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Case No: (1) EA-2023-000110-RN
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(4) EA-2023-000409-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 July 2024

Before :

JUDGE STOUT
MR D SMITH
MR A MORRIS

- -

Between :

(1) MISS G MASIERO

(2) MRS J HUSSAIN

(3) MISS S CHADWICK

(4) MS G DIMITROVA

Appellants

- and -

BARCHESTER HEALTHCARE LIMITED

Respondent

- -
- -

Edward Lowe (instructed by **National Employees Union**) for the **First Appellant**
Oscar Davies (instructed by **Tilbrook's Solicitors**) for the **Second, Third and Fourth Appellants**
Caspar Glyn KC (instructed by **Weightmans LLP**) for the **Respondent**

Hearing date: 27 June 2024

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JUDGMENT

SUMMARY
HUMAN RIGHTS (18) – UNFAIR DISMISSAL (11)

The claimants were employed by the respondent healthcare provider until they were dismissed in May/June 2021 for refusing to be vaccinated against Covid-19 in accordance with the respondent's policy requiring all staff to be vaccinated unless medically exempt. The respondent adopted the policy approximately 6 months in advance of the government mandating the same policy for all care homes by way of legislation in the *Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021*, which came into force in November 2021 and were revoked in March 2022. The Tribunal found the claimants' dismissals to be fair.

Held, dismissing the appeal:-

There was no error of law in the Tribunal's decision. It had properly applied s 98 of the Employment Rights Act 1996, and properly concluded that the claimants' dismissals were compatible with their rights under the European Convention on Human Rights and the Human Rights Act 1998. It had rightly concluded that the respondent's policy did not involve the imposition of a mandatory requirement to submit to medical treatment in abrogation of the claimant's right to free and informed consent. It had rightly concluded that the interference with the claimants' Article 8 rights was justified in pursuit of the respondent's aims of (among other things) protecting care home residents' rights to life under Article 2. The decision that one claimant's dismissal was procedurally fair despite some shortcomings in the process was not perverse.

JUDGE STOUT, MR SMITH AND MR MORRIS:

Introduction

1. The appellants were the claimants before the Employment Tribunal and we will refer to them as such. This is our unanimous judgment.

2. This case concerns the claimants' dismissals by Barchester Healthcare Limited (the Respondent) in May/June 2021 for refusal to comply with the respondent's then newly-introduced policy requiring all staff to have been vaccinated against Covid-19 (unless medically exempt). By a Reserved Judgment sent to the parties on 29 November 2022, the Tribunal (Employment Judge Maidment, sitting with Members in the case of Mrs Hussain) dismissed the claimants' claims of unfair dismissal and dismissed Mrs Hussain's claims of direct and indirect religion and belief discrimination.

3. The claimants appeal against that judgment. Miss Masiero is represented separately to the other three claimants. Miss Masiero was granted permission to appeal by John Bowers KC (sitting as a Deputy High Court Judge) on three out of the six grounds advanced in her Notice of Appeal. The other appellants were granted permission to appeal by Sarah Crowther KC (sitting as a Deputy High Court Judge) on all their grounds of appeal, three of which overlapped with those of Miss Masiero.

4. Mr Glyn KC in his skeleton argument for the respondent combined the grounds of appeal into six grounds of appeal, which we have found it convenient to adopt. The grounds are as follows:-

> Ground 1: erred by failing to carry out the second part of the two-part test for unfair dismissal for some other substantial reason (SOSR), as set out in *Catamaran Cruisers Ltd v Williams* [1994] IRLR 386;
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> Ground 2: erred in law by failing to carry out the balancing exercise endorsed in *Scott & Co v Andrew Richardson* (EAT/0074/04), as originally from *Catamaran Cruisers*;
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> Ground 3 (formerly Miss Masiero's Ground 6): erred in law by failing to correctly

convey the meaning of Article 2 of the European Convention on Human Rights ("ECHR");

Ground 4: erred in law by failing to properly consider the issue of free and informed consent;

Ground 5 (encompassing Miss Masiero's Grounds 4 and 5): erred in law by following *R (Peters) v Secretary of State for Health and Social Care* [2021] EWHC 3182 and/or *Vavřička and ors v The Czech Republic* (Applications no. 47621/13and 5 ors, judgment of Grand Chamber, 8 April 2021);

Ground 6 (Mrs Hussain only): made a perverse finding that there was no procedural irregularity in her dismissal, despite and in the light of the previous findings of fact that the Tribunal had made.

The *Peters* and *Vavřička* cases

5. Given the role that these two cases play in the grounds of appeal in this case, and in the Tribunal's decision below, it is convenient to set out first what these two cases were about.

The Vavřička case

6. The *Vavřička* case is a decision of the Grand Chamber of the European Court of Human Rights dated 8 April 2021. It concerned Czech Republic legislation under which parents could be fined and their children from pre-school if they refused to comply with a statutorily-imposed child vaccination duty. The policy only applied to pre-school children. Unvaccinated children were not prevented from attending school from the age of 6. The case related to "the standard and routine vaccination of children against diseases that are well known to medical science" ([158]). Compensation was available for anyone whose health was damaged by the vaccine or its administration ([18]-[20]).

7. The applicants complained that the policy violated their rights under Article 8 of the ECHR. The Court noted that the focus of the complaint was not the vaccination duty *per se* but the

consequences borne by the applicants as a result of not complying with that duty, the consequences being the fine and non-admission of the child to nursery school ([258]). However, the Court considered that those consequences could not be dissociated from the vaccination duty itself and that therefore the subject matter of the complaints was the vaccination duty as well as the consequences for them of non-compliance with it ([260]). As such, the Court accepted that the claim fell within the scope of Article 8 because a person's physical integrity forms part of their "private life" ([261]). The Court noted that the policy at issue did not involve "involuntary medical intervention" as "none of the contested vaccinations were performed", but the Court was nonetheless satisfied that the policy constituted an interference with the applicants' Article 8 rights because the child applicants were not admitted to pre-school ([263]) and the parent applicant feared serious damage to his child's health ([264]).

8. The Court then turned to the question of justification.

9. The Court found the interference was in accordance with the law because it was laid down in domestic legislation ([266]-[271]).

10. The Court found that the policy pursued the legitimate aims, specifically identified under Article 8(2), of the protection of health and the protection of the (Article 8) rights of others ([272]).

11. The Court then considered whether the interference was "necessary in a democratic society" for the achievement of those legitimate aims by reference to the general principles that apply under the Convention when considering that question ([273]-[275]). It noted that the vaccination duty concerned a "compulsory medical intervention" and thus related to the "individual's effective enjoyment of intimate rights" (a factor normally pointing towards a narrower margin of appreciation for the contracting state), but found that the weight to be given to that factor was lessened by the fact that no vaccinations were administered against the will of the applicants, and nor could they have been as the domestic legislation did not

permit forced vaccination ([276]). The Court noted the "general consensus among the Contracting Parties … that vaccination is one of the most successful and cost-effective health interventions" ([277]). It concluded that the margin of appreciation afforded to the state should be a wide one ([280]). It accepted that the vaccination duty answered a "pressing social need" ([284]) and that the Czech Republic had given relevant and sufficient reasons for the policy ([285]-[289]).

12. Finally, the Court considered the proportionality of the interferences with the applicants' Article 8 rights having regard to the legitimate aims pursued ([290]ff). It noted that the policy provided for medical exemption ([291]) and exemptions 'of conscience' ([292]) (which latter it noted was potentially relevant to the alleged breach of Article 9 in that case – a complaint that did not succeed). The Court noted that although vaccination was a legal duty it could not be forcibly imposed and the fine was not "unduly harsh or onerous" ([293]). Procedural safeguards were in place enabling the applicants to challenge the lawfulness of the application of the policy in their cases before the domestic courts ([295]). The appellants concerns about the safety and effectiveness of the vaccine were set against the general consensus on the overall effectiveness of vaccines ([299] – [301]). The fact that compensation was available for any harm to health caused by the vaccine was relevant to proportionality ([302]).

13. As to the effect of the policy on the applicants themselves, the Court noted that for the child applicants it was confined to considering the effect on them of being denied access to pre-school; knock-on implications for their parents' ability to work and impact on family life had to be ignored ([305]). In terms of the effect on the child applicants, the Court held as follows (emphasis added):-

> 306. The Court accepts that **the exclusion of the applicants from preschool meant the loss of an important opportunity for these young children to develop their personalities and to begin to acquire important social and learning skills in a formative pedagogical environment. However, that was the direct consequence of the choice made by their respective parents to decline to comply with a legal duty, the purpose of which is to protect health, in particular in that age group**. As stated by the respondent Government, and by some of the intervening Governments, who rely on extensive scientific evidence (see paragraphs 213, 218 and 223 above), early

> childhood is the optimum time for vaccination. Moreover, **the possibility of attendance at preschool of children who cannot be vaccinated for medical reasons depends on a very high rate of vaccination among other children against contagious diseases. The Court considers that it cannot be regarded as disproportionate for a State to require those for whom vaccination represents a remote risk to health to accept this universally practised protective measure, as a matter of legal duty and in the name of social solidarity, for the sake of the small number of vulnerable children who are unable to benefit from vaccination. In the view of the Court, it was validly and legitimately open to the Czech legislature to make this choice, which is fully consistent with the rationale of protecting the health of the population. The notional availability of less intrusive means to achieve this purpose, as suggested by the applicants, does not detract from this finding**.
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> 307. The Court would further observe that, **while not underestimating the educational opportunity foregone by the child applicants, they were not deprived of all possibility of personal, social and intellectual development, even at the cost of additional, and perhaps considerable, effort and expense on the part of their parents. Moreover, the effects on the child applicants were limited in time**. Upon reaching the age of mandatory school attendance, their admission to primary school was not affected by their vaccination status (see paragraph 82 above). As for the specific wish of the applicant Novotná to be educated in accordance with a particular pedagogical philosophy, she did not contradict the Government's statement that she would have remained eligible for such schooling notwithstanding her non-attendance at preschool level.

14. The Court concluded overall that the interference with the appellants' Article 8 rights was justified in that case.

The Peters case

15. The *Peters* case was a decision of Whipple J on an application for permission to claim judicial review of the *Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021* (the 2021 Regulations) which Regulations (the parties agree) were to materially the same effect as the respondent's vaccine policy that resulted in the dismissal of the claimants in this case. The only differences between the respondent's policy and the 2021 Regulations were that the Regulations applied to all care home workers not just those employed by the respondent, and was only brought into force some five or so months after the claimants' dismissals in this case, i.e. from 11 November 2021 (although the government policy was under consultation at around the time that the respondent acted to introduce its policy). The 2021 Regulations were repealed on 15 March 2022. The appellants

on this appeal emphasise that the 2021 Regulations were revoked on the basis that they were by then regarded by the government as "disproportionate".

16. The challenge in *Peters* was launched prior to the coming into force of the 2021 Regulations. Permission to claim judicial review was refused on the papers by Eady J. The renewed oral application for permission came before Whipple J on 2 November 2021, shortly before the Regulations were due to come into effect. As is usual on a permission application, she delivered an oral judgment at the end of the hearing. The reasoning is not therefore as full as it might be if judgment had been reserved, or if the matter had gone to a full hearing.

17. At [3] Whipple J noted that the impact of the 2021 Regulations would be substantial given that there were many workers in care homes at that time who were not vaccinated and thus jobs that would be lost as a result of the Regulations. The claimants' first argument was that the Regulations were *ultra vires* because they breached the prohibition in s 45E of the Public Health (Control of Disease) Act 1984 on any person being compelled to undergo medical treatment (including vaccination). It was submitted that care workers would be forced to undergo vaccination in order to keep their jobs and that was accordingly contrary to the statutory prohibition ([8]). Whipple J rejected that contention as unarguable because the 2021 Regulations did not mandate vaccination, they merely prescribed a consequence if a care home worker chose not to be vaccinated ([9]).

18. Whipple J then considered the claimants' second ground that the 2021 Regulations were unlawful because the government had made insufficient enquiry and ignored relevant considerations in relation to the efficacy and safety of the vaccines. This argument too was rejected as unarguable at [13]-[25]. In short, Whipple J accepted that the 2021 Regulations were a rational and lawful way of achieving the stated policy aim of reducing the spread of Covid-19 in care homes in order to protect care home residents. She noted at [21] that this was a policy decision in respect of which a broad discretion was afforded to the government.

19. The claimants' third ground was that the Regulations breached Article 8. Whipple J regarded

this argument as answered *"in large part"* by *Vavřička* ([26]). She reasoned: *"if children can be barred from school because they are not vaccinated … it must follow, by analogy, that there is no breach of Article 8 to legislate so that workers, who are not vaccinated, can be prevented from working in care homes"*.

20. She went on at [27]: *"As the defendant says, the whole point of this measure is to protect lives, namely, the lives of elderly residents in care homes. So the measure itself is intended to protect the Article 2 rights of those who are residents in these care homes. That is a very weighty justification for any interference with Article 8 which might be established"*.

21. She noted again that this was an issue on which the government has a "wide margin of discretion" ([28]). She concluded that ground 3 was not arguable. Permission to claim judicial review was therefore refused.

The Employment Tribunal's decision in this case

22. There were five claimants before the Employment Tribunal. One has not appealed. The claims form part of a larger multiple, with the claimants' claims being identified as sample cases, albeit not formally "lead cases" pursuant to rule 36 of the Employment Tribunal Rules of Procedure. The Employment Tribunal's judgment is 83 pages long. It begins by setting out the agreed list of issues. The Tribunal then outlines the nature of the claims in paragraph 1 as follows:-

> They all relate to the effects of a policy implemented by the respondent, a major care home provider, that staff working in its care homes were required, as a condition of continued employment, to accept a vaccine against the coronavirus. The dismissals of the claimants do not arise out of the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 which came into force only on 11 November 2021, after these claimants had already left the respondent's employment. The respondent effectively pre-empted those Regulations with its own earlier policy decision of similar effect.

23. The Tribunal then explained how the hearing had been organised and its approach. The handling of the cases was complicated by the fact that the judge was "sitting alone" for the

purposes of the unfair dismissal claims under the Employment Rights Act 1996 (ERA 1996), but with members for the claims of Mrs Hussain (and the claimant who has not appealed) under the Equality Act 2010 (EA 2010). The Tribunal explained how it had approached the fact-finding and decision-making in those circumstances, with the judge reaching conclusions alone in relation to matters relevant only to the unfair dismissal claims and jointly with members on the other matters. There is no complaint on appeal about the approach taken.

24. The Tribunal then makes findings of fact, beginning at [20] with an overview of what happened during the pandemic:-

> 20. The actions of the respondent in these complaints were against a background and have their origin in the coronavirus pandemic. On 23 March 2020 the Prime Minister announced the first lockdown in the UK (coming into force on 26 March) ordering people to "stay at home". In June 2020, a phased reopening of schools in England commenced with non-essential shops also reopening. More restrictions were eased in July 2020. However, restrictions were reintroduced on 14 September with a second national lockdown announced in England on 31 October (coming into force on 5 November) to prevent a "medical and moral disaster" for the NHS. That lockdown ended on 2 December with a 3 tier system of restrictions introduced in England. The Pfizer coronavirus vaccine became available from December 2020. Following a relaxation of restrictions over the Christmas period, however, England entered a third national lockdown on 6 January 2021. Hotel quarantine for travellers arriving in England from designated high-risk countries began on 15 February 2021. On 8 March schools were reopened with, however, a "stay at home" order remaining in place. On 29 March outdoor gatherings of either 6 people or 2 households were allowed. The "stay at home" order ended, but with people encouraged to stay local. On 12 April 2021 non-essential retail, outdoor venues, indoor leisure and self-contained accommodation reopened. However, no indoor mixing between different households was allowed. On 17 May, the rule of 6 for indoor social gatherings was introduced with greater flexibility for outdoor gatherings. On 19 July most legal limits on social contact were removed in England. On 10 December, however, facemasks became compulsory in most indoor venues with NHS Covid passes (proof of Covid vaccination) becoming mandatory in specific settings from 15 December.

25. The Tribunal went on to make findings of fact about the respondent's business as the second largest provider of care home services in the UK with around 12,600 residents and more than 17,000 employees. The Tribunal found that the respondent had experienced increased death rates among residents during the pandemic, and that Covid-19 was recorded as a cause of death on the death certificates of 1250 residents during 2020. Six staff members also died for reasons attributed to Covid-19 ([23]). Death rates were up in comparison to previous years ([24]).

26. The Tribunal found that the respondent's residents were particularly vulnerable to Covid-19 because of their age and/or medical conditions, which made them more susceptible to infection and also less likely to be able to maintain social distance, whether because of cognitive difficulties or a need for intimate care ([23]-[29]).

27. The Tribunal found that the respondent had taken measures such as PPE, enhanced hygiene, refusal to accept sick patients discharged from hospital until they showed a negative Covid-19 test, PCR testing of staff etc, but these measures were only partially effective ([30]-[33]). The respondent was also struggling to maintain staffing levels for various pandemic-connected reasons ([38]).

28. The first Covid-19 vaccine was approved by the Medicines and Healthcare products Regulatory Agency (MHRA) on 15 December 2020. The respondent had anticipated the arrival of the vaccines and considered it was a "professional responsibility" for staff to be vaccinated once the vaccine was available. The respondent considered the vaccine to be approved and safe, though recognised that some staff would have concerns and that the vaccine had not gone through the normal process for approval and was very new so that long-term effects could not be known ([37]-[46]).

29. In January 2021 the more transmissible Alpha variant of Covid-19 was recognised. The respondent's first vaccine policy was introduced on 18 January 2021 requiring new employees to be vaccinated and setting out that promotion and discretionary bonuses to all staff would only be available to those who were vaccinated. A second stage policy, the vaccine policy which resulted in the claimants' dismissals, was consulted on from 28 January 2021 with employees, residents and unions. This policy was for staff to be given two months' notice that they needed to be vaccinated in order to continue to work for the respondent. The respondent engaged Professor Stonehouse, Leeds Chair of Molecular Virology, to advise them and answer questions from the staff. Risk assessments were produced ([44]-[54]).

30. At [55], the Tribunal made specific findings about the view and reactions of the unions. The

unions were supportive of the national vaccine programme, but not supportive of the respondent's policy which was viewed as being "at odds with the vast majority of employers in the sector and good practice being urged by government".

31. The Tribunal found that care home workers were eligible to receive a Covid vaccine by 15 February 2021 ([56]). By 30 March 2021 more than 90% of the respondent's staff had been vaccinated. 406 had not yet had the vaccine, but 97 of those were intending to ([59]).

32. In April 2021 the respondent became aware of the Strasbourg Court's decision in *Vavřička* and considered it provided support for its vaccine policy ([61]). The Tribunal made detailed findings about the advice and evidence available about the effectiveness of the vaccines, the limitations of that advice and evidence, the knowledge of the respondent regarding these matters and the information provided to employees ([62]-[73]).

33. On 14 April 2021 the government expressed an intention to consult on the possibility of requiring staff deployed in care homes to be vaccinated and on 16 June 2021 announced an intention to adopt such a policy, which was in the end brought into force by way of the 2021 Regulations on 11 November 2021 ([74]).

34. At [77]-[183] the Tribunal made detailed findings of fact about the particular circumstances of each of the claimants and the process that was followed by the respondent that ended in them each being dismissed in May/June 2021 as they maintained their refusals to be vaccinated. None of them had any medical exemption from vaccination. Only Mrs Hussain and the claimant who has not appealed claimed to have a protected belief under the EA 2010 relevant to their decision not to be vaccinated. We need to consider the Tribunal's findings of fact about Mrs Hussain, but we do that when addressing Ground 6 of the appeal below.

35. At [184]-[193] the Tribunal set out the "Applicable law" in relation to the unfair dismissal claims. It directed itself to s 98 of the ERA 1996 and to a number of the conventional authorities on unfair dismissal, including authorities relevant to dismissals for failure to accept new terms and conditions, specifically *Catamaran Cruisers Ltd v Williams* [1984] IRLR 384

and *Scott & Co v Andrew Richardson* (EAT/0074/04).

36. As the claimants relied on human rights arguments, the Tribunal at [194]ff directed itself as follows:-

> 194. Section 3(1) of the Human Rights Act 1998 places the tribunal under the following obligation:
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> > "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."
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> 195. As the tribunal is a public authority under section 6(3) it must, therefore, under section 6(1) act in a way which is compatible with the Human Rights Act.
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> 196. The approach to take to arguments on human rights was given structure by the Court of Appeal in *X v Y* [2004] ICR 1634 as follows:
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> > (a) "Do the circumstances of the dismissal fall within the ambit of one or more of the Articles of the ECHR? If they do not, the Convention is not engaged and need not be considered
> > (b) Does the state have a positive obligation to secure enjoyment of the relevant Convention right between private persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer
> > (c) If it does, is the interference with the employee's Convention right by dismissal justified?
> > (d) if it is not, was there a permissible reason for the dismissal under the ERA that does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it
> > (e) if there was, is the dismissal fair, tested by the provisions of S.98 ERA, reading and giving effect to them under S.3 HRA so as to be compatible with the Convention right?"
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> 197. Nevertheless, in *Turner v East Midlands Trains Ltd* 2013 ICR 525 the Court of Appeal accepted that the band of reasonable responses test provided a sufficiently robust, flexible and objective analysis of all aspects of the decision to dismiss under Human Rights legislation. There the Court cited *Sanchez v Spain 2011* 54 EHRR 872 where the ECHR observed that:
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> > "Disciplinary authority is one of the essential prerogatives of the employer, whether private or public. In this connection employers have a broad discretion to impose the sanction that they consider the best adapted to the accusations against the employee; the scale of possible sanctions encompasses the power to dismiss a person who has seriously compromised the interests of the company or the public service….."
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> 198. The Court of Appeal noted that when the ECHR observed that: "the measure of dismissal taken against the applicants was not a manifestly disproportionate or excessive sanction . . ." The word manifestly of itself suggests that some deference should be paid to the views of management that dismissal is an appropriate sanction. It continued:
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> > "Strasbourg therefore adopts a light touch when reviewing human rights in the context of the employment relationship. It may even be that the domestic band of reasonable responses test protects human rights more effectively…. "
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> 199. The respondent asserts that its vaccine policy was in furtherance of the Article 2 right to life, with particular regard to its residents. There is compelling evidence that whatever precautions were taken to prevent transmission of Covid in care

homes, once Covid infection entered a care home it spread and caused a risk to life or serious harm. Any assertion to the contrary is, the tribunal accepts, untenable.

200. The right to life is absolute save in defence of another, lawful arrest or escape or quelling riot or insurrection. The tribunal accepts that of all the rights protected by the Convention, the right to life demands that the greatest weight be afforded to it, which will be significant in any balance of proportionality against non-absolute rights.

201. Pursuant to Article 5 of the Convention rights, everyone has the right to liberty and security of person. No one shall be deprived of his liberty.

202. In *R (on the application of Peters) v Secretary of State for Health and Social Care* [2021 EWHC 3182, Whipple J addressed the argument that the subsequent Government Regulations mandating Covid vaccination for care home workers violated liberty or security of person. She held:

> "The claimants say that the effect of the 2021 Regulations is to mandate vaccination and that mandate is precluded by s. 45E. They say that this is a real world understanding and analysis of what occurs or will occur in light of the 2021 Regulations, because care workers will be forced to undergo vaccination to keep their jobs, and that is contrary to the statutory prohibition. They argue that s. 45E has primacy over the 2021 Regulations, on the basis that primary statute prevails over secondary legislation.
> I am unable to accept that submission. I do not consider it to be arguable. On its face, s.45E says that no person can be compelled to undergo medical treatment, but that is not, on a proper understanding, the effect of the 2021 Regulations, which do not mandate vaccination. The way they work is that the individual retains the autonomy to decide whether to be vaccinated or not; the 2021 Regulations impose a consequence, depending on the choice a person makes, and preclude someone who has chosen not to be vaccinated from taking up work in a care home unless they come within an exempted category, which neither of these claimants does. I conclude that this is not a situation where s.45E is even arguably engaged."

203. By way of contrast, the ECHR case of *Solomakhin v Ukraine* 24429/0 involved a case where a patient was vaccinated against his wishes and without his consent. This forced vaccination was an interference with the Article 8 right to respect a person's private life, which included a person's physical integrity.

204. In *Vavricka & Ors v The Czech Republic* 47621/13, the ECHR held that compulsory involuntary vaccination was an interference with private life. The consequences of not getting vaccinated was not being admitted to pre-school and meant that there had been an interference with their Article 8 rights.

205. Referring again to the *Peters* case, the claimants there raised an Article 8 ground in seeking to impugn the Regulations making Covid vaccination a condition of working in a care home effective from 11 November 2021. Whipple J said:

> "26. As to ground 3, that is an Article 8 ground, suggesting that the Regulation gives rise to a breach of Article 8. This is answered in large part by the recent case of Vavřička v. Czech Republic: if children can be barred from school because they are not vaccinated, as was the circumstance of that case, it must follow, by analogy, that there is no breach of Article 8 to legislate so that workers, who are not vaccinated, can be prevented from working in care homes. I see no merit in this ground.

> There are other aspects to the Article 8 argument. As the defendant says, the whole point of this measure is to protect lives, namely, the lives of elderly residents in care homes. So the measure itself is intended to protect the Article 2 rights of those who are residents in these care homes. That is a very weighty justification for any interference with Article 8 which might be established."

> 206. Whipple J was clear that the circumstances in Vavricka were analogous. The tribunal accepts that they were not identical – as Mr Lowe submits, the vaccine involved in Vavricka had been around longer than the Covid vaccines. The tribunal considers, in any event, that Whipple J's reasoning can be read across to the application of any qualified human right in potential conflict with the Article 2 right.

37. The Tribunal then referred to a number of authorities on Article 9 of the EHCR (freedom of religion), and the other Convention rights relied on by some of the claimants (Article 10 (freedom of expression), Article 14 (prohibition on discrimination) and Article 17 (prohibition on abuse of rights) and then continued as follows at [212]ff:

> 212. Whipple J in Peters recognised that the Government would have a wide margin of discretion in implementing measures to protect care home residents. So then must a care home employer.
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> 213. The tribunal recognises that these are not cases solely about the claimants' rights to protection of their religious freedoms or their respect to private life. This is not a case such as *Eweida & Ors v United Kingdom* 48420/10, where the claimant's right to manifest her religious belief by wearing a cross conflicted only with British Airway's desire to have a single corporate image – which is not a human right.
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> 214. By contrast, in the conjoined claim of *Ladele*, her employer relied on the convention rights of protecting and promoting equality and diversity (of gay and lesbian couples right to celebrate civil partnerships) under Article 14 of the convention. Ms Ladele, a registrar, refused to carry out civil partnership ceremonies because of her religious beliefs. The ECHR held:
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> > "On the other hand, however, the local authority's policy aimed to secure the rights of others which are also protected under the Convention. The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights. In all the circumstances, the Court does not consider that the national authorities, that is the local authority employer which brought the disciplinary proceedings and also the domestic courts which rejected the applicant's discrimination claim, exceeded the margin of appreciation available to them. It cannot, therefore, be said that there has been a violation of art.14 taken in conjunction with art.9 in respect of the third applicant."

38. It then went on to give itself directions relevant to the EA 2010 claims that are not in issue on this appeal.

39. At [241]ff the Tribunal set out its Conclusions. At [241] it found that the reason for the respondent's introduction of its vaccine policy was "to reduce the risk of spread of Covid

infection in its homes and, therefore, death and serious illness amongst primarily its residents, but also its staff and any visitors". The Tribunal found this to be a "genuine and substantial one which could justify dismissal of care home workers as a potentially fair reason" for the purpose of s 98(2) of the ERA 1996.

40. The Tribunal went onto consider the substantive fairness of the dismissals. It explained that it was evaluating this by reference to the interference with the claimants' human rights ([244]). It recognised that there was a clash between the respondent's aim of protecting life and the claimant's rights to enjoy a private life and freedom of thought and religion ([245]).

41. At [246], it noted as follows, in a paragraph on which the appellants have focused in this appeal:

> 246. The right to life is often referred to as "an absolute right" which can never be interfered with by the state save in the exceptional cases allowed for within the 1998 Act (which clearly do not apply here). The rights potentially reliable upon by the claimants are, in contrast, "qualified rights" which may be interfered with in order to protect the rights of another or the wider interest.

42. At [247], it noted that the respondent was not suggesting that allowing the claimants to work when unvaccinated "would have necessarily infringed the residents' right to life". It went on at [248]-[249] to explain that it accepted that the respondent was reasonable in considering that its vaccination policy, as applied to each individual employee, minimised the risk of death to residents. It noted that in the *Peters* case Whipple J had accepted that the 2021 Regulations pursued an aim that was the same as the respondent's vaccine policy, and that Whipple J had accepted that the aim included protecting the Article 2 rights of care home residents. The Tribunal noted that Whipple J described this as *"a very weighty justification for any interference with Article 8 which might be established"* [250].

43. At [251] it went on to consider the claimants' argument that the respondent's vaccine policy interfered with their Article 5 rights and/or amounted to forced medical treatment without free and informed consent, holding that it did not as follows:

> 251. … It [has] been said that the respondent's vaccine policy interfered with the Article 5 right to liberty and security of the person. However, the respondent of course never proposed, for instance, vaccination by force.

> It was at pains, throughout the introduction of the policy, to reaffirm that it recognised that vaccines could not be mandated, that vaccination was at the choice of the individual, that consent had to be given freely and consent to future vaccinations could be withdrawn at any stage. There was undoubtedly significant pressure weighing on the claimants' minds as their choice had significant consequences for them in that the decision not to be vaccinated would result in the loss of employment with (and income from) the respondent. In the Peter's case it was also argued that the effect of the Regulations was to mandate vaccination, but Mrs Justice Whipple rejected that argument, holding that the individual retained the autonomy to decide whether to be vaccinated or not with the Regulations rather imposing a consequence depending on the choice a person made. So did the respondent's policy.

44. At [252] the Tribunal accepted that the appellants' Article 8 rights were engaged, noting that this was also accepted in *Peters* and *Vavřička*, although the interference in those cases had been found to be justified so that there was no breach of Article 8. The Tribunal noted one of the differences between this case and *Vavřička* as being that:

> "[in *Vavřička*] not being admitted to pre-school because of a lack of vaccination involved an interference with Article 8 rights. Whilst that exclusion might have affected a child's development, the exclusion in this case might have affected the development of a whole family in terms of a removal of income, where it is an incomplete answer to say that the claimants could simply have obtained employment elsewhere - that is, rather, potentially a factor to be weighed in the balance when seeking to justify an interference".

45. At [255]-[260] the Tribunal carried out a 'balancing exercise' of what it had identified as the competing human rights and concluded that the interference with the claimants' human rights was justified by the legitimate aim of the respondent's policy of minimising the risk of death and serious illness amongst residents and staff and that dismissal was in principle a proportionate measure necessary in a democratic society to achieve that aim.

46. At [261]-[288] the Tribunal went on to consider whether the dismissals were substantively fair in the particular cases, i.e. whether the respondent acted reasonably in treating its potentially fair reason as a reason for dismissal in these cases, by reference to the matters that the claimants had raised as making it unreasonable, including the information then available about the vaccine, and the claimants' views that the vaccine was not proven to be safe or effective ([262]-[266]), the fact that the death rates had decreased ([267]), the availability of antibody tests ([269]), the nature of the claimant's roles and the limited risk posed by them as individuals ([270]-[272]), the limited exemptions allowed by the respondent's policy ([273]),

the risks to the claimants personally ([274]-[276]), the alleged inconsistencies in the respondent's approach ([277]-[282]), the failure to use the Coronavirus Job Retention Scheme ([282]), the argument that having 95% of staff vaccinated was sufficient ([283]), redeployment opportunities ([284]-[286]), and the fact that compensation would not be available for anyone harmed by the vaccine ([287]). Having considered all these factors that had been advanced by the claimants as making it unreasonable for the respondent to dismiss them for failing to comply with its vaccine policy, the Tribunal concluded at [288] that the dismissals were substantively fair.

47. The Tribunal then went on at [289]-[303] to consider whether there were any procedural failings in the process generally and decided that there was no material unfairness in the process either generally or in the claimants' specific cases. Particular consideration was given at [290] to the consultation that had taken place with the unions and the unions' views. Shortcomings in the process adopted in relation to Mrs Hussain were considered at [294]-[296], but the Tribunal concluded that her dismissal was overall fair for the following reasons:-

> 294. The case of Mrs Hussain raises specific individual concerns regarding the fairness of the process. Firstly, whilst the tribunal has made findings that her ability to communicate in English was better than she suggests and that she was able to understand and respond to the questions raised during the investigation meeting, there is no doubt that she would have been disadvantaged by her lack of fluency in English and would have benefited from the presence of an interpreter. Mrs Hussain asked for an interpreter and of course one was provided by the respondent at the formal meeting and subsequent appeal. Nevertheless, holding an investigation meeting without an interpreter, ran the risk of her not being able to fully understand her options and not being fully able to express herself. Ultimately, however, this is insufficient to render her dismissal unfair, given that the process needs to be viewed in the round and where she did have 2 further opportunities for very full meetings at which an interpreter was present. The tribunal can confidently say that she had every opportunity to argue her case and understand that of the respondent.
>
> 295. Mrs Hussain also did not receive a significant pack of documentation until a day before her formal hearing. The evidence of one of the respondent's HR managers, Ms Turner, is that the hearing ought reasonably to have been stopped. Nevertheless, the documents sent to her were not new and included the policy, risk assessment and numerous updates which had been sent to staff in the preceding months. Mrs Hussain puts forward that she had not read those documents when they were sent to her, but she had been able to read other documents and her own research was conducted in English with the aid of Google translate. She did state at the meeting that she was willing to continue and she did so with the key knowledge of how the respondent's

> vaccine policy operated and what she would have to show for it not to apply to her, together with the consequences of her failing to show evidence of a medical exemption. Furthermore, Mrs Hussain subsequently appealed the dismissal decision and certainly, by the time of her very full appeal hearing, had had a full opportunity to consider the documentation sent to her.
>
> 296. Finally, Mrs Hussain complains that documentation she sent to Mr Calveley on 15 March 2021 and documentation she subsequently submitted to HR were not considered at any stage of the decision-making. The tribunal has considered such documentation. Whilst it ought reasonably to have been before the decision-makers, the tribunal cannot, on balance and looking at the case as a whole, consider that the failure to do so renders Mrs Hussain's dismissal unfair. The tribunal, in particular, has reviewed all of the additional documentation sent, which cannot have had any effect on the policy the respondent formulated or how it was being applied to her. The arguments she raised to Mr Calveley could and were repeated, in particular, at the appeal hearing. The reference to the attitude taken by the US authorities was not reasonably relevant to the respondent's considerations based on MHRA and UK government advice. Documents regarding consent were not at odds with the respondent's own position. The respondent was aware and had referred staff itself to yellow card reporting. The respondent did not doubt that the claimant was a Muslim. A document evidencing her mother's condition did not provide proof of it arising from the Covid vaccination and took her objections no further. If anything, her conditional acceptance of the vaccine, indicating that she would take it if the respondent acknowledged, amongst other things, uncertainty over the vaccine safety and gave her an indemnity, undermined her assertions that her religion and/or any belief were behind her refusal to be vaccinated.

48. The Tribunal thus dismissed the claimants' unfair dismissal claims and went on also to dismiss the claims that had been brought under the EA 2010.

Discussion and conclusions in relation to the grounds of appeal

Ground 1: erred by failing to carry out the second part of the two-part test for unfair dismissal for some other substantial reason (SOSR), as set out in Catamaran Cruisers Ltd v Williams [1994] IRLR 386

49. The claimants argue that the Tribunal erred in law by failing to direct itself in the same way as the Employment Tribunal in *Catamaran Cruisers* did at [8] of its judgment in that case, as quoted in [5] of the EAT's judgment in *Catamaran* as follows:-

> 'If an employer proposes a change for sound business reasons and the employee refuses, then it may be fair for the employer to dismiss the employee, simply for refusing to accept the new terms and conditions. What the Tribunal has to do, in our view, is to examine first the employer's motives for what he did and to satisfy themselves that the employer's imposition of the new terms and conditions is not purely arbitrary but is, in fact, proposed for a sound business reason; and secondly, to consider whether, in refusing to accept the new terms and conditions, the employees are acting unreasonably, having regard to the necessity which the

> employer has for proposing the new terms.'

50. The claimants place particular emphasis on the second part of the Tribunal's direction in that case, asserting that a Tribunal needs to consider whether the employees are acting unreasonably in refusing to accept the new terms, having regard to the necessity which the employer has for proposing the new terms. The claimants assert that this approach was approved by the EAT in *Catamaran Cruisers* at [24].

51. We do not accept that submission.

52. The relevant ground of appeal in *Catamaran Cruisers* was concerned with a further self-direction that the Tribunal had given to itself that, in answering the second of the questions it identified in the paragraph quoted above, it needed to consider whether the employer's business reasons for imposing the change "are so pressing that it is absolutely vital for the survival of the employer's business that the terms be accepted", so that the employee would not be acting unreasonably in refusing the change and any dismissal would be unfair.

53. The EAT (Tudor Evans J) at [19] held that the Tribunal had misdirected itself in law and that all that was required was that the employer have "a sound good business reason" in order to establish a potentially fair SOSR for dismissal. The EAT then went on as follows:-

> 23
> The lay members of this Tribunal desire to state that they are concerned that, in reaching the conclusion which we have just stated on the second ground of appeal, there may be seen to be a conflict between, on the one hand, the correct principles of law and their application and, on the other hand, good industrial practice. They wish to record that much of recent employment law has been to protect employees against arbitrary changes of their terms and conditions of employment and that this, as a principle, must stand. The fact that the authorities show that an employer is not restricted, when offering less attractive terms and conditions of employment, to a situation where the survival of his business is at stake, does not provide an open door to change. The lay members wish to add that the laws governing constructive dismissal still apply and that an employer must demonstrate, under s.57(3) of the Act of 1978 that, if he dismisses an employee for failing to accept changed terms and conditions of employment, his action falls within the bounds of reasonableness.
>
> 24
> In the context of these observations, we would draw attention to the principle of law, correctly applied by the Industrial Tribunal in paragraph 8 of this case, that a Tribunal must examine the motives for change in the terms of a contract of employment and to satisfy itself that they are not sought to be imposed for arbitrary reasons.

54. The claimants submission that in [24] the EAT thereby approved the second part of the

Tribunal's self-direction at [8] is thus not correct. The EAT does not mention the second part of the Tribunal's self-direction in [24]. It is not approving the second part of that self-direction in that paragraph, merely confirming that the Tribunal must consider the employer's reasons for imposing the change and satisfy itself that they are not arbitrary. If this were not clear enough from [24] itself, read in context, the point is put beyond doubt by [26]-[27] where the EAT holds as follows (emphasis added):-

> 26 We have come to the conclusion that this case should be remitted for the matters which we shall mention to be considered and decided. As Beldam J (as he then was) pointed out in Richmond Precision Engineering Ltd v Pearce [1985] IRLR 179 at p.184, 32:
>
> > 'The task of weighing the advantages to the employer against the disadvantages to the employee is merely one factor which the tribunal have to take into account when determining the question in accordance with the equity and substantial merits of the case. **Merely because there are disadvantages to the employee, it does not, by any means, follow that the employer has acted unreasonably in treating his failure to accept the terms which they have offered as a reason for dismissal**.'
>
> 27 **Nor does it follow**, as was said in Evans v Elemeta Hold-ings Ltd [1982] IRLR 43, **that if it was reasonable for the employee to refuse the new terms then it was unreasonable for the employers to dismiss him for such refusal**. Balcombe J (as he then was) in Chubb Fire Security Ltd v Harper [1983] IRLR 311 at p.313, 9 declined, rightly in our view, to follow Evans v Elemeta Holdings Ltd [1982] IRLR 43 (supra), holding:
>
> > 'We must respectfully disagree with that conclusion. It may be perfectly reasonable for an employee to decline to work extra overtime, having regard to his family commitments. Yet from the employment point of view, having regard to his business commitments, it may be perfectly reasonable to require an employee to work overtime.'
>
> What has to be carried out in deciding the matters for decision under s.57(3) is a balancing process.

55. What the Tribunal needs to do therefore is to apply *Catamaran* in order to decide whether the employer has established a potentially fair ("sound good business") reason for dismissal for the purpose of ERA 1996, s 98(2). That is what this Tribunal did at [242]-[243]. Then it must ask whether dismissal for that reason was fair in all the circumstances as required by s 98(4), which this Tribunal went on to do at [244]-[288].

56. We therefore reject the first ground of appeal. *Catamaran Cruisers* is not authority for the proposition that in cases where an employer dismisses an employee for failing to accept new terms and conditions of employment that the Tribunal must consider whether the employee

has acted reasonably in refusing to accept the new terms and conditions. There will be cases (perhaps many cases) where the employee will act reasonably in refusing to accept the new terms and conditions, but the employer will still act reasonably in imposing the new terms and dismissing the employee.

57. The most that can be said in favour of the claimants' argument is that it will usually be relevant for the Tribunal to consider, in assessing whether dismissal is fair in all the circumstances under s 98(4), what the impact of the new terms will be on the employee. In some cases, it may be a useful thought exercise for the Tribunal to consider whether the employee has acted reasonably in refusing to accept the new terms, but in other cases it will be easier to consider more generally what the disadvantages to the employee are in order to assess the reasonableness of the employer's decision. As we hold under Ground 2, the Tribunal carried out that exercise in this case. The question for the Tribunal remains, however, always that prescribed by s 98(4). Ground 1 is dismissed.

Ground 2: erred in law by failing to carry out the balancing exercise endorsed in Scott & Co v Andrew Richardson (EAT/0074/04), as originally from Catamaran

58. The claimants submit that the Tribunal failed to carry out the 'balancing exercise' in accordance with the EAT's judgment in *Scott & Co v Andrew Richardson* at [27] when addressing the question of fairness in all the circumstances for the purposes of s 98(4). In that case, Burton P (sitting with members) observed as follows, referring back to *Catamaran Cruisers*:-

> 27. In considering that question [i.e. the s 98(4) question], which, in our judgment, ought to have been the only question which this Tribunal had to resolve on the basis that the Tribunal ought to have found without great difficulty that the dismissal had been for a substantial other reason, there are authorities which assist in carrying out what is plainly, a balancing process. In Catamaran Cruisers Limited v Williams [1994] IRLR 386 at paragraph 28, there is set out in the judgment of Tudor Evans J certain non−exclusive matters which might fall to be considered in such a balancing act:−
>
> (i). The Tribunal should consider the case without the restriction which it applied, namely, unless the business reasons were so pressing that it is vital for the survival of the business that the terms be accepted, it is not unreasonable for an employee to refuse the terms.

> (ii) The Tribunal should not limit their approach to the questions to be answered under s 57(3) of the Act by looking at the matters solely from the point of view of the advantage or disadvantage of the new contract from the point of view of the employee. It is necessary to consider and take into account the benefit to the appellants in imposing the changes in the new contract.
>
> (iv) An express finding should be made as to whether the dismissal was reasonable in the light of the fact that many employees accepted it.
>
> (v) Finally, the Tribunal should consider whether the dismissal was reasonable in the light of any evidence that the trade union recommended the change."

59. (Point (iii) is missing in the list in *Scott* above because Burton P was quoting from *Catamaran Cruisers* and point (iii) related to a specific issue in *Catamaran* that is not of general relevance.)

60. The claimants submit that the balancing exercise described in *Scott* was not carried out anywhere in the Employment Tribunal's judgment. They submit that it is not sufficient that the Tribunal carried out a balancing exercise in terms of considering the claimants' Convention rights argument, they submit that the Tribunal needed specifically to carry out the exercise described by Burton P in *Scott* with reference to each of the factors he mentions there and that the Tribunal erred in law because it did not do that.

61. We reject the claimants' submissions.

62. First, it is clear from Burton P's choice of words "certain **non-exclusive** matters which **might** fall to be considered" (emphasis added) that a Tribunal will not err in law if it fails to go through each of the matters there listed in any particular case. What matters is that, in considering whether dismissal for the employer's reason is fair in all the circumstances for the purposes of s 98(4), the Tribunal should consider all relevant factors.

63. Secondly, the Tribunal in this case has plainly addressed, in what we consider to be impressively conscientious detail, the question of whether these dismissals were fair in all the circumstances, having regard to all material factors relied on by the claimants as indicating that the vaccine policy was not reasonable, or the dismissals not fair, and taking account of all the circumstances, including the disadvantages to the claimants that they had identified. As

we have endeavoured to show when setting out the elements of the Employment Tribunal's decision at [40]-[46] of our judgment above, the Tribunal in this case carried out a "balancing exercise" both by reference to the human rights arguments ([244]-[260]) and by reference to wider considerations of fairness ([261]-[288]).

64. Thirdly, the Tribunal in this case did in the course of those 44 paragraphs of its judgment deal with each of the specific factors mentioned by Burton P in *Scott*:-

a. Burton P's item (i) was, of course, not an item to consider at all but merely an instruction to the Tribunal to avoid the error that the Tribunal fell into in *Catamaran Cruisers* of demanding that the business need for the introduction of the new terms was "vital for the survival of the business".

b. As to item (ii), the Tribunal plainly considered both the disadvantages to the claimants of the policy and the advantages to the respondent (which were, of course, principally advantages to the care home residents for whom the respondent was responsible).

c. As to item (iv), the Tribunal evidently took into account the number of employees who had accepted the policy in considering whether dismissal was fair. It had the numbers in mind (see [59]) and the numbers came back into the assessment at [283] because of the claimants' argument that enough employees had accepted vaccination that the respondent could reasonably have left it at that and allowed those who had objected to remain in employment on the basis that if 95% of the workforce were vaccinated that was 'safe enough'. The Tribunal explained why it rejected that argument. (We add that we reject the claimants' further submission that what Burton P said in *Scott* requires a Tribunal to make an "express finding … as to whether the dismissal was reasonable in the light of the fact that many employees accepted it". That point was no more than a steer from the EAT to the Tribunal that, in general terms, the more employees who accept a change in terms and conditions the more likely it is that the dismissal will be fair. That steer should not be elevated into some separate legal

requirement for the Tribunal to comply with in every case.)

d. As to item (v), the Tribunal also had the unions' views well in mind in this case: see [55] and [290] of its judgment. The unions' views were reflected in all the points raised by the claimants that were addressed by the Tribunal in the 44 paragraphs of its judgment that are devoted to considering whether dismissal was substantively fair in all the circumstances.

65. Ground 2 does not therefore succeed.

Ground 3: erred in law by failing to correctly convey the meaning of Article 2 of the European Convention on Human Rights ("ECHR")

66. The claimants submit that the Tribunal wrongly accepted that Article 2 of the ECHR was engaged in this case. They submit it is only engaged where someone is "intentionally" deprived of their life and that accordingly it should not have been relied on by the respondent as a Convention right that justified the respondent's policy or the interference with the claimants' Article 8 rights. Mr Lowe on behalf of Miss Masiero further submits that there was no "real and immediate risk" to life in this case so the state's operational duty under Article 2 (*Osman v United Kingdom*, Application 23452/94; *Brinca and ors v Malta*, Application 60908/11 and ors) was not engaged. Mr Lowe submits that, in particular, the risk to residents posed by one claimant remaining unvaccinated was very small indeed (1.1% risk of transmitting Covid, Mr Lowe submits) and thus that Article 2 could not be invoked as a justification for interfering with the claimants' rights. Mx Davies and Mr Lowe submit that the Tribunal was "misusing" Article 2 in this case and that Article 2 can only be relied on to justify interference with the rights of others where, without that interference, there would be a breach of Article 2. They submit further that it was not open to the respondent to rely on Article 2 as a justification because residents' rights to life were already sufficiently protected by the existing regulatory health and safety framework and it was only the government, and

not the respondent as a private business, that could take further action in reliance on Article 2 to protect life going beyond that existing regulatory framework.

67. Mr Glyn for the respondent submits that the claimants have misread or misunderstood Article 2 of the ECHR and that it was plainly open to the Tribunal to conclude that Article 2 was engaged in this case on the basis of the evidence before it as to the number Covid-related deaths among the respondent's residents and the published data relied on by the government about the likely efficacy of the vaccine in reducing rates of infection and transmission.

68. We prefer the submissions of Mr Glyn. In our judgment, the claimants' submissions under this ground betray a number of misunderstandings about the operation of the Human Rights Act 1998 (HRA 1998) and the ECHR.

69. First, as the Tribunal properly appreciated, having directed itself by reference to *X v Y* [2004] ICR 1634 and *Turner v East Midlands Trains Ltd* [2013] ICR 525, Convention rights only come into play in the context of an unfair dismissal claim against a private employer by virtue of the Employment Tribunal being a 'public authority' for the purposes of s 6 of the HRA 1998, and also by way of the interpretative obligation in s 3 of the HRA 1998. The requirement is for the Tribunal to be satisfied that the state will not have breached the claimants' rights under Article 8 of the ECHR if the Tribunal finds the dismissal to be fair. Convention arguments in this context provide a 'floor', not a 'ceiling'. In other words, while the Tribunal should, interpreting s 98 ERA 1996 compatibly with the Convention, hold to be 'fair' any dismissal that would otherwise constitute an unlawful interference with the claimants' Article 8 rights, it is not the case that someone can only be (fairly) dismissed if not dismissing would result in a breach of someone else's Convention rights. Further, as the Court of Appeal in *Turner* observed at [57] (in the passage cited by the Tribunal in its judgment at [197]), in the vast majority of cases application of the ordinary principles of unfair dismissal law under s 98 ERA 1996 will secure compliance with the procedural safeguards required by Article 8 of the ECHR.

70. Secondly, the claimants have failed to appreciate the role that Article 2 played in the Tribunal's judgment in this case. It was being relied on by the respondent as one of the reasons why interference with the claimants' Article 8 rights was justified. Article 8 provides (emphasis added):

> Article 8
>
> 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be **no interference by a public authority** with the exercise of this right except such as is **in accordance with the law** and is **necessary in a democratic society** in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, **for the protection of health** or morals, **or for the protection of the rights and freedoms of others**.

71. The interference with the appellants' article 8 rights in relation to dismissal from their employment is in accordance with the law if (so far as relevant in this case) it is lawful under s 98 of the ERA 1996 (interpreted compatibly with s 3 HRA 1998), i.e. if dismissal is for a potentially fair reason and dismissal for that reason is fair in all the circumstances.

72. In this case, the Tribunal found ([241]) that the reason for dismissal was the claimants' non-compliance with the respondent's vaccine policy, which had been introduced by the respondent in what the Tribunal found to be the genuine and reasonable belief that it would reduce the risk of spread of Covid infection in its homes and, therefore, death and serious illness amongst (primarily) its residents. With reference to Article 8(2), the aims of the respondent's policy thus included "the protection of health" of others and "the protection of the rights and freedoms of others". The relevant "rights and freedoms of others" in this context included not only the respondent's right to dismiss its employees for fair reasons, but also the protection of residents' right to life. The residents' right to life was relevant because one of the policy aims was to reduce the risk of death from Covid-19.

73. Thirdly, the claimants are wrong to say that the Tribunal erred in law by failing to consider whether, without their dismissals, there would have been a breach of Article 2 of the ECHR. Steps taken with a view to protecting the right to life are plainly capable of justifying

interference with Article 8 rights without any need for it to be shown that without those steps Article 2 would be breached, whether as a result of a failure to comply with the positive obligations under Article 2 that may arise on *Osman* or *Brincat* principles, or as result of breach of the prohibition in Article 2 on "intentionally" taking life. As is clear from the wording of Article 2 itself, that Article does not 'create' the "right to life". Rather, it recognises the "right to life" which exists as an internationally-recognised 'common law' right independently of Article 2. Article 2 protects that right by setting out obligations on the state to protect life, breach of which will result in a violation of Article 2 of the Convention:

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

74. The nature of the obligations under Article 2 were explained by the Strasbourg Court in *Boso v Italy* (Application no. 50490/99, judgment of 5 September 2022) as follows (emphasis added):

> The Court further notes that the Convention does not define either the term "everyone" or the term "life". It observes that Article 2 contains **two fundamental elements**: the **general obligation to protect by law the right to life**, and the prohibition of intentional deprivation of life, delimited by a list of exceptions.
>
> The Court has held that the first sentence of **Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction** (see L.C.B. v. the United Kingdom, judgment of 9 June 1998, Reports of Judgments and Decisions 1998-III, p. 1403, § 36). This obligation goes beyond the duty to secure the right to life by putting in place criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the suppression and punishment of breaches of such provisions. It may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk (see Osman v. the United Kingdom, judgment of 28 October 1998, Reports 1998-VIII, p. 3159, § 115, and Keenan v. the United Kingdom, no. 27229/95, ECHR 2001-III).

75. In the context of an unfair dismissal claim such as this one, what is relevant is the first

obligation on the state under Article 2 to protect the right to life "by law". The Tribunal has to interpret the relevant law (i.e. s 98 ERA 1996) compatibly with Convention rights, including (as relevant here) the claimants' Article 8 rights in relation to dismissal and the residents' right to life as protected by Article 2.

76. The Tribunal in this case quite properly noted at [245] that the case involved a 'clash of rights' and (at [246]) that the rights involved were, on the one hand, the 'qualified' Article 8 right and, on the other, the 'absolute' right to life in Article 2 ('absolute' being here a 'term of art' indicating that Article 2 contains no general provision equivalent to Article 8(2) under which interference may be justified). The Tribunal did not (to use the term used by Mx Davies) "overegg" the case by proceeding on an assumption that allowing the claimants to work when unvaccinated would have infringed the residents' right to life ([247]). It proceeded on the basis of a realistic understanding of the extent to which vaccination both generally and in relation to the few remaining employees who (like the claimants) remained unvaccinated might have reduced the risks to the lives of residents: see in particular [248]-[249]. It properly directed itself (at [250] and [257]), by reference to the approach taken by Whipple J in *Peters*, that protection of the right to life is in principle *"a very weighty justification for an interference with Article 8 which might be established"*. It follows that it was in our judgment very much open to the Tribunal to find that even a small reduction in the risk to life of residents was capable of outweighing the claimants' Article 8 rights for all the reasons the Tribunal gave at [244]-[260].

77. In our judgment, the Tribunal's approach to Article 2 in this case was correct in law and this ground of appeal fails.

Ground 4: erred in law by failing to properly consider the issue of free and informed consent

78. The claimants' submit that the Tribunal has failed properly to consider or deal with their submissions that the effect of the respondent's vaccine policy was to deprive them of giving their "free and informed" consent to vaccination and thus to amount to a mandatory

requirement to submit to medical treatment.

79. We can deal with this ground very briefly as it is in our judgment clearly without merit. None of the claimants had the vaccination. None of them were deprived of their right to consent to the vaccine. They chose not to have the vaccine. The Tribunal could legitimately have dealt with the claimants submissions on this issue by simply saying that. However, in fact, the Tribunal dealt comparatively fully with the point at [251] in the passage we have set out at our paragraph [43] above. The Tribunal's decision in this respect was consistent not only with the *Peters* case to which it referred in that paragraph, but also with the approach taken in the *Vavřička* case at [263], where the Strasbourg Court proceeded on the assumption that there could be no infringement of the prohibition on involuntary medical treatment if no treatment had occurred.

Ground 5 (encompassing Miss Masiero's Grounds 4 and 5): erred in law by following *R (Peters) v Secretary of State for Health and Social Care* [2021] EWHC 3182 and/or *Vavřička and ors v The Czech Republic* (Applications no. 47621/13and 5 ors, judgment of Grand Chamber, 8 April 2021)

80. We can take this ground equally briefly. The claimants submit that the Tribunal erred in law by following *Peters* and *Vavřička*, but they do not suggest that the Tribunal has wrongly regarded itself as bound by those decisions. They accept that the decisions are both capable of being persuasive authorities to which the Tribunal could properly have regard, and they both accept that the Tribunal treated the authorities as such and did not abrogate its own decision-making function. As such, there is no error of law raised by the claimant under these grounds. It would only be if the claimants could show that the Tribunal had committed some error of principle in its decision that they could establish an error of law in the Tribunal's decision. The attempt by the claimants to argue that there were factual differences between the claimants' cases and those under consideration in *Peters* and *Vavřička* takes them nowhere. If the right legal principles have been applied by the Tribunal, then arguments about

the facts can only avail the claimants if they amount to perversity or a failure to take into account relevant factors, but this ground of appeal is not advanced on that basis.

81. We add only this in relation to each of those authorities: first, in relation to *Peters*, as we have set out above in relation to Ground 3, once it is remembered that Convention rights only come into play in this case in terms of the role of the Tribunal as a public authority, interpreting the legislation compatibly so as to avoid a breach by the state of the appellants' rights under Article 8 of the Convention, it becomes apparent why it is not a material difference between the claimants' cases and those in *Peters* that *Peters* was concerned with the implementation of regulations by the government. What is lawful action by the state in a public law context is unlikely to constitute a breach of the Convention where the state allows the same thing to occur in a private law context. Secondly, so far as *Vavřička* is concerned, it was plainly open to the Tribunal to regard that decision as supportive of the conclusion that it came to in this case that the aims of a vaccination policy (even one which, as the Tribunal fully acknowledged, was in its early stages of responding to a new disease) were important enough to justify interferences with individual rights – at least at the time that these dismissals took place. The *Vavřička* decision in reality concerns a very similar sort of policy with a very similar (and very significant) impact on individuals. There are factual differences between the two cases, including as to the novelty of Covid-19 and the vaccine, the age group the vaccine aimed to protect, the treatment of those with acquired immunity and the availability of compensation for those harmed by the vaccine, but all these factors were considered by the Tribunal in the course of the 44 paragraphs of its judgment dealing with justification of the policy and substantive fairness of the dismissals. The balancing of those factors was a matter for the Tribunal. There is no error of law in its approach.

Ground 6 (Mrs Hussain only): made a perverse finding that there was no procedural irregularity in her dismissal, despite and in the light of the previous findings of fact that the Tribunal had made

82. Mx Davies on behalf of Mrs Hussain submits that the Tribunal's conclusion that Mrs Hussain's dismissal was procedurally fair despite shortcomings in the process that it had identified was perverse. We disagree. It is well established that not every procedural error renders a dismissal unfair. The fairness of the process as a whole must be looked at, alongside the other relevant factors, focusing always on the statutory test as to whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee: *Taylor v OCS Group Ltd* [2006] ICR 1602 at [48]. Perversity is a high threshold (*Yeboah v Crofton* [2002] IRLR 634). The Tribunal at [294]-[296] does a more than adequate job of explaining why, notwithstanding the procedural failings it had identified, it considered that Mrs Hussain's dismissal was overall fair. That is particularly so when these passages are read together with the more detailed findings that the Tribunal made in relation to Mrs Hussain's case earlier in the judgment, to which Mr Glyn referred us in argument. We have in mind in particular: the fact that she had received many of the documents prior to the formal dismissal process ([47]-[49], [51]-[52], [64], [74]); the involvement of the unions in the consultation generally ([55] and [190]); the Tribunal's findings as to her grasp of English ([110]-[119); and the fact that the substance of the points in the documents that were wrongly not before the decision-makers were dealt with by the Tribunal in its judgment and found not to render the dismissal unfair (see [105]-[108], [111], [116], [135]-[136] and [296]). The Tribunal's conclusion was open to it for the reasons it gave. This ground, too, therefore fails.

Disposal

83. The appeal is dismissed.