this was a reason for refusing to take a COVID-19 vaccine, that reason no longer exists.

[180] Ms. Williamson categorically states that none of the claimants can fully or effectively discharge their duties from home. The claimants' duties include one or more of the following:

- a. Meeting with key stake holders (customers, brand owners, advertising agencies and other external parties) at their locations (the 1st-4th Claimants);
- b. Participating in trade visits which is required 40% of the time; (the 1st-4th Claimants);
- c. Attending in-store promotional activities (the 1st – 4th Claimants);
- d. Overseas travel, including to the United States and Canada (the 1st and 2nd Claimants);
- e. Actively participate in stock-taking exercises; (1st – 5th Claimants);
- f. Inspecting the company's products (the 5th Claimant); and
- g. Interacting with other team members (all Claimants).

[181] Ms. Williamson stated that with respect to travel to the United States of America, on October 25, 2021, the President of the United States of America issued a proclamation to suspend and limit entry into the country for non-U.S. citizens who are non-immigrants, seeking to enter the United States by air travel and who are not fully vaccinated against COVID-19.

[182] She points out that the 1st and 5th claimants currently have twelve (12) and sixteen (16) days of unused vacation leave respectively that they have opted not to use. As at October 24, 2021, sixty-six (66) members of staff are unvaccinated, representing eight percent (8%) of the group staff complement, and they have submitted PCR tests results and either attended work or gone into isolation based on testing positive for COVID-19. Since implementing the policy, six (6) employees have returned positive COVID-19 test results. The claimants who are non-compliant represent less than one (1%) of the staff complement. She also denies the claimants' allegation that the defendants are withholding portions of the Claimants' salaries.

[183] Ms Williamson states that the defendants will be severely prejudiced if the Court were to grant the injunction. She further states that there is a fear that it would encourage the employees who are presently unvaccinated but are submitting PCR tests to stop doing so and/or file suit. It would unnecessarily increase the risk of transmission of the virus and increase the chances of another workplace cluster, which would cause millions in losses. Further, that there is no reason to believe that the claimants would be in a position to pay damages, which, in any event would not be adequate to compensate everyone who would be adversely affected. The defendants also fear that some employees would cease coming in to work and/or seek employment elsewhere.

[184] She avers that the 1st claimant would also be unable to perform key aspects of her employment, including attending the Private Label Manufacturers Association (PLMA) Trade Show in Chicago in January 2022, which she attended on the last three (3) occasions.

[185] Lastly, Ms. Williamson contends that the 2nd claimant would not be able to represent the company at any overseas meetings with the brand owners of the portfolio she manages and, the regional office which is based in the Dominican Republic also requires visitors to be fully vaccinated.

ANALYSIS

Constitutional claims

[186] When and against whom can the claimants enforce their fundamental rights under the Charter of Fundamental Rights and Freedoms?

[187] In answer to when can the claimants enforce their rights, the Privy Council said in **Jaroo v The Attorney General of Trinidad and Tobago**²⁸

“37. Dr Ramsahoye said that it was sufficient for him to meet this challenge to show that there had been a breach of section 4(a). This was because it was provided by section 14(1) that his right to apply to the High Court by way of originating motion was without prejudice to any other action with respect to the same matter that is lawfully available. He said that Lord Diplock’s observations in Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265 at p 268 had been misunderstood by the Court of Appeal. He maintained that it was the making of a “mere allegation” of a contravention of a human right or fundamental freedom that was being criticised in that passage by Lord Diplock. He accepted that a mere allegation was not enough to entitle the applicant to proceed by way of an originating motion. But he said that, provided that he could establish that there had been a breach of the constitutional guarantee, the choice of remedy was a matter for the individual.

38. 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

²⁸ [2002] 1 A.C. 871 at paras 38 and 39

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.

39. *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.”*

[188] 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 claimants, like any other citizen/s regardless of ‘race, place of origin, social class’ or political opinion who allege that his or her ‘constitutional rights have been, are being or are likely to be infringed’ may bring a claim before the Supreme Court.

[189] In order to succeed, the claimants must show that:

- (1) they have sufficient standing to bring this claim, that is, they must show that a Charter right has been, is being or is likely to be infringed in relation to them;
- (2) the act/s they wish 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;
- (3) the defendants are bound by the right(s) claimed;
- (4) the defendants' conduct infringed their Charter rights; and
- (5) there are no other adequate means of redress.²⁹

[190] The claimants have established their standing to have brought the claim; in that they have satisfied the requirements of section 19(1) and (2) of the Charter. There is no dispute that they are Jamaican citizens who have been directly affected by the actions of the defendants.

[191] In the case of **Maurice Tomlinson v Television Jamaica Limited and others**³⁰, the Full Court set out what is the starting point in relation to fundamental rights cases as it is for the claimants who seek redress to allege infringement 'in relation to himself,' [themselves].

[192] 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

²⁹ 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.

³⁰ [2013] JMFC Full 5

Court of Jamaica in the case of **Banton and others v Alcoa Minerals of Jamaica and others**³¹ 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 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, compromise 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

³¹ (1971) 17 WIR 207 as stated by Parnell J, at page 305

contravention of the guaranteed right and not merely seeking the advisory opinion of the court on some controversial arid or spent dispute.”³²

[193] 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.

[194] The defendants relied on the cases of **Harrikisson v The Attorney General of Trinidad and Tobago**³³ ; **Thakur Persad Jaroo v The Attorney General of Trinidad and Tobago**³⁴ ; **Attorney General of Trinidad and Tobago v Siewchand Ramanoop**,³⁵ a trilogy of Privy Council decisions out of our sister jurisdiction which all deal with this point.³⁶

[195] **Harrikissoon v Attorney General of Trinidad and Tobago**,³⁷ 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 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

³² This case discussed Chapter III of the Constitution, Order in Council, 1962 which has since been repealed.

³³ (supra) [1980] AC 265 5 PCA 13 of 2004

³⁴ (supra) [2002] 1 AC 871

³⁵ (supra) PCA 13 of 2004

³⁶ 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.

³⁷ (supra) (1979) 31 W.I.R. 348

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.

[196] 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.”

[197] 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”.

[198] The defendants 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**³⁸ 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. ...

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

³⁸ [2002] UKPC 5

person may apply to the High Court for redress by way of originating motion.
(Emphasis mine).³⁹

[199] 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.”

[200] 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.

[201] 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.

[202] 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.

[203] 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.

[204] 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".

[205] 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.

[206] 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.

The Board made it clear that, the originating motion procedure under section 14(1)⁴⁰ 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

⁴⁰ section 19(1) in Jamaica

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.

[207] 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.

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.”

- [208]** In the case of **The Attorney General of Trinidad and Tobago v Ramanoop**,⁴¹ 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 \$18,000.00 for deprivation of liberty, and \$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.
- [209]** 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”.
- [210]** 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

⁴¹ (supra)[2005] UKPC 15

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”.

- [211] 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.
- [212] 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”. However, 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.
- [213] 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.

[214] 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.”

[215] 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.

[216] 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.

[217] 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.

[218] 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.

[219] 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.*

[220] 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.**⁴² 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. 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,

⁴² [2013] EWCA Crim 1649

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.⁴³

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

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

⁴³ Supra paras. 107 and 108

by counsel for the applicant which demonstrate a consideration of *'the true nature of the right allegedly contravened'*.

viii) Further, 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.

Decisions from the Supreme Court

[221] The defendants also relied on the case of **Deborah Chen v The University of the West Indies**⁴⁴ 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, 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.”

[222] 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.

[223] In **Careif Limited v Anthony Tharpe et al**,⁴⁵ my learned brother, K. Anderson, J, said:

“[65]The next question therefore, which this court must ask itself, and then proceed to answer is: Has the 2nd claimant’s statement of case disclosed reasonable grounds for bringing a claim for constitutional redress/reliefs as

⁴⁴ (supra) [2021] JMSC Civ. 1

⁴⁵ (supra) [2016] JMSC Civ. 229

against all of, or either of the defendants? The simple answer to this question is, 'No.'

[66] That is so because, all of the specific matters in respect of which the 2nd claimant has founded his claim for constitutional relief/redress, are all matters in respect of which, he can and should properly seek redress, via the law of tort, as he has in fact done. Alternatively, he could and should have sought redress by means of judicial review.

[67] The Court of Appeal of Jamaica, has, on more than one occasion, in various cases, concluded that even though there appears to have been a breach or breaches by Crown servants and/or agents, of the provisions of the Jamaican constitution which safeguard persons' fundamental human rights, nonetheless, applications for constitutional redress are to be refused, on the ground that adequate means of redress were available to the applicants/appellants, under other law. See for instance, *Director of Public Prosecutions (D.P.P) for Jamaica v Fuertado* – [1979] 30 W.I.R 206.

[224] As a consequence, the learned judge, K. Anderson, J relying on section 19(4) of the Charter and **Harrikissoon**, made orders that the claimants' claim for constitutional redress/relief, was struck out, on the ground that the claimants had adequate, alternative means of redress.

[225] 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:

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).*

[226] It is therefore for the claimants, before resorting to seeking redress under section 19 of the Charter, to consider the true nature of the right allegedly contravened. They 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 section 19 will be inappropriate and will be considered an abuse of the process.⁴⁶

[227] The defendants contend that the true nature of the alleged contravention is in the view of the claimants, a violation of their right to attend work and be paid without complying with the policy requiring vaccination or proof of negative test results. The remedies which the claimants seek on the claim are injunctive relief, to restrain the enforcement of the policy in respect of themselves and damages to compensate for any loss suffered.

The claimants must therefore **show**, meaning in the sense articulated by the learned Chief Justice in **Julian Robinson**, what is the *true nature* of the right allegedly contravened? The claimants bear an evidential burden to establish the true nature of the right and the contravention of each right under the Charter. The standard of proof is on the lower end of the balance of probabilities. The court will now turn to the rights allegedly contravened.

The right to life, 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

⁴⁶ Lord Hope in *Jaroo v Attorney-General of Trinidad and Tobago* [2003] UKPC 5 at 39

of a criminal offence of which the person has been convicted - section 13(3)(a) of the Charter of Fundamental Rights and Freedoms

[228] The evidence which relates to this right is set out below:

“they must be allowed to make their own decisions to take on the risk of death, no matter how large or small that risk may appear.”

“Vaccination against COVID-19 does not prevent the contraction or transmission of the virus, the vaccines are not permanent and that based on their ages the risk of COVID-19 hospitalization is extremely low if they were to contract the virus.... if they were to contract and recover from the virus, they would develop antibodies that will protect them from infection and illness in the future.”

“They must weigh the risks of COVID-19 against the possibility of harm and the long term risks that may arise from taking the vaccine.”

“The policy requires them to undergo one (1) of two (2) procedures that require the insertion of instruments and substances into their bodies which they do not wish to have inserted with the frequency suggested by the 2nd Defendant.”

[229] The guaranteed rights in section 13(3)(a) usually arise in cases concerning the administration of justice, and encompasses the conduct of the state in how it administers, enforces and effects compliance with the law.⁴⁷

As emphasized by my colleague Bastarache J., the dominant strand of jurisprudence on s. 7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person, namely, those “that occur as a result of an individual’s interaction with the justice system and its administration”: New Brunswick (Minister of Health and Community

⁴⁷see Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429 at paragraph 77.

Services) v. G. (J.), [1999] 3 S.C.R. 46, at para. 65 “[T]he justice system and its administration” refers to “the state’s conduct in the course of enforcing and securing compliance with the law” (G. (J.), at para. 65). This view limits the potential scope of “life, liberty and security of the person” by asking whom or what s. 7 protects against. Under this narrow interpretation, s. 7 does not protect against all measures that might in some way impinge on life, liberty or security, but only against those that can be attributed to state action implicating the administration of justice: see B. (R.) v. Children’s Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315, at paras. 21-23, per Lamer C.J., again writing for himself; and G. (J.), supra, for the majority. This approach was affirmed in Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, per Bastarache J. for the majority.”

[230] Security of the person as defined in the *R v Morgentaler*⁴⁸ is 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.*”

[231] The evidence does not disclose state interference with the body of the claimants or that there will be such interference by the defendant. The claimants have cited a willingness to risk death from COVID-19 and this is to be weighed against the right to life. There is no evidence of psychological stress before the court and no evidence of how PCR testing will amount to interference with bodily integrity. The claimants have said they do not wish to be tested, this is different than saying there is interference in the sense meant by a contravention of a protected right. There is no contravention of this right on the evidence.

⁴⁸ [1988] 1 S.C.R. 30 at 56

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

[232] The Full Court in the case of **Brendan Courtney Bain v The University of the West Indies**⁴⁹ 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.”*⁵⁰

[233] 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):

“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.”

[234] The Charter provides for 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

⁴⁹ (supra) [2017] JMFC Full 3

⁵⁰ Para 90

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.

[235] The case of **Bain** was cited by the claimants 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.

[236] 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.”

[237] The evidence adduced under this right was follows:

“The Claimants state that PCR testing costs from Twenty-three Thousand dollars (\$23,000.00) and upwards and that they would incur an additional monthly financial burden of Forty six-thousand dollars (\$46,000.00). They also state that repeatedly undergoing testing would pose an inconvenience to them if they do not wish to be vaccinated at this time.”

“It was highlighted at the staff meeting that the company represented two (2) of the companies that developed the vaccines and that it was his hope that PCR testing would continue. They therefore contend that this thought underpins the policy which only proposes undesirable and burdensome alternatives to vaccination.”

The first claimant states that due to her involvement in the pharmaceutical industry, she is aware that advancements in medical information changes rapidly including product recalls and more effective products. She highlights that some manufactures have announced that they are applying for approval for various antiviral drugs for COVID-19. This she asserts means that the she may soon have the option of taking oral medication of her choosing instead of vaccination with an imperfect vaccine with new technology. She also asserts that she is aware of advancements locally to both early treatment and hospital care even though she has a very low risk of becoming seriously ill from COVID-19 based on her age.

[238] 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.”

[239] The fourth claimant asserts a religious exemption for taking the vaccine.

[240] This right has been characterised by the Supreme Court of Canada in the case of Big M Drug Mart Ltd.⁵¹

“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 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.”

[241] The 4th claimant has given this court the same reasons as the other claimants for not being tested which are the inconvenience, burdensome, undesirable and expensive PCR tests. There is therefore no religious exemption with regard to testing on the evidence. These use of these adjectives to describe the process of testing or the test itself does not discharge the evidential burden which has been placed on the claimants. The defendants advised the claimants where to obtain free testing, the claimants say that they were told that the notion of free testing is false. The claimants’ have not adduced any direct evidence in this regard. The issue of the cost of PCR tests and its effect on the claimants is one which is being reserved for the trial of the claim.

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

[242] In the case at bar, the claimants allege inter alia, a breach of the freedom of thought, conscience, belief and observance of political doctrines. The evidence presented by the claimants disclosed that they registered their discontent with the defendants and then chose to fail to comply with the policy. It is therefore arguable that there was no contravention of the right.

[243] The right to freedom of thought, conscience and belief does not impose a corresponding duty on a juristic person who is a private citizen to allow for others to express their thoughts and beliefs on his private property. The private citizen also has the right to his thoughts about the thoughts and rights of others. That private citizen would first have to allow another person to enter onto his premises and then to allow for the free exercise of the right. The property owner also enjoys the right to privacy and property. It is the duty of the one asserting the right not to exercise it to the prejudice of the owner of the property 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 happen to also own or possess property. This right is honoured as a prohibition rather than as a positive duty.

[244] The claimants have failed to adduce evidence to show that right has been interfered with by the defendant. They have set out their objections to the policy in writing, in staff meetings, in messages, they have not been interfered with. There is no discernible breach of this right.

The right to equality before the law - Section 13 (3) (g) of the Charter of Fundamental Rights and Freedoms

-Does the Defendant's policy have the force of law?-

[245] In the case of **Virgo, Dale and ZV v Board of Management of Kensington Primary School**⁵², Bertram-Linton, J examined the right to equality before the law.

⁵² [2020] JMFC Full 6

She noted that the authorities have concluded that in order to determine whether a claimant's right has been breached, "the court has to examine the nature, content and meaning of the right which has been said to be infringed. At paragraphs 95 – she opined as follows:-

"[95] In the case of **Rural Transit Association Ltd v Jamaica Urban Transit Company and others**⁵³, the court considered the reasoning of the court in **Banton** and in **Maurice Tomlinson**, in particular on the issue of standing. The court concluded that in order to determine if a Claimant's right has been breached, "the court has to examine the nature, content and meaning of the right which has been said to be infringed.

[96] Therefore, what does it mean to have 'equality before the law'? In answering this question, the court in **Rural Transit** sought guidance, on the interpretation of section 13 (3) (g), from the Privy Council case of **Central Broadcasting Services Limited and Another v Attorney General [2007] 2 LRC**, where a similar provision under section 4 of the Trinidad and Tobago Constitution was being considered. McDonald, J posited:

[169] In **Central Broadcasting Services Limited and Another v Attorney General (2007) 2 LRC**, the Judicial Committee of the Privy Council offered guidance on the interpretation of the following similar provisions under Section 4 of the Trinidad and Tobago Constitution.

"(b) the right of the individual to equality before the law and the protection of the law....."

"(d) the right of the individual to equality of treatment from any public authority in the exercise of any functions....."

⁵³ [2015] JMSC Civ. 224

[170] In **Central Broadcasting Services Ltd. Lord Mance** noted at paragraph 20:

“The Board has, however, one observation to make on the treatment in the courts below of inequality. In both courts it was assumed that the unequal treatment which was established justified a breach both of s 4 (b) and s 4 (d) of the Constitution. The Board does not consider this to be correct. Section 4 (d) is the provision covering circumstances such as the present. Section 4 (b) is, in the Board’s view directed to equal protection as a matter of law in itself and its administration in the Courts”

[171] I find that Section 13 (3) (g) of the Jamaica Constitution may be interpreted in the same way as Section 4(b) of the Trinidadian Constitution having regard to the similarity of the provisions.

[246] Justice Bertram-Linton continued in her analysis and stated categorically that the case illustrates that for the right under section 13 (3) (g) to be engaged the alleged breach must be a law. At paragraphs 97- 100 she posited that:-

“The Constitution defines ‘law’ in section 1 (1) of the Constitution, it states: “1 (i) ‘law’ includes any instrument having the force of law and any unwritten rule of law.’

*We can deduce from this definition that the Constitution, when referring to ‘any instrument having force of law’, is describing legislation and any subsidiary laws such as regulations. The Constitution does not specify what can fall within the term ‘unwritten rule of law’ leaving the court to make its own interpretation. In the case of **Arthur Baugh v Curtis et al** (unreported) Supreme Court, Claim No. CL B 099 of 1997, judgment delivered 6 October*

2006, Sykes J considered what is included in the term 'unwritten rule of law'.
He states:

“From these passages unwritten law must include the common law. If it were not so then what we would have had is the possibility of the common law prevailing over the constitution – a possibility inconsistent with the position that the Constitution is the supreme law of Jamaica. The effect of Lord Hope’s analysis is that the authority of Nasralla has been severely weakened. What was not so vividly expressed in the majority was made plain by the concurring minority.”

McDonald, J in **Rural Transit** in her analysis of the right to equality before the law, having considered the content, nature and meaning of the right, determined that the right cannot include policy, even if it is a policy of a government entity as a policy does not have force of law. She posits in paragraph 188:

So having regard to the definition contained in Section 1(1) of the Constitution of 'law', and the manner in which the Court has interpreted that section, I find that it could not be seen as including a policy that has been made, or a directive that has been given which does not have the force of law as contemplated by these authorities. I would respectfully adopt the observation of my learned colleague Mr. Justice Frank Williamson when he states that “the difficulty that the Claimant faces in light of the definition of law in Section 1 of the Constitution and the general undertaking of the scope of section 13 (3)(9),” is that the Defendants have all described the creation of the exclusive bus lane as a policy or project and there has been no instrument having the force of law put before the court or any reference made to any rule of the common law which the court might consider as the source of the constituted breaches being complained of”.

Having regard to the assessment of the authorities, I am of the view that the facts of this case do not support a finding that the right to equality before the law has been engaged, let alone infringed by the Defendants. The policy in question does not meet the criteria, it not being a law.”

[247] This court similarly finds that the policy in question does not fall within the definition of ‘law’ for the purposes of section 13 (3) (g). This right also has not been contravened.

[248] The right of everyone to respect for and protection of private and family life, and privacy of the home – section 13(3)(j)(ii)

The right of everyone to protection of privacy of other property and of communication – section 3(3)(j)(iii)

[249] The right to privacy is sacrosanct, it is guaranteed and jealously guarded by the Charter, however like every right it is not absolute, there are limitations once the restriction is not arbitrary or unreasonable. It again, is for the claimant to demonstrate the true nature of the right, this has not been done. Decisions made to safeguard the well-being, health and safety of workers are important and those decisions are always reviewable. The context in which the decision to implement the is important because it must be weighed against the standard of reasonableness. The inherent dignity of the human body is not at stake here.

[250] The aim of the policy is for another stage in the proceedings, the claimants first have to raise a prima facie case by their evidence. There has been no evidence with respect to any possible breach of this right. The claimants have only said that the contract of employment does not require them to provide confidential, medical information to the defendants and they do not know how this information when it is provided is stored. They are of the opinion that in a company the size of the defendants’ this information will be discussed, there is no basis for this conclusion in the evidence. The determination of any implied terms in the contract of employment is an issue reserved for trial and the absence of evidence is not

evidence. If the claimants cannot speak to how data is stored then they cannot be giving evidence about the manner of storage. The claimants have failed to discharge the evidential burden for these rights as well.

The insufficiency of the evidence presented to the court

[251] The claimants have not provided any evidence as to the following:

- a. medical reports with respect to the medical exemptions sought under the policy;
- b. expert reports with respect to the scientific conclusions set out in the affidavits;
- c. payslips in respect of the averment as to deductions from their salaries;
- d. leave records.

The impact of PCR testing cannot be measured by the court because the claimants have not been tested. Therefore, all that remains is the financial burden which testing will impose. The court has not been put in a position to weigh the evidence presented to it. The absence of evidence is not evidence and the court is therefore not prepared to find a contravention of a protected Charter right under this head.

Adequate parallel/alternate remedy

[252] The mere existence of an alternative remedy does not automatically justify excluding constitutional proceedings. The crux is their adequacy. The power to decline jurisdiction arises after the consideration of whether the alternative means of redress are adequate.

[253] The defendants submit that the court can award both an injunction and damages on a claim for breach of contract if the court is satisfied that the claimants are so entitled. They argue that there is no authority which equates adequate remedy with

desired remedy. The defendants submit that the claimants have pleaded that the enforcement of the policy is a breach of their respective contracts of employment. In this regard, the adequate parallel remedy to prevent the further enforcement of the policy against the Claimants as well as to compensate them for any loss incurred from the prior enforcement of the policy are available in a claim for breach of contract. It therefore cannot be said that that the private law remedies are inadequate in order to justify embarking on a constitutional claim.

[254] The claimants submitted that there is a deficiency at common law in respect of breach of contract claims and the non-existence of compensation for non-pecuniary loss. A significant aspect of the claimants' case is the impact that the vaccine mandate policy has had on them as humans and as individuals, the injured feelings and indignity suffered by the claimants. Non-pecuniary loss includes damages for injured feelings, whereas damages for the manner in which a particular breach of contract has occurred are non-existent under our common law.

[255] 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" exists⁵⁴. 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 more costly 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.

[256] 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 private entities. The

⁵⁴ Tracy Robinson, Arif Balkan, Adrian Saunders, *Fundamentals of Caribbean Constitutional Law*, 2015, para 9-037

question for the court is whether there are adequate remedies in the law of contract (the parallel remedy) which can provide an adequate remedy for the alleged contraventions of the claimant's constitutional rights.

Under this head the court will turn to look at non-pecuniary loss to address the claimants' concerns.

Non-pecuniary loss – shame, hurt feelings, indignity

[257] The claimants submit further, that an award of damages at common law cannot compensate for the shame and embarrassment of being turned away from work for reasons concerning the inviolability of the physical person. The claimants argue that the law of contract cannot avail the claimants who require a declaration that their constitutional rights have been violated by the defendants' implementation of the policy.

[258] The claimants submit that the policy amounts to bodily coercion in order to prevent the loss of their employment and the court ought to reject the policy as manifestly absurd. They rely on the cases of **Brendan Bain v The University of the West Indies**⁵⁵, **Edward Gabbidon v Sagicor Bank Jamaica Limited**⁵⁶, **Addis v Gramophone Company Limited**.⁵⁷

[259] In **Edward Gabbidon**, this court considered a claim for wrongful dismissal arising out a technical operations error which led to a net loss of \$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

⁵⁵ (supra) [2017] JMFC FULL 3

⁵⁶ (supra) [2020] JMCA Civ 9

⁵⁷ (supra) [1909] A.C. 488

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.

[260] 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.

[261] 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 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.”

[262] The case at bar is not one in which the claimants have been dismissed. In fact, the submissions of the claimants 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. It is pellucid that there is not only a remedy at common law but there is also a statutory regime set up under the Labour Relations and Industrial Disputes Act (“the LRIDA”), its subsidiary legislation, the Labour Relations Code of which the claimants can avail themselves. They have not assisted the court to understand why conciliation is also outside of the realm of possibilities.

[263] In the case of **Brendan Bain v The University of the West Indies**, 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.

[264] In the judgment of P. Williams, J (as she then was) the learned judge expressed reservations about the horizontal application of constitutional rights alleged to have

been breached. She said at paragraph 263 that there must be some objectionable behaviour on the part of the defendant which demands some compensation. There was no evidence sufficient to persuade the learned judge that even a declared breach of the right to freedom of expression by the court then required an order for the payment of damages, she stated explicitly that a declaration was sufficient to vindicate the right. This is in the context of an infringement so serious that it resulted in the termination of the claimant's contract of employment. She awarded damages for breach of contract, aggravated damages and damages for stigma and reputational damage were refused.

[265] The cases cited by the claimant have not assisted them based the case they have advanced. There has been a significant degree of discourse on the award of damages for non-pecuniary loss such as hurt feelings, embarrassment and indignity which the common law will not compensate. The **Bain** case shows that even if there are non-pecuniary losses of an emotional or psychological nature, damages will not automatically follow and more importantly vindicatory damages are not always consistently awarded even in the face of a declaration by the court that there has been the contravention of a Charter right.

[266] In addition, the claimants have not pleaded vindicatory damages in their claim. **Bain** makes it clear that vindicatory damages must be specifically pleaded and the factual basis for its award set out in the pleadings. The claimant have sought declaration as the remedy for the alleged constitutional breaches. The non-pecuniary loss addressed in the submissions have no legal foundation upon which to stand. In any event, an award for vindicatory damages does not necessarily flow for a breach of a Charter right as was discussed in **Bain**.

[267] It is clear from section 19 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*". The Charter gives the Supreme Court the power to enquire into and to scrutinize all constitutional claims, constitutional rights emanating from the

supremacy of the constitution. However, constitutional issues are not impervious to either being struck out or remitted. By way of comment, it cannot be right that it is the simple commencement of proceedings under section 19 of the Constitution which 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.⁵⁸ The court finds that the claimants have failed to demonstrate the true nature of the rights allegedly contravened.

[268] It is also clear that on a review of *Bain* that non-pecuniary loss will not necessarily lead to relief under the head of vindicatory damages. In fact neither aggravated nor exemplary damages were not awarded to the claimant in that case which was a case of dismissal and a declaration that there had been a breach of his Charter right to freedom of expression.

[269] This court finds that there is an adequate parallel remedy.

Special Features

[270] In this case the claimants have conceded that it is settled law that where an adequate alternative remedy exists there must be some special feature which makes an application for constitutional relief appropriate. However, they argue that in the case at bar, there is no adequate alternate remedy. Having found that there is, the court will now turn to special features raised in the event of error.

[271] Furthermore, the claimants distinguish the cases cited above by the defendants' on the basis that alternate parallel remedies were available to each of the claimants in those cases and in the instant case, there is no adequate parallel remedy and that the claimants' rights under the Charter having been allegedly

⁵⁸ These comments are of general application and not a personal view of this case, the personal view of a judge is irrelevant.

violated, there is no common law action which would support the award of damages claimed under that head.

[272] The defendants submit that there are no special features in this claim, it is a risk of loss that is the real issue if the claimants are to submit biweekly PCR tests at their own expense. That issue can be determined by the law of contract.

[273] In the claimant's written submissions, the following were raised as special features of the claim in the alternative:

- ii. The only alternative to the vaccine is testing which will have unjustifiably unequal effects such as:
 - a. unvaccinated individuals are the only ones tested under the policy despite the fact that both vaccinated and unvaccinated individuals can contract and transmit Covid-19.
 - b. unvaccinated individuals are the only ones tested under the policy despite the fact that both vaccinated and unvaccinated individuals can remain asymptomatic while having Covid-19.
 - c. only unvaccinated individuals will be liable to be put on leave, including unpaid leave, in the event that they test positive despite the fact that both vaccinated and unvaccinated individuals can return positive tests.
- vi. the public interest in the litigation
- vii. The indivisibility of any policy requiring employees to submit to one of two medical procedures from not just their rights as contractual employees, but as citizens of Jamaica
- viii. The possibility that any future employer may implement these measures as part of contracts from the outset.

[274] The claimants are raising 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 defendants have 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.

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

Horizontal Application

[276] Section 13 (5) of the Charter makes it clear that it is to be applied between persons natural or juristic. It has been agreed by both sides that the defendants are juristic persons within the meaning of section 13(5) of the Charter. Therefore, Charter rights apply to both the claimants and defendants in this action. This means that Section 13 (1)(c) 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.

[277] It is settled law that 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.

[278] The next step in the event of error in the previous finding, is whether the rights sought to be enforced by the claimants are to be applied to the defendants as juristic persons, taking into account the nature of these rights and the nature of any duty imposed by these rights.

[279] 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.

[280] In order to determine the content of the right and then to decide whether the content of the right applies to the defendants, again the court looked at the evidence. The claimants' evidence assume that in the face of the policy, they have a prima facie right to be granted access to the defendants' premises in person or that they have a right to work from home if they are able to. It is these assumptions which they must show to be correct by establishing the existence of these rights. In a court of law, he who asserts must prove. If they have no such rights, then clearly any refusal by the defendants cannot make them liable for any alleged breach of these Charter rights. There is a factual insufficiency on this aspect of the case presented by the claimants.

[281] 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**, supra). 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."

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.

Section 13(1)(c) of the Charter

[282] It is important to remember that citizens of Jamaica are each endowed with the same rights. Therefore, the court must consider the claimants' rights as well as the rights of the defendants' to their freedom of thought, conscience, belief and

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

[283] It is the view of this court that the position of the claimants 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 claimants is that they too must respect and uphold the rights of the defendants. 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 claimants have not addressed this duty in either their evidence or acknowledged that it exists in their submissions.

[284] It is for these reasons that this court has formed the view that the claimants have not shown the nature of and extent of the rights they allege have been or are likely to be contravened by the defendants. While the global pandemic of COVID-19 is a new phenomena, 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 –

.....

[285] *(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.*

[286] 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).⁵⁹ 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.⁶⁰ 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.*’

[287] *“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.**⁶¹ 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.*

[288] 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 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. Each citizen has the duty to uphold the rights and freedoms of others. 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. It also provides that the rights and freedoms may be limited if it is demonstrably justified to do so, in a free and

⁵⁹ 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

⁶⁰ *supra*

⁶¹ (*supra*)

democratic society. With rights come duties and with freedoms come responsibilities.

[289] This court has to carefully consider the Charter rights that the claimants allege 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.

[290] In other words, it is for the claimants to show that the rights they allege have been contravened are applicable to the defendants. A citizen may enforce rights guaranteed under the Charter against other private individuals and juristic persons, which includes companies. This is what is referred to as the horizontal application of Charter rights: citizens are now permitted to sue each other, alleging a breach of their human rights. What is of grave importance now is how those rights are to be interpreted in relation to each citizen, in respect of each other.

[291] Returning to the analogy of the private citizen, the rights sought to be enforced by the claimants impose a duty on the claimants as well as a corresponding duty on the private citizen. The court must look at the nature of the right and the duty imposed by these rights in considering, to what extent an applicable right should bind the defendant. The claimants have to what extent these rights should bind the defendants.

[292] The private citizen also has the same rights and freedoms guaranteed by the Charter. 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. This has not been addressed by the claimants. This court will state categorically that the defendants are entitled under the Charter to hold their own views as to how to operate their businesses, they have 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 claimants not to believe in it.

[293] The court finds that in a matter which concerns a workplace policy devised as a response to the COVID-19 pandemic, the claimants' have not shown that these rights are applicable to the defendants. In other words, they have not proven the assertions made in their affidavits. There is no evidence that any of the claimants are qualified to give the scientific or medical evidence which they have sought to give in an effort to buttress their 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 claimants to prove the truth of their assertions. This they have failed to do.

[294] Further, the claimants' case has been that the court should strike down the defendants' policy and/or it should be declared that they are exempt from its provisions. As the case was presented, the first claimant has said that she offered to take an antigen test and was met with a negative response. This is a matter reserved for trial. None of the other claimants have indicated this. They have all advanced the position that the PCR tests are expensive and would strain their budgetary resources as well as that they do not wish to have any instruments inserted into their bodies. 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 claimants are asking the court to find, is it that they are saying no matter the cost whether \$1 or \$100,000, I will not be tested, or is that they are saying I would be tested if I could afford it. Is it that they are arguing that the frequency of testing is too great coupled with the cost of testing which will be onerous or are they contending that I would be tested if it were more infrequent and/or the defendant defrayed some of the cost. There is also the claimants' submission that they are seeking declaratory relief under the Charter in that they are constitutionally entitled to resist the defendants' policy. The combination of these different positions have served to weaken the case presented by the claimants considerably.

[295] The evidence is that the 1st claimant said she was willing to take an antigen test, and was told that she could not. This evidence is unchallenged. It is also clear that the 5th claimant took an antigen test so she could travel overseas. These are important points for trial. They cannot be raised to the standard of proof required under the Charter however.

[296] 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.

[297] The defendants undertook consultations with its staff, and participated in the joint session in which the protocol advisory paper was produced. At this joint session, most importantly the rights of workers were represented by the Jamaica Confederation of Trade Unions. This consultation can be described as extensive.

[298] The 1st, 2nd, 3rd, and 4th Claimants state that they were permitted to work from home for the month of September and successfully completed their duties. During that month, they received no deductions in their salaries.” This can be viewed as a reasonable accommodation given the context of the DRMA and the spread of the COVID-19 virus.

[299] The defendants undertook consultations with its staff, with the associations of which it is a member and in addition, they exhibited the protocol paper produced after a joint session of the representative groups of all the private sector bodies and most importantly the rights of workers were represented by the confederation of trade unions. The defendants in supplemental submissions contend that the policy which is based on the protocol adopted after the joint session is in

compliance with the Labour Relations Code made pursuant to the Labour Relations and Industrial Disputes Act.

[300] 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.

[301] 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 claimants' 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 defendants' companies. The claimants have not addressed the views and concerns held by other members of staff within the defendants' companies which they have 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.

[302] The defendants in supplemental submissions contend that their policy is in compliance with the protocol advisory and the Labour Relations Code made pursuant to the Labour Relations and Industrial Disputes Act. The claimant's supplemental submissions do not answer these issues. Nowhere in the evidence is there a recognition by the claimants that their Charter rights as set out in their claim are equal in nature and quality to the rights of the defendants. The claimants have set out in their evidence staff meetings which took place and consultations between employer and employee. They were also invited to a consultation meeting with the Defendants where the policy was reiterated to them and they in turn reiterated their objections to the policy to the Defendants.

[303] In what is a new area of law and policy, the court has to consider the decision made by the defendant 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 defendants when it implemented the policy.

[304] As this case has been 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 these defendants.

[305] There is also the inconsistent position in the claimants' pleadings between the cost of PCR testing which they say is onerous and the assertion that they do not wish to undergo the procedure of PCR testing. This was against the background of the 5th claimant having been permitted to attend one of the hearings by video link, admitting through her counsel that she would have to have taken an antigen test in order to enter the United States of America which was her remote location on the day of the hearing. This court was constituted then as it was now and was the court which permitted the 5th claimant to attend virtually. The claimants cannot explain that position and it further adds to the inconsistent nature of the evidence.

[306] In a claim filed on October 19, 2021, the claimants seek orders against the defendants for:

- i. Breach and or anticipatory breach of the claimant's respective breach of contracts; and
- ii. Violation of the claimant's constitutional rights under sections 13(3(a), (b), (g), (j)(ii) and j(iii) of the Constitution of Jamaica
- iii. Damages, interest and costs;

In that the defendants by a policy instituted by the first defendant on October 4, 2021 have unilaterally modified and/or will unilaterally modify the claimants' respective employment contracts to require them to subject themselves to vaccination and/or bi-weekly polymerase chain reaction (PCR) testing for COVID-19 and has barred them access to work failing compliance with this unilateral modification.

[307] It is upon this foundation, that the rights and freedoms set out in Chapter 13 have been erected. The bricks and mortar of the rights and freedoms set out in the Charter must be balanced one against another as the rights set out in the Charter apply to each Jamaican citizen and private entity. Every citizen has those same rights. Each is equal before the law. The words “respect”, “uphold” and “prejudice” are equally applicable to both parties to this action. There is a duty on anyone alleging the contravention of a fundamental right to also respect and uphold the rights of others. The court is then in protecting the rights and freedoms of the claimants, also entitled to consider the prejudice to the rights and freedoms of others in its determination of the issues raised.

[308] In considering the application of section 13(5), to the defendants, 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.

[309] 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 defendants. The claimant’s submissions assume that they have a prima facie right to be granted access to the defendants’ premises in the face of the policy. It is this assumption which they must show to be correct by establishing the existence of this right. In a court of law, he who asserts must prove. If they have no such right, then any refusal by the defendants to allow them onto the premises cannot make them liable for breach.

[310] Having failed to demonstrate the nature and extent of the duty of the protected rights to the defendant, this court finds that the horizontal application of the Charter rights guaranteed to the claimants are not applicable to the defendants in the case at bar

[311] To make a declaration against the defendants in favour of the claimants could have only been accomplished by prejudicing their rights and freedoms. Such a proposition, could not have been the intention of the framers of section 13(5) of the Charter.

[312] 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.

[313] There is also the mechanism set out by the LRIDA for disputes between employer and employee through a process of conciliation and unjustifiable dismissals may be referred to the IDT. 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.”⁶² In **Edwards**, having comprehensively reviewed the law in Jamaica, Brooks, JA stated that:

‘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

⁶² Jamaica Flour Mills Limited v Industrial Disputes Tribunal and anor [2005] UKPC 16, at paras 6 and 7.

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.”⁶³

[314] 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. This question has not been answered.

[315] This case involves substantial disputes of fact which will require cross-examination to resolve. Once facts are in dispute, in relation to the contract of employment, it would require, inter alia, an amendment of the pleadings to pursue the common law remedy which had always been open to the claimants. They could have gone that route based on the affidavits in response, but rather, have continued to pursue the constitutional claim which given the factual disputes is an unsuitable and an inappropriate procedure.

[316] In **Jaroo**, 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

[317] The claimants’ submission that an action in contract cannot be maintained and therefore the abuse of power complained of are genuine breaches of constitutional rights which qualifies as an exceptional feature. That reasoning is flawed when the available parallel remedy is examined.

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

⁶³ Supra para 90

contract which is adequate to compensate the claimants 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.

[318] It is therefore with this in mind that the claimants' position on this application is viewed by the court as an action in contract clad in the black tie of constitutional redress and may be viewed as an abuse falling squarely within the warnings of the Privy Council in the trilogy of Trinidadian authorities. For these 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 in these that the constitutional rights of the claimants have been infringed.

Orders:

1. The defendants' application is granted.
2. The court declines to exercise its powers pursuant to section 19(4) of the Charter of Fundamental Rights and Freedoms.
3. 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.
4. The declarations sought in the claim form filed on the 19th day of October, 2021 for constitutional redress pursuant to the Charter of Fundamental Rights and Freedoms are struck out.
5. Any and all paragraphs in the claimant's pleadings and affidavits dealing with the issue of constitutional redress are struck out.
6. Costs of the application to the defendants to be taxed if not agreed.