Human rights

On 1st October 2000 the Human Rights Act (HRA) 1998 came into force. In broad terms it obliges Courts to interpret primary and subordinate legislation in accordance with the ECHR and, when unable to do so, to make a declaration of incompatibility. Before 1st October 2000, however, citizens of the United Kingdom were still entitled to bring claims to the European Court of Human Rights (ECtHR) in Strasbourg on the grounds that the United Kingdom was in breach of the Convention. The effect of the Act of 1998 is that the Convention is directly incorporated into domestic law.

The question thus arises of what affect it has had and has the potential to have on the jurisprudential development of s.98(4). The Articles of the Convention most relevant for the purposes of the law of unfair dismissal, and indeed employment law as a whole, are Art.6(the right to a fair trial), Art.8 (the right to family and private life), Art.9 (the right to freedom of thought and conscience), Art.10 (the right to freedom of expression) and Art.11 (the right to assembly and association). Before the impact of these articles is considered it is first convenient to set out the key provisions and principles of the Act and the general approach to human rights in cases of unfair dismissal.

Outline of the Human Rights Act

S.2 of the Act concerns the interpretation of convention rights and provides:

> (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
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> (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
> (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
> (c) decision of the Commission in connection with Art.26 or 27(2) of the Convention, or
> (d) decision of the Committee of Ministers taken under Article 46 of the Convention,
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> whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.
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> (2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

Prior to 1998 a citizen of a member state or a member state itself would make an application to the European Commission of Human Rights alleging that a member state had infringed his or its rights under the convention. If the commission considered the application admissible they would then refer it to the ECtHR who would decide whether the relevant Article under the convention had been infringed. In 1998 the commission was abolished and the court acquired its role in addition to its traditional one. The Committee of Ministers of the Council of Europe observes whether member states enforce the judgements of the court and if they fail to do so consider expelling them from the council.

S.2(1) makes it clear that domestic courts and tribunals are obliged to consider the decisions of the commission, the court and the committee. In the House of Lords decision in *Regina v Special Adjudicator (Respondent) ex parte Ullah (FC) (Appellant)* [2002] UKHL 26 Lord Bingham set out the scope and nature of the duty in the following terms:

> While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, paragraph 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only

by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by s.2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under s.6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.

In other words Strasbourg decisions are to be treated deferentially, are to lead the development of the convention right and are only to be departed from in exceptional circumstances. Accordingly, it is essential when considering the impact and potential impact of the convention on s.98(4) to do so against the backdrop of Strasbourg Jurisprudence.

S.3 concerns the duty to interpret legislation in accordance with the convention and provides:

(1) 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.
(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;
(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

The words "whenever enacted" in s.3(2)(a) make it clear that the provision has retrospective effect and thus applies to the ERA. In the Court of Appeal's decision in *Poplar Housing and Regeneration Community Association Ltd v. Donoghue* [2002] QB 48 Lord Woolf CJ explained the interpretative duty: *"(a) unless the legislation would otherwise be in breach of the convention s3 can be ignored (so courts should always first ascertain whether, absent s3, there would be any breach of the convention; (b) if the court has to rely on s3 it should limit the extent of the modified meaning to that which is necessary to achieve compatibility; (c) s3 does not entitle the court to legislate (its task is still one of interpretation, but interpretation in accordance with the direction in s3).*"

S.4 provides that a court may declare that a convention Article is incompatible with a legislative provision. However, court is defined, by s.4(5), as meaning the House of Lords, the Privy Council, the Courts-Martial Appeal Court, the Court of Appeal, the Scottish Court of Session and the High Court. In other words the Employment Tribunal and the EAT whilst obliged, by virtue of s.3, to interpret the Employment Protection Legislation in accordance with the Convention, are not empowered to make a declaration of incompatibility.

S.6 provides that it is unlawful for a public authority to contravene a convention Article and thus proceedings may be brought directly against a public authority under the convention. This further restricts the Employment Tribunal's capacity to implement and consider the convention. The Tribunal's jurisdiction is created by statute and thus confined to the Employment Protection legislation including s.98(4) of the ERA 1996. In other words Claimants before the Tribunal wishing to invoke their convention rights must do so by asking the Tribunal to interpret the relevant statutory provision, such as s.98(4), which comes within its jurisdiction, in accordance with the convention. The convention applies in the Tribunal indirectly by virtue of s.3 but not directly as s.4 and s.6 are inapplicable. Thus if, hypothetically, a public authority dismissed one of its employees in contravention of, say, Art.8 the Claimant may either sue directly under Art.8 and bring the claim in the civil court – which has no jurisdiction to consider s.98(4)

- or sue under s.98(4), bring the claim to the Tribunal and ask the Tribunal to apply s.98(4) in accordance with Art.8.

As previously indicated in cases of unfair dismissal the most commonly invoked convention rights are Art.6, 8, 9, 10 and 11. In broad terms the Articles, other than Art.6, all provide that infringement of the rights does not contravene the convention when the infringement is lawful and necessary in a democratic society or meets a pressing social need. This is often described as the "proportionality test." This contrasts markedly with the traditional approach to reviewing the decisions of public authorities. This is often known as the *Wednesbury* test after the case - *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 – which declared the principle – namely, that the decision of a public authority is only unreasonable if no reasonable person would have taken it.

Lord Steyn, in the House of Lord's decision in *Regina v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26 described the difference between the two tests:

> The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. It will be recalled that in *Smith* the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The challenge based on Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to respect for private and family life) foundered on the threshold required even by the anxious scrutiny test.

Similarly the ECtHR in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 held:

> the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court's analysis of complaints under Article 8 of the Convention.In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

Whilst, as has been said, s.6 does not fall under the Tribunal's jurisdiction and the Tribunal is not charged with directly reviewing the decisions of public authorities the principles enunciated in *Daly* nonetheless are relevant in applying the band of reasonable responses approach in the context of convention rights. It is with this in mind that the general approach to human rights in cases of unfair dismissal should be considered.

General approach

The general approach was considered by the EAT (McMullen J Presiding) in *Pay v Lancashire Probation Service* [2003] UKEAT/1224/02 and, then, by the Court of Appeal in *X v Y* [2004] IRLR 625 and *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932. In

due course the facts of the cases will be set out. For present purposes it suffices to enunciate the principles declared therein.

In *Pay* the EAT opined that "the Tribunal was correct to begin its examination of the complaint by considering s.98." This was because s.6 of the 1998 Act did not come within the Tribunal's jurisdiction. The Tribunal then went on to consider the convention rights relied upon. The EAT could see "nothing wrong in a Tribunal taking that analytic approach provided it ultimately injects consideration of Convention Rights into s.98(4)." The Tribunal, the EAT went on, "should do this by interpreting the word "reasonably or unreasonably" as including "having regard to the Applicant's Convention Rights." The EAT declined to consider how this approach is to be applied in cases of a private sector employer as that question did not arise on the facts. However, as regards a public sector employer, the EAT accepted "that a public authority employer will not act reasonably under ERA 1996 s.98(4) if it violates its employee's convention rights." Indeed the EAT went so far as to declare that "in our view, in a case involving misconduct, the rules on unfair dismissal clarified by the Court of Appeal in *Foley v Post Office* [2000] IRLR 827 need to be considered in the light of convention rights, applying the interpretative obligation explained by Lord Woolf CJ in *Popular Housing and Regeneration Community Association Ltd v Donohue* [2002] QB 48." Thus whilst s.98(4) must be the principal focus and starting point of the inquiry contravention of a Convention Right may *per se* render the dismissal unfair and the band of reasonable responses approach itself may need to be re-considered.

Two of the matters raised in *Pay* – the impact of the Convention on private and public sector employers and the interpretation of s.98(4) – were addressed by Mummery LJ in *X*. As for private and public sector employers his Lordship opined:

> In many cases it would be difficult to draw, let alone justify, a distinction between public authority and private employers. In the case of such a basic employment right there would normally be no sensible grounds for treating public and private employees differently in respect of unfair dismissal, especially in these times of widespread contracting out by public authorities to private contractors.

As already noted in *Pay* the EAT had suggested that the band of reasonable responses approach enunciated in *Foley* ought to be reconsidered in the light of the Convention. Furthermore, in *X* it was expressly submitted that *Foley* had been decided incorrectly in the light of the Convention. Whilst his Lordship did not expressly consider the submission he made it clear, in the following terms, that the traditional approach to s.98(4) survived unscathed despite the Convention:

> It is not immediately obvious, on a reading of s.98 without reference to a particular set of facts, as to how it could be incompatible with or be applied so as to violate Article 8 and Art.14 and so attract the application of s3. Considerations of fairness, the reasonable response of a reasonable employer, equity and substantial merits ought, when taken together, to be sufficiently flexible, without even minimal interpretative modification under s3, to enable the employment tribunal to give effect to applicable Convention rights. How, it might be asked, could the proper application by the employment tribunal of the objective standards of fairness, reasonableness, equity and the substantial merits of the case result in the determination of a claim for unfair dismissal that was incompatible with Article 8?

It was only, his Lordship went on, when "there was a possible justification under s98" for the dismissal that "the tribunal ought to consider Art.8 in the context of the application of s.3 of the HRA to s98 of the ERA. If it would be incompatible with Art.8 to hold that the dismissal for that conduct reason was fair, then the employment tribunal must, in accordance with s3, read and give effect to s98 of the ERA so as to be compatible with Art.8. That should not be difficult, given the breadth and flexibility of the concepts of fairness used in s98." His Lordship expressly referred to Art.8 and Art.14 as they had been pleaded in the present case. However, it is clear his remarks apply to the Convention as a whole. In other words it will be very rare that the Convention will

fall for consideration. In most cases the traditional approach to s.98(4) will be sufficient. The Convention will only be applied when there is a possible justification for the dismissal under the traditional approach. So whilst the EAT in *Pay* suggested that the traditional approach may need to be re-examined the Court of Appeal in *X,* as it had done in *Foley* when the traditional approach was challenged not by the Convention but by *Haddon*, ensured the primacy of orthodoxy.

A similar approach is evident in *Copsey*. The Convention Right in question was Art.9 but the approach to it adopted by the Court is applicable to the Convention as a whole. Rix LJ held that the view that the Convention "lies outside the concept of unfair dismissal...is a mistake and unnecessary conclusion at which to arrive." However, as the Court of Appeal had done in *X* he stressed the elasticity of s.98(4) holding that "the English law of unfair dismissal by itself covers the situation under discussion" – i.e. whether dismissing an employee because he refuses to work on Sundays was contrary to Art.9 given that his refusal was due to his religious beliefs. Similarly, Neuberger LJ held that "a balancing exercise under Art.9 would seem to be very similar to that which, in my opinion, would be involved under the 1996 act."

Whilst, in a case where convention rights are invoked, fairness is determined in accordance with s.98(4), the convention is more than merely a matter to be taken into account. Were it so and its rights merely, for the purposes of resolution of an unfair dismissal claim, no more than guidelines then the Tribunal could find the employer in breach of the right relied upon yet still find the dismissal fair. However, it seems clear, in the light of the EAT's decision in *Pay*, that breach of the convention will *per se* render the dismissal unfair. Therefore, whilst in theory s.3 of the 1998 Act restricts the Tribunal to interpreting s.98(4) in accordance with the Convention in practice Convention Rights can be relied upon directly. However, as the Court of Appeal stressed in *X,* the apparent licence that this approach affords to the Convention is reined in by the broad and flexible nature of s.98(4) in that if the dismissal is found fair, in accordance with the traditional approach to applying s.98(4), then there is a powerful presumption that the Convention has not been infringed.

Article 6

Art.6 concerns the right to a fair trial. It provides:

1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3) Everyone charged with a criminal offence has the following minimum rights:
   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   (b) to have adequate time and facilities for the preparation of his defence;
   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court".

Art.6(1) covers both proceedings in respect of civil rights whereas Art.6(2) and (3) only apply to criminal proceedings. This raises two questions for the purposes of the law of unfair dismissal. Firstly, can disciplinary proceedings be regarded as relating to the determination of a civil rights? Secondly, assuming Art.6(1) does apply to disciplinary proceedings, are the rights, conferred by Art.6(2) and Art. (3) irrelevant or do they, whilst not applying directly, affect the construction and application of Art.6(1) in so far as it relates to disciplinary proceedings. Furthermore, Art.6(1) lays down both absolute and limited rights. A hearing being conducted by an independent and impartial Tribunal established by law is absolute. Ordinarily hearings must be held in public. However, this does not apply if it would be necessary in the interests of a democratic society for the hearing to be held in private where "in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

The decisions of the ECtHR concerned with the application of Art.6 to cases of dismissal concern Belgium doctors whose licences to practice were suspended or revoked due to malpractice. In each case the disciplinary action concerned was affirmed by the Appeals Council convened by Belgium's Medical Association - a statutory body charged with the regulation of the medical profession.

The first ECtHR decision is *Le Compte, Van Leuven and De Meyere v Belgium* [1981] 6878/75; 7328/75. Dr Le Compte's licence was suspended due to an interview he gave to a newspaper where he said things that the association considered incompatible with his duty as a doctor. Dr Van Leuven and Dr De Meyere were suspended due to fee arrangements they entered into with patients contravening rules prescribed by the Medical Association. They claimed that the Appeals Council was not independent and impartial, in the Art.6(1) sense, in that its members were also medical professionals.

The court first addressed the question of whether the protection afforded by Art.6 covered the Appeals Council. The court concluded that it did. It accepted that "disciplinary proceedings do not normally lead to a contestation (dispute) over civil rights and obligations." However, the Court went on to find that Art.6(1) "is not solely applicable to proceedings which are already in progress: it may also be relied on by anyone who considers that an interference with the exercise of his (civil) rights is unlawful and complains that he has not had the possibility of submitting that claim to a tribunal meeting the requirements of Art.6." In the circumstances of the case the right to practice medicine was a civil right, covered by Art.6(1). This, as the Court explained, was because "it is by means of private relationships with their clients or patients that medical practitioners in private practice, such as the applicants, avail themselves of the right to practise; in Belgium law, these relationships are usually contractual or quasi-contractual and, in any event, are directly established between individuals on a personal basis and without any intervention of an essential or determining nature by a public authority." As there was a "direct relationship between the proceedings in question and the right to continue to exercise the medical profession" the proceedings came within the ambit of Art.6(1).

The ECtHR, however, rejected the contention that the Appeals Council, due to it being comprised of medical practitioners, was not independent and impartial. This was because "the personal impartiality of each member must be presumed until there is proof to the contrary." That said, the Article had been breached. This was because the hearing had not been conducted in public. The Court was mindful that Art.6(1) does provide for exceptions to the requirement that hearings be conducted in public such as when the interests of juveniles or national security or of a democratic society are concerned. In the present case, the Court found, "there is no evidence to suggest that any of these conditions was satisfied." The allegations where "neither matters of professional secrecy nor protection of the private life of these doctors themselves or of

patients were involved." Therefore, there was nothing that "could have justified sitting in camera."

The ECtHR followed and approved the decision in *Albert and Le Compte v Belgium* 7299/75; 7496/76 [1983] ECHR 1. Dr Albert's licence was revoked for issuing certificates of unfitness to work without possessing the medical records of the patients concerned and without carrying out a sufficiently thorough examination. Dr Le Compte's licence was revoked due to him engaging in publicity that was contrary to the rules of the Belgium Medical Profession. They also complained that the disciplinary proceedings contravened Art.6 due to the composition of the Appeals Council and the fact that the hearing took place in private. The ECtHR confirmed the principles set out in *Le Compte* – i.e. that proceedings fell within the ambit of Art.6 as the right to practice medicine was a private right, that the composition of the Appeals Council did not offend Art.6 as there was no proof of bias but that the failure to conduct the hearings in public rendered the proceedings incompatible with the Article.

In addition Dr Albert relied on Art.6(2) claiming that he had not been informed of the charges, had not had adequate time for the preparation of his defence and had not been permitted to call witnesses. The Court was mindful that Art.6(2) expressly covers only criminal rather than civil proceedings. However, the Court found, the "principles enshrined" in Art.6(1) are "contained in the notion of a fair trial as embodied" in Art.6(1). Accordingly, "the Court will therefore take these principles into account in the context of para.1."

Whilst the disciplinary proceedings in question came within the ambit of the principles in Art.6(2) Dr Albert's contentions failed on the facts. The Appeals Council had written to him setting out the allegations, he had been given fifteen days to prepare his defence and he had never sought to call witnesses.

The scope of Art.6, as construed and applied in *Le Compte* and *Albert*, at first sight seems wide. It could be said there is no basis in principle for distinguishing between the right to employment, as provided under a contract of employment, and the right to practice medicine. Both rights are employment rights arising from private, contractual relationships. Given that, in dismissal cases, there is a direct link between disciplinary proceedings and the employee's rights under his contract then, applying the approach in *Le Compte* and *Albert,* can it be said that the requirements of Art.6 should always apply?

It would appear not. Domestic authorities have restricted the scope of the Strasbourg Jurisprudence. Before discussing the authorities and the principles they enunciate that have restricted the scope of Art.6 it must be noted they concern cases of breach of contract and judicial review rather than unfair dismissal. Nonetheless, given the elasticity of s.98(4) the principles set are likely to be applicable to claims of unfair dismissal.

The general approach was set out by the Court of Appeal in *Kulkarni v Milton Keynes Hospital NHS Trust and Secretary of State for Health* [2009] IRLR 829. A patient alleged that Dr Kulkarni had placed a stethoscope under her knickers without her consent. His employers brought disciplinary proceedings against him. They declined his request for legal representation. The High Court declined to make a declaration that he was entitled under the terms of his contract to legal representation. The Court of Appeal disagreed. Having held that he was entitled under his contract to legal representation it was not necessary to address Art.6. Nonetheless the Court proceeded to do so. Smith LJ held:

> Article 6 is engaged where an NHS doctor faces charges which are of such gravity that, in the event they are found proved, he will be effectively barred from employment in the NHS.

She went on:

> The next question is whether, in the context of civil proceedings, Article 6 implies a right to legal representation. In my view, in circumstances of this kind, it should imply such a right because the doctor is facing what is in effect a criminal charge, although it is being dealt with by

disciplinary proceedings. The issues are virtually the same and, although the consequences of a finding of guilt cannot be the deprivation of liberty, they can be very serious.

This, of course, concerned the circumstances where Art.6 affords a right to legal representation. As for generally the circumstances where the Article applies she held with reference to the Strasbourg Jurisprudence:

> It appears to me that the distinction which the court was drawing was that, in ordinary disciplinary proceedings, where all that could be a stake was the loss of a specific job, Article 6 would not be engaged. However, where the effect of the proceedings could be far more serious and could, as in that case, deprive the employee of the right to practise his or her profession, the Article would be engaged.

The High Court expressed this principle in *R (on the application of Puri) v Bradford Teaching Hospital NHS Trust* [2011] IRLR 582. Dr Puri's contract with his employers described him as a consultant urologist. However, in practice he undertook, in addition to urology, laparoscopic prostatectomy. He also had a separate private sector practice. He was dismissed for treating his colleagues rudely and in a matter that could be perceived as harassment. He sought judicial review claiming that the disciplinary proceedings had been held in contravention of Art.6. The High Court, however, held that Art.6 did not apply.

Blair J held that "in ordinary disciplinary proceedings, where all that could be at stake was the loss of a specific job, Art.6 would not be engaged." However, his Lordship went on:

> where the effect of the proceedings could be to deprive an employee of the right to practise his or her profession, the Article would be engaged. Article 6 would be engaged where an NHS doctor faces charges which are of such gravity that, if proved, he would be effectively barred from employment in the NHS.

In the present case the disciplinary proceedings would not deprive Dr Puri of the right to practice his profession. That was because he had a private sector practice and on the evidence whilst he might be hard for him to work in the NHS again it would not be impossible given that there was no question as to his competence.

The Supreme Court in (*On the application of G) v Governors of X School and Y City Council* [2011] IRLR 756 considered the matter in circumstances where the allegations against the employee could be the subject of external proceedings in addition to disciplinary proceedings. When the external proceedings entail a right to legal representation the question arises of whether that is a sufficient safeguard and hence it is not necessary for Art. 6 to confer a right to legal representation in respect of the disciplinary proceedings.

The Claimant was a teacher. The employers alleged that he had kissed and had sexual contact with a 15 year old boy. If the allegation were made out he could be placed on a statutory "barring list" with the effect that he would no longer be entitled to work as a teacher. The employers bought disciplinary proceedings against him. He requested legal representation. They refused and subsequently dismissed him. The Claimant sought judicial review of the decision not to permit him to have legal representation. The employers argued that Art.6 did not apply as the Claimant had the right to have the matter determined by the Independent Safeguarding Authority (ISA) and he had a statutory right to legal representation before the Authority. Nonetheless both the High Court and the Court of Appeal found in his favour. The Supreme Court, however, did not.

Lord Dyson held that Art.6(1) applies in the following circumstances. Firstly, the decision in the disciplinary proceedings must "be truly dispositive of a civil right." It is not the case that "Art.6(1) applies in any case where the connection between the two proceedings is merely more than tenuous or where the consequences of a decision in proceedings A for proceedings B is merely more than remote." That begged the question of how "close does the link have to be?" His Lordship held it "is not possible to classify

all the cases into neat hermetically-sealed categories." Thus the answer to the question depends on the circumstances. The factors to be taken in account include "(i) whether the decision in proceedings A is capable of being dispositive of civil rights in proceedings B or at least causing irreversible prejudice, in effect, by partially determining the outcome of proceedings B; (ii) how close the link is between the two sets of proceedings; (iii) whether the object of the two proceedings is the same; and (iv) whether there are any policy reasons for holding that Art.6(i) should not apply in proceedings A."

Laws LJ in the Court of Appeal had propounded a test of "substantial influence or effect." Lord Dyson held this was a "useful formulation."

Both *Kulkarni* and *Puri* suggest that Art.6 applies when the disciplinary proceedings can deprive the employee of the right to practice his profession. However, the Court of Appeal disagreed in *Mattu v University Hospitals of Coventry and Warwickshire NHS Trust* [2012] IRLR 661 thereby further restricting the reach of Art.6. Dr Mattu was dismissed. The employers' disciplinary procedure provided that in cases of professional misconduct the panel at the disciplinary hearing should include someone who is medically qualified. There was no such member on the disciplinary panel that dismissed. However, the High Court and the Court of Appeal both held that Art.6 did not apply. Central to the Court of Appeal's reasoning was the fact that the dispute was contractual unlike the cases of the Belgium doctors which concerned decisions taken by regulatory bodies.

Elias LJ held:

> I would unhesitatingly hold that the exercise of the contractual power to dismiss, even pursuant to agreed procedures, does not attract the protection of Article 6 even where the dismissal effectively freezes the employee out of his chosen profession. The ECHR cases which establish that Article 6 applies to the right to exercise a profession or vocation are all concerned with decisions taken by public or professional bodies directly regulating that right. None of them has to my knowledge involved the exercise of contractual rights by an employer.

It is irrelevant whether or the disciplinary proceedings can affect the employee's right to continued employment. This, as Stanley Burton LJ explained, would lead to great uncertainties:

> As Sedley LJ mentioned in the course of argument, during the course of a disciplinary procedure relating to an allegation of apparently minor importance against a doctor, such as bad time-keeping, it might emerge that his bad time keeping was a symptom of a serious drug dependency, so that dismissal would become a potential outcome. Would the disciplinary procedure change from not engaging Article 6 to engaging Article 6 when that evidence emerged? What is the test for deciding that the new evidence brings Article 6 into play? Is the converse true? In the course of a disciplinary hearing in which serious allegations are made, it becomes apparent/arguable/possible that they are not made out, although some misconduct, not amounting to gross misconduct, remains in issue. Does Article 6 cease to apply?

Such an approach, his Lordship continued, "is an invitation to uncertainty and costs which would be better deployed, in a case such as the present, in caring for patients."

Furthermore, Elias LJ held, it is not the dismissing employer but any prospective employer who refuses to employ the dismissed employee. Therefore, His Lordship continued, Dr Mattu "cannot assert as against the trust his right – more accurately under domestic law a liberty – to work for other employers. The only rights in issue between the parties remain contractual rights."

That left the problem of *Kulkarni*. Stanley Burton LJ was satisfied that Smith LJ's remarks about Art.6 were *obiter* as irrespective of Art.6 Dr Kulkarni's contract entitled him to legal representation. Elias LJ *Kulkarni* did not think that it "establishes a sound principle."

Similarly, the Court was satisfied that the Supreme Court in *R (G)* had not held that Art.6 applies in cases where the disciplinary proceedings can imperil the right to

continued employment. Stanley Burton LJ observed that "it was not suggested that the fact that the teaching assistant's reputation was damaged by the finding in the disciplinary proceedings, as surely it was, rendered Art.6 applicable." Similarly Elias LJ held:

> None of the authorities relied on by Lord Dyson to reach the conclusion in that case involved the exercise of contractual rights. It seems that the court simply assumed without argument that rights were being determined by the employer. For reasons I have given, I do not believe that is the case. I would therefore conclude that there has as yet been no decision which has authoritatively held that the exercise of the contractual power to dismiss for gross misconduct involves the determination of civil rights, even in those exceptional cases where its effect is that the employee is be unable to get a job elsewhere in the same field.

It was submitted, in the alternative, that Art.6 applied because Dr Mattu had suffered loss of reputation. Elias LJ rejected this submission as "the trust was not determining any right to reputation; it was exercising contractual powers and whilst the appellant's reputation may have been damaged as a consequence of the decision, it was not determined by it."

The effect of *Mattu* is that Art.6 will never apply in cases where the dispute is contractual. This will be so in nearly all cases. It remains to be seen to what extent the Strasbourg cases are operative in cases where the dismissal is carried out by a public or professional body. It also remains to be seen to what extent *Mattu* will apply in cases of unfair dismissal which, of course, is a statutory concept transcending contract. However it is likely to do so given the following, admittedly *obiter*, passage in Elias LJ's judgment where his Lordship commented on cases of unfair dismissal:

> Again, however, this does not allow the tribunal fully to review the decision of the employer. The employment tribunal cannot review the finding of primary facts for itself. Essentially it asks whether the decision to dismiss was taken after adopting a reasonable procedure and was one which a reasonable employer could have adopted: see the seminal case of *British Home Stores v Burchell* [1978] IRLR 379, EAT. It is not, therefore, a full rehearing although it is more intrusive than classic judicial review. Given the existence of fair and detailed procedural safeguards at the initial level, coupled with a right to appeal, I consider that where available (and it may not be in all cases) a claim for unfair dismissal would suffice to constitute full jurisdiction complying with Article 6, notwithstanding that it does not allow findings of primary fact to be reviewed

In any case the protection afforded by Art.6 is for the most part contained with s.98(4) – namely the general principles of procedural fairness as found within the rules of natural justice and the ACAS code of practice. In other words a successful contention, under s.98(4), that a dismissal is unfair will seldom depend on invoking Art.6.

Art.6 is notably broader than the traditional approach to s.98(4) in that it provides that the hearing must be open and before a court or tribunal established by law. However, the literal reading of Art.6(1) makes it clear that this applies in respect of judicial and not domestic proceedings. Given the restrictive approach shown by the Supreme Court in *R (G)* and the Court of Appeal in *Mattu* it is hard to believe that the domestic courts would authorise a broader meaning.

Article 8

Art.8 of the Convention concerns the right to family and private life. It provides:

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.

Art.8(1) makes it clear that the Article confers two rights – family and private life. Thus the meaning and scope of both rights, and the inter-relationship between the two, must be discussed. Once rights under Art.8(1) are engaged the question then arises as to whether an infringement with this right is justified under Art.8(2). This is only so if the infringement is, firstly, in accordance with law and, secondly, necessary in a democratic society. It can only be necessary if in the interests of national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others.

Art.8(1) has a wide scope. It is not difficult to imagine how it could be invoked in cases of dismissal in connection with an employee attending to his family and domestic responsibilities in preference to his employment. Curiously, however, most dismissal cases where Art.8 has been invoked have concerned private life. It is therefore necessary to consider how the ECtHR has defined "private life" before specifically considering the application of Art.8 in dismissal cases.

In *PG and JH v United Kingdom* [2002] 44787/98 the ECtHR held:

> Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8 (see, for example, the B. v. France judgment of 25 March 1992, Series A no. 232-C, § 63; the Burghartz v. Switzerland judgment of 22 February 1994, Series A no. 280-B, § 24; the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, § 41, and the Laskey, Jaggard and Brown v. the United Kingdom judgment of 19 February 1997, *Reports* 1997-1, § 36). Article 8 also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, Burghartz v. Switzerland, Commission's report of 21 October 1992, *op. cit*., § 47; Friedl v. Austria, no. 15225/89, Commission's report of 19 May 1994, Series A no. 305-B, § 45). It may include activities of a professional or business nature (see the Niemietz v. Germany judgment of 16 December 1992, Series A no. 251-B, § 29; the Halford v. the United Kingdom judgment of 25 June 1997*, Reports* 1997-III, § 44). There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'.

In *Niemietz v Germany* 13710 [1992] ECHR80 the ECtHR specifically addressed the right to private life, conferred by Art.8, in the context of work:

> The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude there from entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.

A search warrant had been issued against Mr Niemietz authorising the search of many files and documents that he kept at work. The court found that the wording of the warrant was imprecise and has such infringed his right to privacy in the context of work.

In *Botta v Italy* [1998] 153/1996/772/973 the ECtHR stressed that Art.8 may also require positive steps be taken to develop the rights the Article confers on an individual. The court found that "the guarantee afforded by Art.8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings." From this is followed that "these obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves." It should be noted that Mr Botta's claim failed. He was disabled and had claimed that failure to provide proper changing facilities for disabled persons at a beach violated his Art.8 rights. The court found otherwise as the scope of such a duty would be

"indeterminate" and unclear. However, there would appear to be no reason in principle why, in certain circumstances, the court's finding that Art.8 obliges positive measures being taken to improve the development of individuals between themselves could not apply to an employer.

The right to private life, conferred by Art.8, essentially provides that the individual is entitled to develop personally and in his development with others. This can encapsulate sexual orientation, physical and mental health and self-expression. These are all matters potentially of relevance in the context of industrial relations as the Strasbourg court has recognised.

Art.8 was invoked, in a dismissal case, before the Strasbourg Court, in *Smith and Grady v United Kingdom* [1999] 33985/96 and 33986/96. S.146(4) of the Sexual Offences Act 1967 provided it was permissible to dismiss a member of the Armed Forces if they were gay. Furthermore, the Armed Forces in their *Policies and Guidelines on Homosexuality* stated that gays would be dismissed on the grounds that their sexual orientation was not conducive to creating military operational effectiveness. Accordingly, Miss Smith, a lesbian, and Mr Grady, a homosexual, were both dismissed from the Air Force. As members of the Armed Forces are excluded from the right to claim unfair dismissal they sought judicial review of the decision to dismiss them. However, both the High Court and the Court of Appeal rejected their claims. Accordingly, they turned to Strasbourg for relief.

The relief was granted. There was no dispute that sexual orientation constituted private life, for the purposes of Art.8(1), and thus the issue was justification under Art.8(2). The Court found that the consequences of dismissal for both Applicants would be grave accepting "that the applicants' training and experience would be of use in civilian life. However, it is clear that the applicants would encounter difficulty in obtaining civilian posts in their areas of specialisation which would reflect the seniority and status which they had achieved in the air force". Furthermore, "the absolute and general character of the policy which led to the interferences in question is striking." Whilst the Court accepted that the intention behind the policy was genuinely to ensure military effectiveness "these attitudes, even if sincerely felt by those who expressed them, ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues. To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above any more than similar negative attitudes towards those of a different race, origin or colour." Furthermore, the Court noted "the lack of concrete evidence to substantiate the alleged damage to morale and fighting power that any change in the policy would entail." Accordingly, whilst the interference with the Art.8 rights of Ms Smith and Mr Grady were in accordance with the law and for a legitimate aim, i.e. the military effectiveness, it was not in the interests of a democratic society and thus Art.8 was infringed.

Art.8 has also been invoked in the domestic courts in the context of dismissal relating to homosexuality. In *Pay* the EAT, although not called upon, on the facts of the case, to address whether dismissal on the grounds of sexual orientation is contrary to Art.8 opined that given that s.98(4) must be construed in accordance with the Convention "it follows that two public authority cases decided by the EAT now require re-examination. Each involved the cautioning of an employee for gross indecency and his subsequent dismissal. Each dismissal was held by the EAT on appeal to be fair: *Notts County Council v Bowley* [1978] IRLR 252; *Wiseman v Salford City Council* [1981] IRLR 202". *Wiseman* was disused in Ch. 10. In both cases the Claimants were teachers, who engaged in homosexual activities in public, although outside the employer's premises, and were dismissed on the grounds that this meant they would be a risk to the children they taught. In both cases the Tribunal and the EAT found the dismissals fair.

Whilst the EAT in *Pay* may have thought that their correctness required reconsideration in the light of the Convention the EAT and the Court of Appeal, in *X*, when the issue arose before them on the facts, patently thought otherwise. Mr X's duties included liaising with local Probation Officers and working with young people on activities he organised. Whilst off duty and outside his employers' premises he went into the toilet of a motorside cafe. There he engaged in homosexual activity with a man he had never met before. A Police Officer arrived on the scene and arrested both men for gross indecency. He was subsequently dismissed on the grounds that his conduct fundamentally damaged his relationship with his employers given that his job involved day to day contact with young persons. The Tribunal, the EAT and the Court of Appeal all found the dismissal fair and rejected the submission, made on Mr X's behalf, that his dismissal was contrary to Art.8.

The EAT (Clark J Presiding) found that Art.8(1) had not been engaged – i.e. Mr X had not exercised private life rights and thus the question, under Art.8(2), of whether any infringement with them was justified did not arise. The reason Art.8(1) did not apply, according to the EAT, was because the sexual act took place in a public toilet and thus "the activities in which the Applicant were engaged were 'genuinely' in public" as opposed to 'private' for Art.8(1) purposes. Furthermore, the EAT rejected the "argument that all sexual relations should be regarded as private."

The Court of Appeal adopted a similar approach. Mummery LJ cited *PG* where the ECtHR had held, in discussing the meaning of private life, that "there are a number of elements relevant to a consideration of whether a person's private life is concerned in measures effected outside a person's home or private premises." His Lordship then went on to hold that: "*What is "private life" depends on all the circumstances of the particular case, such as whether the conduct is in private premises and, if not, whether it happens in circumstances in which there is a reasonable expectation of privacy for conduct of that kind*". Accordingly, the present case did "not fall within the ambit of Art.8, because the dismissal of the applicant for the offence did not have a sufficient link with his right to respect for 'private life.' The conduct in question was in a public place and outside Art.8. That reason alone is sufficient to dispose of the point".

Nonetheless, it is submitted that the EAT and the Court of Appeal erred in two respects. Firstly, in determining whether Art.8(1) rights came into play, they only considered whether the homosexual activities in question occurred in public or private rather than whether the mere act of engaging in homosexual activity amounted to the exercise of a right to private life. Whilst it is true, as Mummery LJ recognised, that the ECtHR in *PG* held that the question of whether something amounts to the exercise of a right to private life can depend on whether it was performed in public or private the Court also held that "elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Art.8." In other words the EAT and the Court of Appeal erred in failing to apply the broad meaning of Art.8 as set out in *PG* and *Niemietz*. Secondly, it is arguable that Mr X's dismissal was unfair in accordance with the traditional approach to s.98(4). Mr X had been dismissed for an offence committed outside of work. Accordingly, the guidance in para.43 of the previous ACAS Code of Practice, discussed in Ch. 10 applied (see, also Ch.10 for a comparison of para.43 of the previous code with para 30 of the current code which, also, concerns offences committed outside of work). This provided that in such cases: "The main consideration should be whether the offence, or alleged offence, is one that makes the employee unsuitable for their type of work." The Tribunal, the EAT and the Court of Appeal failed to adopt this approach. It is arguable that had they done so they would have found the dismissal unfair as the employers did not rely on any strong evidence that Mr X's activities made him unsuitable to do his type of work. If this is correct then this, perhaps, minimises the potential utility of Art.8 in such cases.

That said the EAT in *X* despite finding for the employer considered it "pertinent to recall the pre-HRA decision of the EAT in *Saunders v Scottish National Camps Association*

Ltd [1980] IRLR 174." The EAT set out the facts of that case and the decision and then opined: "*In the post-HRA era cases such as Saunders may require revisiting.*" *Saunders* is discussed in Ch. 2, 4 and 13. Mr Saunders was a homosexual and was responsible for maintenance at a children's camp. Psychiatric evidence, before the employers, concluded not only that he was no danger to young people but that heterosexuals were just as likely to pose a danger to the young. The employers, however, did not share this view. They thus dismissed him on the grounds that his sexual orientation meant the children in his care were at risk from him. The Tribunal and the EAT found the dismissal fair. In *X* the EAT said of this decision "arguably, in the absence of any suggestion of a real risk to children or a relevant criminal offence...the dismissal in *Saunders'* case interfered with his Art.8(1) right."

Saunders is only distinguishable from *X* in that in the latter the employee committed a homosexual act in public whereas in the former the dismissal did not arise from any specific sexual act performed. However, in both cases the employees were dismissed not for being homosexual specifically but because they allegedly posed a risk to young persons in their care. It is thus submitted that whilst it is unclear to what extent Art.8(1) may be engaged in cases of dismissal relating to sexual orientation Art.8(2) may render dismissal contrary to s.98(4) when the reason for dismissal is that the employee's sexual orientation means he is a danger and the employer is unable to substantiate this. Here it must be recalled that the EAT and the Court of Appeal in *X* did not consider whether the employers were entitled to belief that Mr X's activities meant he posed a threat to the young persons in his care as this was a question going to Art.8(2) and thus did not arise given that they found that Art.8(1) did not apply.

However, dismissal on the grounds of sexual orientation is unlawful discrimination. Therefore, an employee dismissed on grounds of sexual orientation would be best advised to rely on the relevant discrimination legislation rather than s.98(4) construed in accordance with Art.8. This was first the Employment Equality (Sexual Orientation) Regulations 2003 and is now the EQUA 2010 (s.12 making it clear that sexual orientation is a protected characteristic). However, as is perhaps evident in the EAT's comments in *X* on *Saunders*, when the reason for dismissal is not so much the employee's sexuality *per se* but matters that relate to it such as how the employee manifests it then, depending on the circumstances, the employee may be advised to invoke Art.8.

Art.8 has not only been invoked in cases of dismissal relating to sexual orientation. In *Pay* the EAT was asked to decide whether dismissal for reasons relating to the Claimant's involvement in bondage and sado-masochistic activities engaged Art.8. Mr Pay was a Probation Officer and worked with sexual offenders. He was also a director of an organisation that merchandised bondage, sado-masochism and domination via its website. Its website also contained pictures of him performing a fire act with semi-naked women. Furthermore, he performed his fire act in hedonistic and fetish clubs. His employers considered this inappropriate given that he dealt with sexual offenders and had the potential to damage their reputation in the public eye. Consequently, they dismissed him. He contended that this breached Art.8. The EAT upheld the Tribunal's finding to the contrary. This was because "Art.8 was not engaged because the Applicant's activities had been publicised on the website of Roissy of which he was a Director and that he was present in bars and clubs to which the public was admitted promoting the interests of Roissy in BDSM".

The restrictive approach to Art.8 in *X* is also evident in *Pay*. Just as the Court of Appeal in *X* considered solely the relevance of the act occurring in public rather than private instead of the activity in itself so to the EAT in *Pay* only took into account the fact that the activities were in the public domain rather than the activities in themselves. It is again submitted that this narrow approach to Art.8 is contrary to the wide meaning given to private life by the ECtHR in *Niemietz* and *PG*.

That said Mr Pay took his case to Strasbourg and the ECtHR found his application inadmissible (*Pay v United Kingdom* [2008] 32792/05). However, unlike the EAT the Court did not reject his application on the grounds that Art.8(1) was not engaged due to his public displays of his sexual expression. It is true that the Court found that these displays "could give rise to some doubts as to whether the applicant's activities may be said to fall within the scope of private life and, if so, whether...there had been a waiver or forfeiture of the rights guaranteed by Art.8." However, the Court went on, his "performances took place in a nightclub which was likely to be frequented only by a self-selecting group of like-minded people and that the photographs of his act which were published on the internet were anonymised." Furthermore, in discussing the rights conferred by Art.8(1) the court held that there is "a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life.' There are a number of elements relevant to a consideration of whether a person's private life is concerned in measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded in a public manner, a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive, factor." As for Mr Pay the Court was "prepared to proceed on the assumption, without finally deciding, that Art.8 is applicable."

However, Mr Pay fell at the Art.8(2) hurdle. Dismissal was proportionate. This was despite, as the Court itself noted, "the hallmarks of a 'democratic society' include pluralism, tolerance and broadmindedness." Given "the sensitive nature of the applicant's work with sex offenders, the Court does not consider that the national authorities exceeded the margin of appreciation available to them in adopting a cautious approach as regards the extent to which public knowledge of the applicant's sexual activities could impair his ability effectively to carry out his duties." The decision seems to confirm the broad meaning given to private life whilst recognising that the extent to which the activities concerned are performed outside the Claimant's home is not irrelevant and whether it is determinative will depend on the circumstances of the case.

In *McGowan v Scottish Water* [2004]UKEATS/0007/04 the EAT (Lord Johnston Presiding) considered whether the employers' use of covert surveillance, as part of its investigation into alleged misconduct, was contrary to Art.8 and thus rendered the dismissal unfair. Mr McGowan's employers suspected that he was falsifying his timesheets. In order to investigate the matter further they decided to place him under surveillance even though he was going through a period of bereavement. The purpose of the surveillance was so as to quantify the number of times he went to the process plant as this helped determine the accuracy of his subsequently submitted timesheets. They decided against putting cameras in the process plant where he worked on the grounds that this was impracticable. Instead they opted to engage the services of private investigators who positioned themselves outside his house and filmed him coming and going. The suspicions of the employers were confirmed, Mr McGowan was dismissed and the Tribunal and the EAT found the dismissal fair.

The EAT did so reluctantly. Mr McGowan prayed in aid on *Niemietz* where, as has been said, the ECtHR held that the intrusion into an employee's privacy at work, where it involved non-work related matters, was an infringement of Art.8. The EAT did not find "this matter easy, because at least at first sight, covert surveillance of a person's home, unbeknown to him or her, which tracks all people coming and going from it, quite apart from persisting with it over a period of bereavement, raises at least a strong presumption that the right to have one's private life respected is being invaded and if the issue stopped there we might have considered that the Article was engaged." The issue, however, did not stop there as, so said the EAT, "what seems to us to matter, however, is the question of proportionality." Given the severity of the allegations the employers were "forced into action to investigate the matter. It is not the case where surveillance was simply undertaken for external or whimsical reasons. In our view, it

goes to the essence of the obligations and indeed rights of the employer to protect their assets. Looking at the matter this way, it therefore seems to us that it is not disproportionate and, accordingly, the findings of the Tribunal that the Article was not breached can be supported on this basis." Thus the employer using cover surveillance as part of an investigation into misconduct engages Art.8(1) but whether it engages Art.8(2) and thus renders the dismissal unfair under s.98(4) is purely a question of fact.

In *Stedman v United Kingdom* [1997] 23 EHRR the Commission was called upon to determine the admissibility of an application where the right to family life, rather than private life, under Art.8 was invoked. Mrs Stedman's employer sought to change her contractual hours requiring her to work on Sundays on a rota basis. She resigned and claimed unfair constructive dismissal. Her husband worked Mondays to Fridays and thus the new rota, by requiring her to work on Sundays, would have reduced the amount of time she could spend with him. Her claim before the Tribunal, the EAT and the Court of Appeal failed as she did not have the necessary length of service to entitle her to bring a claim for unfair dismissal. It was thus left to the Commission to consider Art.8. They did so in favour of the employer. The Commission held that "given the almost inevitable compromise and balance between work and family commitments, particularly in families where both partners work, the Commission does not consider that the requirement that the applicant work a five day week to include Sundays on a rota basis, amounted to an interference with her family life such as to constitute a violation of Art.8(Art. 8) of the Convention." Thus Art.8 must be applied in accordance with the reality of the circumstances of work and family commitments and an appropriate balance sought. Whilst the Commission did not say so in express terms, and there is no further authority on the matter, this is likely to be a question of fact.

The implications of Art.8 on s.98(4) are potentially far ranging nonetheless its jurisprudential development, in cases of unfair dismissal, has been limited and cautious. The Article covers a wide range of rights of relevance in the workplace. Furthermore, the EAT, both in *X* and *Pay*, in suggesting that certain decisions, made prior to the Human Rights, may require re-examination, has made clear that it has the potential to alter the traditional approach to s.98(4). However, the extent to which this is the case is far from clear given the reluctance to apply the broad meaning the ECtHR has given to private life and the assertion by the Court of Appeal in *X* that in most cases the application of s.98(4), without reference to Art.8, will be sufficient to cover the issues raised.

Article 9

Art.9 concerns the right to freedom of thought, conscience and religion. It provides:

1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Art.9 confers two rights – the right to thought, conscience and religion and the right to manifest religion or belief. In others words the Article distinguishes between holding and expressing a belief. Only the right to manifest religion or belief is a limited right under Art.9(2). Infringement of the right is only justified if prescribed by law and necessary in a democratic society. It can only be necessary if in the interests of public safety, the protection of public order, health or morals or the protection of the rights and freedoms of others.

The ECtHR in *Kokkinakis v Greece* [1993] 17 EHHR 397 explained the difference between the two rights conferred by Art.9. As for the rights to freedom of thought, conscience and religion:

> they are absolute. The Convention leaves no room whatsoever for interference by the State. These absolute freedoms explicitly include freedom to change one's religion and beliefs. Whether or not somebody intends to change religion is no concern of the State's and, consequently, neither in principle should it be the State's concern if somebody attempts to induce another to change his religion. The right to manifest religion is a limited right: Article 9 (art. 9-1) refers only to freedom to manifest one's religion or belief. In so doing, it recognises that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.

The impact of Art.9 on the law of unfair dismissal did not have to await the coming into force of the HRA in October 2000. It arose before the Court of Appeal in *Ahmad v Inner London Education Authority* [1977] 3 WLR. Mr Ahmad was a primary schoolteacher and a devout Muslim. S.30 of the Education Act 1944 prohibited dismissal of a teacher "by reason of his religious opinions or of his attending...religious worship." Furthermore, his contract contained a clause that entitled him to be paid for being absent on special days that his faith specified were days when no work should be done. However, prior to entering into the contact he neglected to inform the employers that his faith required his attendance for prayer at Mosques on Fridays. They agreed to him being absent for three quarters of an hour on Fridays so as to attend the local mosque on condition that he agreed to be paid for 4.5 days rather than 5 days a week. He refused and resigned and claimed that he had been unfairly constructively dismissed. The Tribunal, the EAT and the Court of Appeal all rejected his claim.

As for s.30 and the clause in Mr Ahmad's contract regarding paid absence on special days Lord Denning MR held that they must be construed so as to comply with the school's timetable. As for Art.9 his Lordship held: "*as so often happens with high-sounding principles, they have to be brought down to earth. They have to be applied in a work-a-day world."* As for Muslims, his Lordship went on, if "in the name of religious freedom, they were given special privileges or advantages, it would provoke discontent, and even resentment among those with whom they work". Accordingly, Mr. Ahmad's right to "manifest his religion in practice and observance" must be subject to the rights of the education authorities under the contract and to the interests of the children whom he is paid to teach. I see nothing in the European Convention to give Mr. Ahmad any right to manifest his religion on Friday afternoons in derogation of his contract of employment: and certainly not on full pay."

Orr LJ agreed. Scarman LJ, however, dissented. Both s.30 and Mr Ahmad's contract had to be construed in accordance with Art.9 and the fact the society was becoming increasingly multi-cultural. As his Lordship explained: "*Religions, such as Islam and Buddhism, have substantial followings among our people. Room has to be found for teachers and pupils of the new religions in the educational system, if discrimination is to be avoided. This calls not for a policy of the blind eye but for one of understanding. The system must be made sufficiently flexible to accommodate their beliefs and their observances: otherwise, they will suffer discrimination.*" Accordingly, the true construction of Mr Ahmad's contract meant that "he is to suffer no financial or career disadvantage by reason of his religion." Furthermore, Art.9 imposed on the employers a positive obligation to make arrangements to accommodate Mr Ahmad despite the financial expenditure this entailed: "*It may mean employing a few more teachers either part-time or full-time: but, when that cost is compared with the heavy expenditure already committed to the cause of non-discrimination in our society, expense would not in this context appear to be a sound reason for requiring a narrow meaning to be given to the words of the statute.*" The extent of judicial intervention, prescribed by his Lordship, is difficult to reconcile with the deference to managerial prerogative afforded by the band of reasonable responses approach.

However, Scarman LJ was in the minority. Mr Ahmad thus took the matter to Strasbourg (*Ahmad v United Kingdom* [1981] 4 EHRR 128). The Commission held that "the case was one of coincidence of teaching obligations and religious duties rather than of religious manifestations in the course of the performance of professional functions." Furthermore, "throughout his employment the applicant remained free to resign if and when he found that his teaching obligations conflicted with his religious duties." The Commission also considered whether a timetabling accommodation could have been found and concluded that in the circumstances there had been no failure to "give due consideration to his freedom of religion." Accordingly, the dismissal did not infringe Art.9.

Similarly, in *Konttinen v Finland* [1996] 249/49/93 the Commission held the complaint inadmissible. Mr Kontinnen was a Seventh Day Adventist and an employee of Finland's state railways. His faith prevented him from attending work on Saturdays. This placed him in conflict with his contract of employment which required him to work on Saturdays. On six occasions he refused to attend work on a Saturday. His employers, therefore, dismissed him. The Commission found "that the applicant was not dismissed because of his religious convictions but for having refused to respect his working hours." In an approach reminiscent of that taken in *Ahmad* the Commission further observed: "The Commission would add that, having found his working hours to conflict with his religious convictions, the applicant was free to relinquish his post."

The matter arose again before the Commission in *Stedman v United Kingdom* [1997] 23 EHRR. As has already been seen Mrs Stedman also relied on Art.8. She was a devout Christian. Her employers required her to work on Sundays. She handed in her notice on the grounds Sunday work was in conflict with her faith. The employers then proposed that she still work on Sundays but take one day's absence in lieu during the week. Again, she refused. Her notice expired and she claimed she had been unfairly constructively dismissed. The Commission referred to *Kontinen* and held that it applied in the present case. The fact that Mr Kontinen had been employed by the state and Mrs Stedman by a private employer was immaterial as "*a fortiori* the United Kingdom cannot be expected to have legislation that would protect employees against such dismissals by private employers."

These rulings by the Commission warrant further comment. The assertion, in *Ahmad* and *Konttinen*, that the Claimants could resign seems to amount to a failure to consider that in refusing to work at a time their faiths stated that no work could be done the Claimants were manifesting their religion. In other words their exercise of this right should have led to consideration of whether the infringement with it was justified. Instead the Commission seemed to hold that the fact the employee had the option of resigning meant that the right to manifest religious belief did not apply. Indeed it is noteworthy that the "right to resign" argument was not raised in *Smith and Grady v United Kingdom*. Furthermore, the Commission failed to carry out the balancing exercise, between the competing interests of the employees' rights under Art.9 and those of the employer, required by Art.9(2).

These rulings were considered by the Court of Appeal in *Copsey*. Mummery LJ found their effect was that "the qualified Art.9 right of a citizen in an employment relationship to manifest his belief is not engaged when the employer requires an employee to work hours which interfere with manifestation of his religion or dismisses him for not working or agreeing to work these hours because he wishes to practise religious observances during normal working hours." Rix LJ said that on the facts he was "unable to understand how it can be said that the applicant was not prevented from manifesting his religion by asking him to choose between his employment and his observance of the Sabbath." Furthermore, the decisions by the Commission were confused and thus do not "represent a body of consistent decisions." Accordingly, the domestic courts are not obliged to follow them. The only consistent point that did emerge and which should be applied was "the general thesis that contracts freely entered into may limit an

applicant's room for complaint about interference with his rights." Neuberger LJ declined to opine on the correctness and the effect of the decisions as he could "see no reason, either on the authorities or in principle, how or why Art.9 of the Convention takes matters any further" than the approach prescribed by s.98(4).

Whilst their Lordships did not agree on the relevance or the effect of the approaches taken by the Commission they did agree that, on the facts, the Tribunal was entitled to find Mr Copsey's dismissal fair. Mr Copsey was a devout Christian. His employers won a new contract which substantially increased their work. They decided that the only way to deal with this was to extend the operating hours by bringing the employees onto a standard seven day shift pattern. Mr Copsey refused to agree to this as it entailed Sunday working. His employers entered into discussions with him to see how the situation could be resolved. They offered another post that would have involved less Sunday work although it was less well paid. Ultimately the attempts at resolution proved fruitless and Mr Copsey was dismissed. Mummery LJ, in accordance with his finding that the effect of Commission rulings is that Art.9 is not engaged when an employer requires an employee to work hours which conflict with the employee's faith, held that "the dismissal did not involve a material interference with his Art.9 rights." Rix LJ held, in contrast, that "where an employer seeks to change the working hours and terms of his contract of employment with his employee in such a way as to interfere materially with the employee's right to manifest his religion, then Art.9(1) is potentially engaged." Resolution of Art.9(2) depends on whether then employer has sought "a reasonable accommodation with the employee." On the facts of the present case this test was satisfied and thus the appeal fell to be dismissed. Neuberger LJ noted the Tribunal's finding that the employers "did their best to accommodate his requirement not to work on Sundays" and given this finding it could not be said the dismissal was unfair.

Art.9 has not only been invoked in dismissal cases where the employee's duty to his faith has placed him in conflict with his duty to perform his contractual working hours. In *Kalac v Turkey* 20704/92 [1997] ECHRR 37 the ECtHR considered a case where the Claimant was dismissed because of his religious activities. Mr Kalac was a Group Captain in the Turkish Air Force. As such he owed a duty, under Turkish Law, of loyalty to secularism as this was the constitutional foundation of Turkey. Despite this he was an active member of the fundamentalist Suleyman Sect. Accordingly, he was dismissed. The Court rejected his contention that his dismissal contravened Art.9 as:

> in choosing to pursue a military career Mr Kalaç was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians.

This resonates with the approach taken by the Commission in *Ahmad, Kontinnen* and *Stedman* – i.e. that the scope of Art.9 is restricted by the fact that the Claimant enters into a contract or embarks upon a career that places constraints on his ability to manifest his religion.

The decision of the ECtHR in *Eweida and others v United Kingdom* [2013] 48420/10, 59842/10, 36516/10 has brought greater clarity. The court considered four, consolidated cases. All concerned employment but only one concerned dismissal. Nonetheless, the principles encunciated are likely to determine the approach in most dismissal cases. All the Claimants were devout Christians. Mrs Eweida was employed by British Airways. Their wearer guide prohibited employees from wearing jewellery with their uniform. Thus Mrs Ewedia was not permitted to wear a crucifix. However, the company did permit the wearing of turbans and hijabs. After a few years British Airways eased the restrictions. The Tribunal, the EAT and the Court of Appeal all rejected her claim for indirect religious discrimination. Mrs Chaplin was a nurse. Her employers would not permit her to wear her crucific further to their policy that necklaces could not be worn on grounds they could cause injury to patients. Her claims for direct and indirect religious discrimination failed before the Tribunal.

Mrs Ladele was a registrar. She refused to register civil partnerships between same sex couples. Her claims for direct and indirect religious discrimination succeeded before the Tribunal but failed before the EAT and the Court of Appeal. Mr McFarlance was a relationship counsellor. He refused to advice same sex couples. His employers dismissed him. His claims for unfair dismissal and direct and indirect religious discrimination all failed before the Tribunal and the EAT.

It has already been noted that in earlier cases the Commission had found that Art.9 did not apply given that the employees had the option of resigning. The court noted those rulings and seemed to depart from them. They noted that "the Court has not applied a similar approach in respect of employment sanctions imposed on individuals as a result of the exercise by them of other rights protected by the Convention." They held that "where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate." Further "while the Court does not consider that an individual's decision to enter into a contract of employment and to undertake responsibilities which he knows will have an impact on his freedom to manifest his religious belief is determinative of the question whether or not there has been an interference with Article 9 rights, that is a matter to be weighed in the balance when assessing whether a fair balance has been struck" (a remark made in the context of Mr McFarlane's case but clearly a point of general principle).

The Court then applied the principles. Only Mrs Eweida's claim succeeded – the others failed. As for Mrs Ewedia's case the Court was cognizant that the dress code had been in force for several years and that there had been consultation in respect of it. These factors combined to "mitigate the extent of the interference" with the Art. 9 right. They further accepted that the employers' wish to project a corporate image was an aim which was "undoubtedly legitimate." However the domestic courts had given these considerations "too much weight." Her "cross was discreet and cannot have detracted from her professional appearance." There was no evidence that employees wearings hijabs or turbans "had any negative impact on British Airways' brand or image." As for Mrs Chaplin, however, whilst the importance to her of wearing a cross "must weigh heavily in the balance…the reason for asking her to remove the cross, namely the protection of health and safety in a hospital ward, was inherently of greater magnitude".

The Court recognised that the consequences for Mrs Ladele and Mrs McFarlane were serious – disciplinary action and dismissal. However, "for the Court the most important factor to be taken in account is that the employer's actions were intended to secure the implementation of its policy of providing a service without discrimination."

It is clear that the mere fact that the employee has entered into a contractual relationship with his employer *per se* limits his scope for complaining that his Art.9 rights have been unlawfully infringed.*Copsey* suggested that it was unclear to what extent this principle applied. According to Mummery LJ this effectively meant that Art.9 will never apply, Rix LJ disagreed holding that Art.9 is applicable but that in most cases the traditional approach to s.98(4) will be sufficient whereas Neuberger LJ held that there is no need to consider Art.9 at all. However, in the light of *Ewedia* it is clear that the employee entering into a contractual relationship is merely a matter to take into account. A common sense, fact sensitive approach applies. The Commision cases did not seem to distinguish between dismissing for holding and manifesting a religious belief. It is submitted that applying *Kokkinakis* to dismissal cases the position is that dismissal of an employee, on the grounds that he holds a particular thought, conscience or belief, will always be unfair whereas the question of whether dismissing an employee for manifesting a particular thought, conscience or belief is a question of fact depending on the circumstances. A question the ECtHR has yet to address is the extent to which an employer may be required to take reasonable steps to accommodate the employee's

wish to manifest his religion. However, this question, as implied in the judgment of Neuberger LJ in *Copsey*, is likely to be one of fact requiring a careful balancing exercise of the conflicting interests of both sides.

The scope of Art.9 is potentially wider in dismissal cases than the protection afforded by the EQUA 2010 (s.10 of the same providing that religion and religious belief are protected characteristics). The Act renders direct and indirect discrimination on grounds of religion or belief unlawful. S.10(2) defines belief as "any religious or philosophical belief." In contrast there is no reason why the wording in Art.9 should restrict the Article only to religious beliefs or manifestations of religious belief. Art.9 could, it is submitted, cover other beliefs including political belief.

That said it appears likely that most cases of dismissal for manifesting a religious belief, as opposed to any other belief, would be covered by s.19. This concerns indirect discrimination. Here when the protected characteristic is religion or belief it provides that an employer discriminates against an employee on the grounds of the latter's religion or belief when the employer (1) applies to the employee a provision, criterion or practice which he applies or would apply to persons not of the same religion of belief, (2) which puts or would put persons of the employee's religion or belief at a disadvantage, (3) puts the employee at the disadvantage and (4) which is not a proportionate means of achieving a legitimate aim.

In most cases the provision, criterion or practice is likely to relate to how the employee manifests his belief in relation to working time or dress sense. Thus the Christian employee dismissed for refusing to comply with a provision, criterion or practice that he work on a Sunday could just as easily avail himself of the 2010 Act as Art.9. In both cases the issue would be proportionality. Under the 2010 Act this would be put as whether it was a proportionate means of achieving a legitimate aim; under Art.9 whether it was necessary in a democratic society. In practical terms it is difficult to see how the approaches would differ.

Article 10

Art.10 concerns the right to freedom of expression. It provides:

1) This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Art.10, like Art.8 and Art.9, is a limited right. Art.10(1) makes it clear that the right includes the holding of opinions as well as the right to expression. Infringement of the right is unlawful when prescribed by law and proportionate if in the interests of various matters such as the interests of a democratic society and national security. In *Vogt v Germany* [1996] (17851/91) ECHR 34 the ECtHR made it clear that these matters, or exceptions to the right, "must be narrowly interpreted and the necessity for any restrictions must be convincingly established." Furthermore, the "adjective "necessary," within the meaning of Art.10(2) implies the existence of a "pressing social need."" In other words, the Court made clear, interference with the right is seldom permissible.

However, the Commission had, earlier in *Rommelfanger v Germany* [1986]12242/86, found that the dismissal in question was not contrary to Art.10. Mr Rommelfanger was a doctor employed by a Roman Catholic Foundation. German Law permitted Religious Institutions to confer its offices without the participation of the state or the civil community. Consequently Mr Rommelfanger's contract contained a clause obliging him

to discharge his duties in accordance with Catholic Principles and entitled his employers to dismiss him without notice for serious offences against the Catholic Church. Despite this Mr Rommelfanger wrote an article in a newspaper in support of Germany's Law on abortion and criticising Christian Conservatives who opposed the law. His employers considered that this was in breach of his contract. He was dismissed.

The Commission found that despite the fact that he had freely entered into the contract there was no "no basis for the assumption that the applicant waived his freedom of expression as such." However, the Commission noted that "the employer is an organisation based on certain convictions and value judgments which it considers as essential for the performance of its functions in society." The Commission was cognizant of the employer's right to freedom of expression "as it is in fact in line with the requirements of the Convention to give appropriate scope also to the freedom of expression of the employer." Accordingly, "an employer of this kind would not be able to effectively exercise this freedom without imposing certain duties of loyalty on its employees." In the circumstances the Commission was satisfied that there was "a reasonable relationship between the measures affecting freedom of expression and the nature of the employment as well as the importance of the issue for the employer." Thus whilst Art.10 is superimposed on the contract the matter is determined by balancing the interests of both the employer and employee.

Similarly, in *Kosiek v Germany* 9704/82 [1986] ECHR 10 the ECtHR found that Art.10 did not apply. Mr Kosiek was initially employed as a University Research Assistant. Under German Law he was a civil servant. As such the law prohibited him from being a member of an organisation which sought to abolish the democratic constitutional system. Nonetheless, he was an active member of the National Democratic Party which opposed parliamentary government, espoused extreme nationalism and had a racist ideology. He was the chairman of the local branch of the party and member of the party's Federal Executive Committee. He applied, successfully, for a lectureship at the university where he was employed. Within a year, i.e. before the expiry of his probation period, his employers decided to review his political activities and, accordingly, dismissed him.

Before the Court the German Government submitted that the right in question was not the right to freedom of association but the right of equal access to the public and civil services. As the Convention, unlike other instruments of Human Rights such as the Universal Declaration of Human Rights, did not provide for this right Mr Kosiek, the Government argued, was not entitled to avail himself of Art.10. The Court, reminding itself that Art.1 provides that Convention Rights apply to "everyone within the jurisdiction" of the contracting states, held that:

> the status of probationary civil servant that Mr. Kosiek had acquired through his appointment as a lecturer accordingly did not deprive him of the protection afforded by Art.10. The issue, the Court determined, was whether the dismissal amounted to an interference with the exercise of freedom of expression or whether the dismissal was within the sphere of the right of access to the civil service, a right that is not secured in the Convention.

The Court held that the requirement of not belonging to parties adverse to the democratic constitutional system "applies to recruitment to the civil service, a matter that was deliberately omitted from the Convention, and it cannot in itself be considered incompatible with the Convention." Accordingly, Mr Kosiek's rights under Art.10(1) were not engaged and thus proportionality under Art.10(2) did not arise.

However, in *Vogt v Germany* [1996] (17851/91) ECHR 34 the Court took a very different approach on markedly similar facts. Mrs Vogt was a school teacher and hence, under German Law, regarded as a civil servant. Mrs Vogt was an executive member of the German Communist Party ("DKP") and the Chairperson of the party's local branch. She had stood in elections and spoken at party conferences. The nature of her work within the party reflected her desire to further peace, combat fascism and champion

democracy and human rights. However, the DKP itself harboured anti-constitutional aims. Mrs Vogt, hence, was dismissed.

The Court found that her dismissal was contrary to Art.10. The interference was prescribed by the applicable German Law but was not proportionate. The Court was mindful that Mrs Vogt was "firmly convinced that she could best serve the cause of democracy and human rights by her political activities on behalf of the DKP." The court was critical of the German Law as it did pay regard to the circumstances as "it does not allow for distinctions between service and private life; the duty is always owed, in every context." The consequences of dismissal for Mrs Vogt were severe "because of the effect that such a measure has" on the "reputation of the person concerned and secondly because secondary-school teachers dismissed in this way lose their livelihood." Furthermore, there was no evidence that she took "advantage of her position to indoctrinate or exert improper influence on her pupils." Thus in the circumstances there was a "violation of Art.10." In so finding the Court seemed to lay down that the nature of the words or actions must not be considered in themselves but in the context of all the circumstances and in particular the Claimant's performance.

The ECtHR distinguished *Kosiek* and *Glasenapp* on the grounds that "in those cases the Court analysed the authorities' action as a refusal to grant the applicants access to the civil service on the ground that they did not possess one of the necessary qualifications."Mrs Vogt, in contrast, was not a probationary but a permanent member of the civil service. It is submitted that the cases cannot be distinguished on this basis. Mrs Vogt, Mr Kosiek and Mrs Glasenapp were all employees whose employment was terminated. The issue in each case was whether dismissal, due to the requirement in German Law that civil servants not be associated with political parties whose objectives were contrary to the democratic constitutional system, was contrary to Art.10. It is submitted that it was immaterial that Mr Kosiek and Mrs Glasenapp were on probation. They were employees and had thus effectively entered the civil service. Furthermore, there seems to be no good reason, in principle or in logic, why dismissal of a civil servant cannot simultaneously engage the rights to freedom of expression and the right of access to the civil service. In any case, as the Commission made clear in *Rommelfanger*, Art.10 is superimposed on the contract. Thus whether, under the terms of the contract, the applicants had fully entered the civil service or not should not have been a relevant consideration. What was relevant was that they had been employed and were dismissed because of their political opinions and activities.

The approach in *Kosiek* and *Glasenapp* is reminiscent of the Commission's rulings on Art.9, discussed above, which suggested, at least as understood by Mummery LJ in *Copsey*, that an employee, by freely entering into a contract of employment, relinquishes his convention rights. To this extent *Vogt* sits uneasily with the Convention's jurisprudence. *Vogt* is perhaps best understood as the application, in a case of dismissal, of the principle the ECtHR laid down that, as has already been noted, interference with Art.10 is seldom permissible and is so only if proportionate to a pressing social need. Such a principle restricts the scope of the principle of freedom of contract.

In *Wille v Liechtenstein* [1999] 28396/95 the approach in *Vogt* seemed to prevail. Dr Wille was a Judge and President of the Administrative Court of Liechtenstein. In a lecture he stated that, in his opinion, the Court was competent to interpret the Constitution of Liechtenstein in the case of a disagreement between the Prince and the Parliament. The Prince did not agree that the Constitution afforded the Court such power. Thus the Prince wrote to him expressing his disapproval, as he saw it, of Dr Lille placing himself above the Constitution. Consequently, when Dr Wille's term of office expired the Prince refused Dr Lille's application to extend thereby effectively dismissing him.

Just as the German Government had done, successfully in *Kosiek* and *Glasenapp* but unsuccessfully in *Vogt*, the Liechtenstein government submitted that the case concerned the right of access to the civil service – not the right to freedom of expression. The Court

rejected this as the Prince, prior to refusing to renew Dr Lille's term of office, had written to him during his term of office and thus the refusal to renew was "unconnected with any concrete recruitment procedure involving an appraisal of personal qualifications."

Furthermore, the dismissal was not proportionate. The ECtHR referred to *Vogt* and expressly approved its principle that interference with freedom of expression will seldom be permissible. Thus, the Court went on, the exceptions to the right "must be narrowly interpreted, and the necessity for any restrictions must be convincingly established." The Court accepted that members of the Judiciary, such as Dr Wille, should "show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question." Despite this, the Court went on, "interference with the freedom of expression of a judge in a position such as the applicant's calls for close scrutiny." Such scrutiny disposed of the matter in Dr Lille's favour. The Court noted that there was no suggestion that Dr Wille's views "had a bearing on his performance as President of the Administrative Court" and "the Government did not refer to any instance where the applicant, in the pursuit of his judicial duties or otherwise, had acted in an objectionable way." This is reminiscent of the principle implied in *Vogt* – namely that the words or actions in question must be weighed up against the Claimant's wider performance. It is submitted that the effect of *Vogt* and *Wille* is that dismissal due to a Claimant's political opinions or activities will seldom be justified.

Art.10 has not only been invoked in cases of dismissal for political opinions and activities. It has also been invoked in cases where the employee has been dismissed for criticising his employer. Take, for example, the ECtHR's decision in *De Diego Nafria v Spain* [1999] 46833/99. Mr De Diego Nafria was an inspector of the Bank of Spain. He wrote a letter to the Bank's inspectorate accusing the Governor and other senior officials of irregularities. His employers found that the allegations were unsubstantiated and dismissed him. The ECtHR found that the dismissal was not contrary to Art.10. The ECtHR accepted that he had a right to criticise his employers but that in making allegations that could not be substantiated he had overstepped the acceptable bounds of his right to criticise.

In *Fuentes Bobo v Spain* [2000] 39293/98, the ECtHR, however, found that the Claimant's dismissal, for criticising his employers, amounted to an unlawful infringement of Art.10. Mr Fuentes Bob was employed by Spanish State Television as a Producer. He was dismissed for co-authoring an article in a newspaper criticising certain actions of management performed in the context of a labour dispute. The ECtHR found that his dismissal was disproportionate for the purposes of Art.10(2). This was because the remarks in the article were of a general nature and had been in the context of a labour dispute. In other words the employers had erred in attaching undue weight to the remarks themselves rather than the circumstances in which they were made.

In *Peev v Bulgaria* [2007] 64209/01 Art.10 was invoked in a case of whistle blowing. Mr Peev wrote an article in a newspaper accusing his employer of creating a fearful working atmosphere by being verbally abusive towards, and even physically assaulting, his staff. As a result he was dismissed. The ECtHR found that the Bulgarian Government "had not adduced any arguments showing what legitimate aim was pursued by these measures and why they are to be considered necessary in a democratic society" for its attainment.

In *Cuja v Moldova* [2008] 14277/04 the ECtHR set out at length the relevant considerations in determining when, in whistle-blowing cases, the test of proportionality is satisfied. Mr Cuja was Head of the Press Department of the Prosecutors General's Office. Several people brought complaints of police abuse to the office. Accordingly the Office commenced an investigation. In response the police officers concerned wrote letters challenging the legality of the investigation to various government ministers. One of them wrote to the Office querying whether the Office was

fighting crime or the police. Another government minister wrote a similar letter in support of the police to the Office. Mr Cuja sent both letters to a newspaper. The newspaper then wrote an article accusing the government of interfering with the investigation and referred to the letters. The Office asked the Claimant to explain why he had released the letters. He wrote to them stating that it was "to fight the scourge of trading in influence" and to "uncover those who abuse their position in order to obstruct the proper administration of justice." Nonetheless his employers dismissed him.

The ECtHR affirmed that "Art.10 extends to the workplace in general and to public servants in particular." However the court was "mindful that employees owe to their employer a duty of loyalty, reserve and discretion". Furthermore "the duty of discretion owed by civil servants will also generally be a strong one." Nonetheless the court was satisfied that whilst they may have been a legitimate aim, namely the prevention of crime, the interference, namely the dismissal, with the Art.10(1) right, that was the disclosure of the letters, was not proportionate.

Firstly they set out the material considerations. They comprised "whether there was available to the applicant any other effective means of remedying the wrongdoing which he intended to uncover," also "the authenticity of the information disclosed," the court "must weigh the damage, if any, suffered by the public authority as result of the disclosure in question and assess whether such damage outweighed the interest of the public in having the information revealed" and "the motive behind the actions of the reporting employee" as "for instance as act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection."

The Court then applied those principles. There were no, alternative effective means of remedying the wrongdoing. This was because the Prosecutor General "gave the impression that he had succumbed to the pressure that had been imposed on his office." There was a public interest in the disclosure as it "had a bearing on issues such as the separation of powers, improper conduct by a high-ranking politician and the Government's attitude towards police brutality." There was no dispute that the letters were genuine. Furthermore "the public interest in having information about undue pressure and wrongdoing within the Prosecutor's Office revealed is so important in a democratic society that it outweighed the interest in maintaining public confidence in the Prosecutor General's Office." The Court could not find "any reason to believe that the applicant was motivated by a desire for a personal advantage" or "held any grievance against his employer."

The ECtHR took a similar approach in *Kudeshkina v Russia* [2009] 29492/05. Mrs Kudeshkina was a judge. She heard a criminal case concerning the police abusing their powers. The public prosecutor accused her of bias towards the victims. The Moscow City Court President intervened and removed her from the case. She later gave an interview to a radio station where she referred to the incident and alleged that the courts of Moscow were not independent and free of political interference. The Moscow Judicial Qualification Board took exception to the remarks and dismissed her.

The ECtHR found that her dismissal was a disproportionate interference with Art.10. They held that the Qualification Board had "failed to secure a reliable factual foundation for their assessment." In making the disclosure "she raised a very important matter of public interest, which should be open to free debate in a democratic society." She had acted in good faith as her disclosure was not to be regarded as a "gratuitous personal attack but as a fair comment on a matter of great public importance"

Dismissal for making a protected disclosure dismissal is, under UK Law, a form of automatic unfair dismissal and will be discussed in the part on automatic unfair dismissal in this book. However, it is convenient to state the law in broad terms for present purposes given that, as *Peev, Cuja* and *Kudeshkina* establish, Art.10 may also be invoked in whistle blowing cases. The protected disclosures are, as set out at s.43B of the ERA 1996, (1) that a criminal offence has been committed, is being committed or is

likely to be committed, (2) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (3) that a miscarriage of justice has occurred, is occurring or is likely to occur, (4) that the health or safety of any individual has been, is being or is likely to be damaged and (5) that information tending to show any of these matters is being or is likely to deliberately concealed. The scope of Art.10, it is submitted, is wider as, on its face, it concerns any matter of public importance that the employee expresses rather than the specific matters set out at s.43B. Furthermore it has been established that the protected disclosure legislation concerns disclosures of information, defined as the conveying of facts, rather than mere allegations (*Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38). It is submitted that Art.10 is not so restrictive – Mrs Kudeshkina, after all, did not so much disclose information as allege that the courts were not independent and free of political interference.

Furthermore it is submitted that the protected disclosure legislation is more restrictive in respect of the circumstances where a disclosure to a third party qualifies as a protected disclosure and hence can be the basis of a claim for unfair dismissal (it should be noted that the cases all discussed were cases of a disclosure to a third party). Under s.43C a disclosure made to a person other than the employer can qualify if the disclosure concerns that other person. In other words that other person must be the subject of an allegation contained in the disclosure. S.43G concerns more generally disclosures made to a third party. Amongst the requirements to be satisfied are a belief that that the disclosure be substantially true and any of the following: (1) a reasonable belief that the employer would destroy or conceal any evidence relating to the disclosure if it was made to him, (2) a reasonable belief that the employer would subject him to a detriment or (3) the employee must have made a disclosure of substantially the same nature to his employer. Furthermore it must be reasonable in all the circumstances to make the disclosure to the third party concerned. In contrast in *Cuja* the ECtHR seemed to hold that disclosure can be made to a third party when there is no alternative, effective means of remedying the wrongdoing.

Similarly, Art.10 is wider than the prohibition of dismissal for asserting a statutory right. This is set out at s.104 of the ERA 1996 and will be discussed in the part on automatic unfair dismissal in this book. In broad terms it provides that dismissal of an employee because he has alleged that the employer has infringed one of his rights conferred by the act or has brought proceedings against his employer under the act is unfair. Art.10 is wider in that it clearly covers other allegations or criticism of the employer made by the employee.

Pay, already discussed in the context of Art.8, is the only domestic authority on Art.10. As noted in the discussion on Art.8 Mr Pay was dismissed for his involvement in an organisation that merchandised bondage, domination and sado-masochism and for performing a fire eating act in hedonistic clubs on the grounds that this was inappropriate given that he was a probation officer who dealt with sexual offenders. The dismissal was in part prompted by his refusal to give up his activities and to severe his links with the organisation. It was agreed that Art.10(1) was engaged and that the interference was prescribed by law – namely s.98(4). The issue was whether the inference was necessary in a democratic society. The EAT considered *Vogt* and accordingly found that that "the central argument was whether there was a 'pressing social need' for the Respondent to dismiss the Applicant; whether it was a proportionate response to the Applicant's activities for him to be dismissed". They went on to find that it was "a question of fact as to whether the balance between the competing interests in Art.10 had been correctly struck." The EAT proceeded to note that the Tribunal had noted that Mr Pay had refused to cease his activities and thus concluded "the Employment Tribunal committed no error of law when it decided on the balance of competing interests required by its analysis of Art.10.2 that there was no violation of the Applicant's right to freedom of expression." It is perhaps disappointing that the EAT

despite approving the *Vogt* test was reluctant to address and discuss at greater length whether the employers, on the Tribunal's findings of primary fact, had satisfied this seemingly demanding test.

The potential impact of Art.10 on s.98(4) is far reaching. Stasbourg jurisprudence makes it clear that Art.10 covers association with political parties, the holding of political and ethical opinions and the right of an employee to criticise his employer. The rights the Article confers are not expressed in domestic law to the same extent as the rights expressed by Art.8 and 9 are. It has already been noted that the right not to be discriminated against on the grounds of sexual orientation and religious opinion and belief are given effect in domestic anti-discrimination legislation as well as by Art.8 and Art.9. Whilst the right of an employee to criticise his employer is to some extent provided for by the whistle blowing provisions in the ERA 1996 Art.10 provides the employee with potentially wider protection in this regard. Furthermore, it must be noted that there is no domestic legislation specifically concerned with the prohibition of discrimination on the grounds of political opinion or activities. In other words employees dismissed on such grounds may have no option but to rely on s.98(4) interpreted and applied in accordance with Art.10. Not only does Art.10 express a wide range of rights but the test in *Vogt,* approved by the EAT in *Pay*, suggests that dismissal in contravention of the right will seldom be justified although the effect of this approach is perhaps to some extent tempered by the suggestion by the EAT that ultimately the question of whether the dismissal was for a pressing social need is a question of fact.

Article 11

Art.11 concerns the right to freedom of assembly and association. It provides:

1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Art.11 will often be relied upon in addition to Art.10 in cases of dismissal for association with a political party or organisation. Hence in *Vogt* the ECtHR had no hesitation in finding that as far as Art.11 was concerned "Mrs Vogt's dismissal was, for the reasons previously given in relation to Art.10(see para.51 to para.60 above), disproportionate to the legitimate aim pursued". In cases where the Claimant's expression of his political views justifies dismissal in the sense of the interference with the Art.10(1) right, namely the dismissal, being in the interests of a pressing social need the Claimant may still be able to rely on Art.11 by establishing that dismissal was contrary to his right to membership of or association with the party concerned as opposed to his right to express the views it espouses.

Indeed the ECtHR in *Redfearn v United Kingdom* [2012] ECHR 1878 considered the impact of Article 11 in cases of dismissal for membership of a political party. Mr Redfearn was a member of the British National Party (BNP). He was employed by Serco ltd as a driver – a role that required face to face interaction with the public. Many of the passengers he drove were of Asian ethnicity. However, he did not espouse his political views at work. Further, his employers were satisfied with his performance and considered awarding him for their "first class" employee award. He was elected a BNP councillor. This brought his political views into the public domain. His employers then decided to dismiss him on the grounds that his continued employment would provoke anxiety amongst passengers and imperil their contract with the local council.

Mr Redfearn claimed race discrimination as he did not have sufficient continuity of employment for the purposes of unfair dismissal. The basis of his claim was that as the views on race of the BNP were the underlying cause of his dismissal it followed that he had been dismissed on racial grounds. His claimed failed before the Tribunal but succeeded before the EAT. The Court of Appeal, however, restored the Tribunal's decision.

Could the convention come to his aid where domestic law had not? The ECtHR answered that question affirmatively holding that his dismissal contravened Article 11. The Court accepted the difficult position the employers were in his when Mr Redfearn's "candidature became public knowledge." It accepted that this could have placed its contract with the council in jeopardy "as the majority of service users were vulnerable persons of Asian origin." However, the court was also cognizant that "prior to his political affiliation becoming public knowledge, no complaints had been made against him by service users or by his colleagues." The Court also noted that his performance was well-regarded and "at the date of his dismissal he was fifty-six years old and it is therefore likely that he would have experienced considerable difficulty finding alternative employment." As for his political views it was not the role of the court "to pass judgment on the policies or aims, obnoxious or otherwise, of the BNP at the relevant time." UK law did not provide an adequate remedy - unfair dismissal because of the qualifying period and discrimination law because it did not cover discrimination on political grounds.

It is tolerably clear that the decision has greater implications for discrimination law than it does for the law of unfair dismissal. As for discrimination law it should be noted that since Mr Redfearn made his clam the Equality Act 2010 has come into force. The Act covers discrimination on the grounds of religion and belief. The term is defined at section 10. Section 10 (2) provides: "Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief." It is arguable that in the light of *Redfearn* the words "philosophical belief" should be construed as covering political belief.

As for unfair dismissal the following, *obiter*, passage from the judgment of Mummery LJ in the Court of Appeal's decision (*Serco Ltd v Redfearn* [2006] IRLR 623) should be noted:

> If this was an unfair dismissal case, there would be substance in the critical comments on the circumstances of Mr Redfearn'sdismissal. It is not, in general, fair to dismiss a person from employment for engaging in political activities or for being a member of a political party propagating policies that are unacceptable to his employer, to his fellow employees, to trade union officials and members, or even to most of the population. We aspire to live in peace with one another in a politically free and tolerant society. Unpopular political opinions are lawful, even if they are intolerant of others and give offence to many. The right to stand for political office in a democratic election and to engage in political debate is entitled to respect, however unpalatable the person's political convictions may be to many others.

This seems to suggest that irrespective of Article 11 dismissal in such circumstances is unfair. That said the decision of the ECtHR perhaps clarifies the position.

Human rights and the band of reasonable responses

The Convention potentially impacts on the meaning, the scope and the correctness of the band of reasonable responses approach to s.98(4) when convention rights apply. It has already been noted that in *Daly* Lord Steyn explained how the proportionality test prescribed by the Convention differs from the traditional approach to judicial review by requiring "the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions." His Lordship also observed that in *Smith and Grady* the ECtHR had criticised the traditional approach to judicial review, as applied in that case, as "it effectively excluded

any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need." The law of unfair dismissal is, of course, a part of private and not public law. Nonetheless, as was suggested in Ch. 7 when discussing the rules of natural justice, many principles of public law have been imported into it. This is because the two areas of law share an essential common feature – the review of a decision and a decision making process. It is thus arguable that an approach similar to the approach to judicial review, as developed by the Convention, applies to cases of unfair dismissal when the reason for dismissal engages a Convention right. Indeed it will be recalled that in *Pay* the EAT suggested that the traditional approach to s.98(4) may need to be clarified or re-considered in the light of the Convention. It is submitted that, applying these principles, the band of reasonable responses does not apply when a Convention right is engaged or alternatively that it requires a greater degree of scrutiny and greater weight to be attached to the interests of the employee in the balancing exercise.

Conclusion

Thus far the actual impact of the Convention has been minimal and its potential impact uncertain. The rules of procedural fairness are unlikely to be developed significantly by Art.6. In most cases employees dismissed on the grounds of their sexual orientation or religious beliefs would best advised to rely on the relevant parts of the anti-discrimination legislation than s.98(4) applied in accordance with Art.8 and Art.9. The Convention will apply as a matter of last resort when remedies do not lie elsewhere or where they are limited. Those dismissed due to their membership of a political party or their political or other beliefs may have no recourse other than Art.10 or Art.11 given that that there is no legislation concerned with political discrimination. Similarly, Art.10 may be more likely to offer an employee relief when dismissed for criticising his employer than the whistle blowing provisions and the prohibition on dismissal for asserting a statutory right in the ERA 1996. However, it is submitted that the greatest impact, potentially, of the Convention on s.98(4) is the approach to applying the subsection itself in that it has implications in respect of the band of reasonable responses test.