In the Supreme Court of St. Helena (within jurisdiction for Ascension Island)

Citation: SHSC 523/2020 & 09/2021

Civil

Judgment on Preliminary Issues

Plaintiffs

(1) MS ELAINE ARMS
(2) MR DAVID AVERY

-v-

Defendant

WOLF CREEK FEDERAL SERVICES INC

Judgment dated 25th of May 2022 & corrected on the 16th of June 2022 & further corrected on the 5th August 2022

The Chief Justice Rupert Jones

1. This is a corrected version of my judgment on the preliminary issues in this case which I handed down on 25 May 2022 and first corrected on 16 June 2022. It arises as a result of an application of the Defendant, made on 13 July 2022, for me to review and revise my original judgment. The application followed: a) the enactment of the Employment Ordinance 2022 ('the 2022 Ordinance') and its coming into force on 20 June 2022; and the b) publication of the Government policy on the Regulation of Employment in Ascension as revised on 5 July 2022. The 2022 Ordinance replaced the Employment Ordinance 2021 which I was provided with in draft, and accompanying draft commencement regulations, but which never came into force. However I referred to the 2021 Ordinance in my original judgment on the basis I expected it to come into force.

2. I dismissed the Defendant's application to review and revise my original judgment for the reasons set out in my judgment dated 30 July 2022 but offered to amend this judgment in light of the reasons I gave therein.

The nature of the Preliminary issues

3. This is my judgment on the preliminary issues raised in these two plaints (alternatively referred to as claims). The Judgment follows a hearing which took remotely by video technology with the consent of the parties on 1 April 2022.

4. The two key issues that were the focus of the parties' argument are:

a) whether the Supreme Court has jurisdiction to hear breach of employment contract claims made by the Plaintiffs, former employees, against the Defendant, a US contractor company on Ascension Island; or whether only the American courts may have jurisdiction by virtue of a UK/US Treaty governing jurisdiction on the island ('the first issue'); and
b) whether the Supreme Court can imply terms into the Plaintiffs' employment contracts which imply the equivalent of procedural fairness in respect of dismissal ('the second issue'). Such terms are not expressly provided for in their employment contracts and there were no statutory unfair dismissal rights at the time of their employment and dismissals between 2015 and 2019 (such rights may now be available pursuant to the Employment Ordinance 2022). There was very limited statutory employment protection which applied at the relevant time. The only legislation in force - the 1926 Workmens Protection Ordinance – did not confer any type of protection against unfair or unlawful dismissal.

The hearing

5. I am extremely grateful to counsel, Mr Toms for the Plaintiffs, and Mr Rogers, for the Defendant for their written and oral submissions before and during the hearing. They were of significant assistance.

6. Prior to the hearing, on 1 April 2022, I invited the Foreign Commonwealth and Development Office to intervene in proceedings on any points of principle with which they were concerned, should they wish, but they declined.

The background

7. The Plaintiffs are former employees of the Defendant. They bring separate plaints or claims against the Defendant claiming that their dismissals were in breach of their employment contracts. They seek damages for breach of contract.

The Defendant

8. The Defendant ('WCFSI' or 'Wolf Creek') is a company incorporated in the United States of America (U.S.) which was contracted by the United States Air Force ("USAF") to provide facility and maintenance management at the USAF Auxiliary Base situated on Ascension Island ("the Base") from the 1st October 2015.

Mr David Avery

9. I begin by considering the Second Plaintiff, Mr Avery.

10. In a plaint dated 18 July 2020, Mr Avery sought damages for breach of his contract of employment and/or his rights under the Constitution of Ascension Island based on his dismissal from his employment by the Defendant on the 25th May 2018.

11. Mr Avery was initially employed on Base initially by CSR in August 2010 as an Electronics Technician. His employment was transferred to the Defendant (who had taken over from CSR) from 1st October 2015. His work duties included classified and unclassified work for the United States government and other civilian bodies. He had held a Secret Level security clearance for over 20 years.

12. Prior to the 25th May 2018, the Plaintiff had not been subject to any formal disciplinary or capability action by CSR or the Defendant over his work or work performance whilst employed on Ascension Island.

Mr Avery's contract of employment

13. Mr Avery's contract of employment with the Defendant was dated the 8th April 2015 and began with the following role description:

> 'Thank you for your interest in Wolf Creek Federal Services, Inc. (WCFSI). I am pleased to offer you the position of electronic technician at the Range Operations Services (ROS). This position reports directly to the Communications supervisor and pays an hourly wage of $ xx. This position is a regular full-time hourly position. This position is not subject to FLSA overtime requirements, hours worked in excess of 40 will be paid at straight time.'

14. The contract contained the following relevant express terms and conditions:

(a) that the Plaintiff's employment could be terminated at will. The term stated:

"Your employment is at will. That means that either you or WCFSI is free to end the employment relationship at any time, with or without notice or cause. And nothing in this letter or WCFSI policies, either now or in the future, is intended to change the at-will nature of your employment. As such, neither this letter nor any other oral or written representations may be considered a contract for any specified period of time."

(b) that any breach of the Defendant's policies, including in relation to the use of

personal computers for the Defendant's business, could result in disciplinary action:

"As an employee, you will be expected to follow the established polices of the Chugach Employee Handbook"

15. It is Mr Avery's case as pleaded in his plaint that his contract of employment also contained implied terms and/or there were common law duties on the Defendant which obliged it to:

(a) treat him with trust and confidence;

(b) exercise the power of dismissal in good faith;

(c) be honest with him and to refrain from untruthful, unfair or insensitive conduct when exercising the power of dismissal;

(d) not to discriminate against him including on grounds of disability.

16. In the Particulars of Claim dated 18 July 2020 Mr Avery alleged various breaches of these implied terms in relation to his dismissal for alleged breach of the policies on holding or using computers. The particulars of which are set out at paragraph 17:

PARTICULARS OF BREACH OF CONTRACT/COMMON LAW DUTIES
(a) there was no or no adequate investigation into the allegations against him;
(b) he was not given any or any adequate notice of the allegations against him;
(c) he was not given an opportunity to contest the allegations at a disciplinary hearing;
(d) he was not given an opportunity to call witnesses or to provide other evidence to refute the allegations;
(e) he was not given a right of appeal;
(f) his employment was terminated in breach of the Defendant's own disciplinary procedures.

17. The Defendant's original Defence dated 19 August 2020 pleads that Mr Avery's dismissal was justified as set out at paragraphs 1-3.

1. On Thursday May 24, 2018, during an internal Information Assurance security inspection, a Wolf Creek security team found three personal laptops and a scanner in an Open Storage Area (a secure area where Classified Documents are processed) on property on Ascension Island under the jurisdiction of the United States Air Force (hereinafter Air Force) and not in the local community. Posted on the outer door to the Open Storage Area was a sign clearly indicating that personal electronic devices were prohibited from being brought into the secure area.

2. It was established, and is uncontested, that these items belong to Mr. Andrew Avery, the Plaintiff. Mr. Avery was not in the general proximity when the inspection was conducted but, despite the Plaintiff s assertion that his actions consisted a violation of his rights to use his private computer as he saw fit, his actions of bringing his personal laptops and scanner into the secure area was a breach of Air Force security regulations and Wolf Creek policy. See Particulars of Claim, paragraph 16 (a).

3. Having the personal laptops and scanner in the Open Secure Area is a violation of Air Force and company policies. Wolf Creek, as a contractor to the Air Force, does not have authority to waive or ignore Air Force policies; rather, it can only make its own policies more stringent or issue complementary polices which do not obviate Air Force policy.

18. In its amended Defence dated 21 June 2021 the Defendant also denied that the Supreme Court had jurisdiction over this breach of contract dispute. The Defendant submitted that the Supreme Court has no jurisdiction to imply terms into Mr Avery's contract.

Mrs Arms

19. I then turn to the First Plaintiff, Mrs Arms.

20. In a plaint and Particulars of Claim dated 5 January 2020 Mrs Arms brought a claim in relation to her dismissal from employment by the Defendant, this time in 2019. By her plaint, the Plaintiff sought damages for breach of her contract of employment and or the common law duly to treat her fairly and or her rights under the Constitution of Ascension Island based on her dismissal from her employment by the Defendant on the 25 March 2019 based on her diabetes.

21. Her contract of employment included the following express terms:

This contract made the 09th day of March in the year 2018 between Wolf Creek Federal Services Inc., (WCFSI), Patrick Air Force Base, Florida (hereinafter called the Employer), of one part, and Elaine Arms of St Helena (hereinafter called the Employee), of the other part.

Witnessed as follows:
1 The Employer agrees to hire the Employee, and the Employee agrees to serve the Employer in the capacity of Staff Clerk Senior at WCFSI Ascension Island, for the period of one year commencing from 14 April 2018 at the rate of £xx.xx per hour for each hour worked
2. The Employee contracts with the Employer to serve him faithfully and to the best of his/her ability during the continuance of this contract.
Terms of Contract

1. The Employee may terminate this contract before its expiration by giving two weeks' notice in writing to the Employer.
2. The Employer may terminate this contract before its expiration by giving two weeks' notice or statutory notice, whichever is greater
3. The Standards of Employment annexed hereto sets out the required standards of conduct. In the event of misconduct, the Employee may be subject to the Employer's disciplinary process.
4 If, owing to ill health of the Employee or extenuating circumstances beyond his/her control, the Employee is unable to fulfill the terms of this contract, the Employer shall repatriate the Employee to the Employee's home of record and the contract shall cease to have effect as from the date of his/her arrival there. In such circumstances, the Employee will be entitled to a payment equal to his/her statutory notice period.
….

8. If any provision or the enforcement of performance of this contract is or shall at any time be determined to be contrary to Ascension Island Law, then such provision shall not be applicable or enforced or performed, except to the extent permitted by law. If, at any time thereafter, such provision or its enforcement or performance shall no longer conflict with the law, then it shall be deemed restored in full force and effect

9. If any provision of this contract or the application of such provision to any person or circumstances shall be held invalid, the remainder of this contract or the application of such provision to other persons or circumstances shall not be affected thereby.

22. Significantly, the employment contract recognised that it was subject to the law of Ascension Island at paragraph 8 (as set out above) and stated as follows that it was enforceable under St Helena / Ascensions Island law rather than US law:

General
This contract is made pursuant to and subject to the provisions of the Ascension Island Worker's Protection Ordinance (A28) and Worker's Compensation Ordinance (A28) and to the Regulations for the time being in force there under and shall be interpreted and enforced in accordance with the laws for the time in force in the Colony of St. Helena

23. Pursuant to her plaint she filed a Particulars of Claim, paragraphs 1-2 of which set out the background to her claim:

1. The Plaintiff commenced employment with CSR al the USAF Base on Ascension Island in April 2012 as a Senior Staff Clerk (an office based role). On the 1 October 2015 her contract of employment was transferred to the Defendant under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 1981 which apply to Ascension by virtue of the Transfer of Undertakings (Protection of Employment) Regulations (Application) Ordinance 2001.

2. The Plaintiff was employed on a series of one year fixed term contracts. Her most recent contract was dated 9th March 2019 and due to commence on the 14 April 2019. This was a renewal of her previous fixed term contract

24. Like Mr Avery, she sought to imply into her employment contract the same four terms as set out above at paragraph 15.

25. The particulars of breach included the six grounds relied on by Mr Avery plus (i) that her dismissal was an act of disability discrimination and (ii) that the Defendant was not honest with the Plaintiff, it did not act in good faith in that the explanation for her dismissal was untrue.

26. The Defendant's defence dated 21 June 2021 raised similar points about the lack of the Supreme Court's jurisdiction as the amended Defence for Mr Avery and raised questions of delay and the limitation period in bringing the plaint. Further it submitted that there was no termination of contract nor dismissal – see paragraphs 5-7:

> 5. It is an important distinction that Defendant's then-existing Contract of Employment was not terminated; rather, she was not offered a subsequent renewal of her contract. See Attachment 1 . Under English law, when an Employer is faced with defending a claim of Unfair Dismissal, it is the Employer's burden to demonstrate that it had a valid, justifiable reason for dismissal and acted reasonably in the circumstances. Further, the Employer must had been consistent (for example, not dismissing one employee for doing something that they let other employees do) and must have investigated the situation fully before dismissing the employee. In this case, the Defendant did not 'dismiss' the Plaintiff but simply dd not offer her a subsequent contract but, regardless, the Defendant acted in reasonable reliance on the diagnosis and opinion of two medical professionals who consulted regarding Plaintiff's specific medical condition. See Attachment 2.
>
> 6. The Defendant did not terminate the Plaintiff's employment. Instead, the Medical Officer at the Beacon Clinic on Ascension Island, after consultation with the Senior Medical Officer at the Georgetown Hospital, determined that the Plaintiffs condition rendered her 'Not Fit to Work' on Ascension Island. See Attachment 2. In the Plaint, Plaintiff confirms that the Georgetown Senior Medical Officer formally opined that he became aware of her medical condition, upon consultation from the Beacon Clinic Medical Officer (Note - it is important to note that this was not on information provided by the Defendant), in 'March 2019' (the same month her contract ended) and the Georgetown Medical Officer confirmed and concurred that, "[the Plaintiff's] health was an increased risk."

7. Finally, in accordance with English law, the Plaintiffs dismissal could be considered unfair if the Defendant did not: 1) have a good reason for dismissal, and 2) follow the Defendant's formal disciplinary or dismissal process. In this case, the Defendant reasonably relied on the advice of two consulting and concurring medical professionals and reasonably acted on that information by not offering the Plaintiff a subsequent Contract of Employment once her existing Contract of Employment expired. The English government provides a summary of employers' responsibilities and employees' rights law relating to Unfair Dismissal available at: https://ww'w.gov.uk/dismissal. The Plaintiff essentially conceded that the Defendant/Employer acted properly by her subsequent actions; she immediately submitted a request for the lump-sum payment of her retirement which was timely remitted to her by the Defendant. See Attachment 3. Any further claims that the Plaintiff somehow lost her ability to reside on Ascension Island are mooted by the fact that Plaintiff's husband was employed on the island and, thus, she remained entitled to remain.

27. Mr Rogers, for the Defendant, spent some time at the hearing referring to the substantive merits of the Plaints and the Defences lodged. However, I must stress that it is not for the Supreme Court to resolve the merits at this stage of proceedings (eg. whether there was any dismissal or termination; whether any dismissal was justified or procedurally fair or breached any express or implied contract term). These will be a matter for determination on the evidence if the plaints proceed to trial.

The preliminary issues

28. The plaints of the two Plaintiffs have been joined in order to determine common preliminary issues including the two key issues that I have identified at the outset of this judgment.

29. A list of issues was set out by Mr Toms in his skeleton argument – these were derived from all the issues raised in the Defendant's Defences and amended Defence to the two plaints. I have re-ordered these as set out below:

First Issue – Jurisdiction of the Supreme Court to determine breach of contract claims in relation to US citizens who were employees of US Contractor companies of the US Air Force

(i) Does the Supreme Court have jurisdiction to hear the Second Plaintiff's claim or can the Defendant rely on *forum non conveniens* to have the Second Plaintiff's claim transferred to the United States of America?
(ii) Does the Supreme Court have authority and jurisdiction over employment matters regarding United States (U.S.) citizens employed by U.S. Contractor Companies conducting business on Ascension Island solely for the purpose of supporting the U.S.

Government (USG) pursuant to an International Agreement between inter alia the U.S. and United Kingdom (U.K.)?

Second Issue – Ability of the Court to imply terms into the employment contracts as to good faith / fairness / non-discrimination in dismissal

i) has the Ascension Island Government (AIG) been silent on the need to update antiquated employment law, the Workmen's Protection Ordinance 1926, as it is outdated, no longer reflects the reality of employment on Ascension Island, and has a number of shortcomings, leading to undesirable outcomes for both employees and employers?
ii) Can the nature of the Plaintiffs' claims for breach of contract rely on implied terms and are they sustainable in law?
iii) to what extent can the Plaintiffs rely on Article 137 of the *St Helena, Ascension and Tristan Da Cunha Constitution Order 2009 S/I No. 1751 from 2009* ("the Constitution")?
iv) if the Plaintiffs can rely on Article 137 in any way, how should the issue of disability be judged?

30. There were also consequential issues arising from matters raised in the pleadings:

Remaining consequential issues

(i) are the Plaintiffs claiming for unfair dismissal under the Employment Rights Act 1996 ("ERA")?
(ii) did the Plaintiffs have to go through ACAS before presenting their claims?
(iii) did the Plaintiffs have to present their claims within three months of the date of termination? and
(iv) can the Court extend time for presenting any plaints or claims for unfair dismissal?

The First Issue

The Law

The Bahamas Agreement

31. The relevant bilateral treaty governing the Supreme Court's jurisdiction over US nationals on Ascension Island is the Bahamas Long Range Proving Ground to Ascension Island (*Bahamas Agreement*), 25th June, 1956 between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland.

32. Relevant sub-articles of Articles V, XII and XV provide as follows

ARTICLE V

Jurisdiction

(1) The Government of the United States of America shall have the right to exercise the following jurisdiction over offences committed in Ascension Island:—

(c) Where the accused is not a member of the United States Forces, a British national or a local alien, but is a person subject to the United States Uniform Code of Military Justice,

(ii) if a state of war does not exist and there is no civil court of the United States sitting in Ascension Island, exclusive jurisdiction over security offences which are not punishable under the law of Ascension Island; concurrent jurisdiction over all other offences wherever committed:

(d) Where the accused is not a member of the United States Forces, a British national or a local alien, and is not a person subject to the United States Uniform Code of Military Justice, and a civil court of the United States is sitting in Ascension Island, exclusive jurisdiction over security offences committed inside the Sites; concurrent jurisdiction over all other offences committed inside the Sites and, if a state of war exists, over security offences committed outside the Sites.

(2) Wherever, under paragraph (1) of this Article, the Government of the United States of America has the right to exercise exclusive jurisdiction over security offences committed inside the Sites, such right shall extend to security offences committed outside the Sites which are not punishable under the law of Ascension Island.

ARTICLE XII

Immigration

(1) The immigration laws of Ascension Island shall not operate or apply so as to prevent admission into Ascension Island, for the purposes of this Agreement, of any member of the United States Forces posted to a Site or any person (not being a national of a Power at war with Her Majesty The Queen) employed by, or under a contract with, either the Government of the United States of America or a contractor of that Government, in connexion with the establishment, maintenance or use of the Long Range Proving Ground, or his wife or minor children; but suitable arrangements shall be made by the United States to enable such persons to be readily identified and their status to be established.

(2) If the status of any person within Ascension Island and admitted thereto under the foregoing paragraph shall be altered so that he would no longer be entitled to such admission, the United States authorities shall notify the Government of Saint Helena and shall, if such person be required to leave Ascension Island by that Government, be responsible for providing him with a passage from Ascension Island within a reasonable time, and shall in the meantime prevent his becoming a public responsibility of Saint Helena.

ARTICLE XV

Taxation

(1) No member of the United States Forces or national of the United States, serving or employed in Ascension Island in connexion with the establishment, maintenance or use of the Long Range Proving Ground, and residing in Ascension Island by reason only of such employment, or his wife or minor children, shall be liable to pay income tax in Ascension Island except in respect of income derived from Ascension Island.

The Defendant's arguments

33. Mr Rogers submits that the Supreme Court has no jurisdiction to determine breach of contract claims brought by the Plaintiffs because the Bahamas Agreement (the treaty entered into by and between the Government of the United Kingdom of Great Britain and Northern Ireland (UK) and the Government of the United States (US), entitled "Agreement Concerning the Extension of the Bahamas Long Range Proving Ground by the Establishment of Additional Sites in Ascension Island") cedes jurisdiction to determine the plaints to the courts of the United States of America (U.S.).

34. He submitted that the Supreme Court has neither authority nor jurisdiction over a U.S. citizen employed by U.S. Contractor Companies conducting business on Ascension Island

solely for the purpose of supporting the U.S. Government pursuant to the Bahamas Agreement.

35. He submitted that the Plaintiffs have offered no precedent nor authority in which the Supreme Court has exercised jurisdiction over questions of employment of a single U.S. citizen employed by a U.S. contractor. Thus, this case is one of first for the Supreme Court to consider. He submitted it would overturn some 70 years of past practice on island and expose any similarly situated previous and former employers to extraordinary financial liability, adversely impacting diplomacy and the national security of Ascension Island, the UK, and the U.S Governments.

36. Mr Rogers submitted that the Bahamas Agreement exempts U.S. contractor employees from Ascension Island Government ('AIG') income taxes for remuneration earned working for a U.S. contractor and, similarly, does not treat such employees as emigrees, specifically defined separately from U.S. uniformed military personnel. For non-U.S. military personnel (uniformed or contractor), income tax is paid on income earned on Ascension at a rate of 27%. By definition, income tax is used to defray the cost of a functioning government. As the AIG's primary focus is to protect its citizenry, the Bahamas Agreement seeks to further that aim – local citizens pay to have their employment rights protected by their government while U.S. citizens, as taxpayers of a separate sovereign, have their employment rights protected by their government, the United States.

37. He submitted that the Plaintiffs had made the completely unsupported statement that, 'the Defendant has provided no evidence that the Courts of the U.S. are an appropriate forum including the possibility of them entertaining the claims currently being pursued by the Second Plaintiff. They clearly would not be an appropriate forum if, in law, they would not accept his claim.' He submitted that because the Plaintiffs' claim might be rejected due to timeliness, statute of limitations, or other procedural defects does not mean that a U.S. court would not accept the Plaintiffs' claim. Granted, they might dismiss them on procedural grounds, due to Plaintiffs' dilatoriness in perfecting the claims, but that does not mean the Supreme Court should entertain the Plaintiffs' plaints out of sympathy.

38. Further, under Article V of the Bahamas Agreement, the United States has exclusive jurisdiction over the Second Plaintiff's employment matters because the termination of Mr Avery's employment was specifically based on a security incident that he created. Federal U.S. investigating officers directed he be removed from Ascension Island immediately and his computer equipment seized because he jeopardized National Security. The Defendant had no standing to refuse the direction of the U.S. government officials and, instead, keep the Plaintiff in the employ of the Defendant on Ascension Island, as he became *persona non grata* without a right of abode. As the Supreme Court has no jurisdiction to consider the underlying security incident as it is, by treaty, an exclusive matter for the U.S. to address, the Defendant has by no means, 'accepted the jurisdiction of the Supreme Court of St Helena'; rather, the Defendant has respected the dignity of the court by not cavalierly dismissing its deserved distinction.

39. Mr Rogers further submitted that throughout Plaintiff s Particulars of Claim, there are repeat references to the Plaintiff not having a contract of employment with WCFSI in contravention of Ascension Island law. However, the long-standing practice, to which the Supreme Court should give deference, is that U.S. expatriate employees hired by a U.S. government contractor for U.S. Air Force, are subject to U.S. employment laws and not the employment laws of Ascension Island. This practice long predates Wolf Creek's presence on island dating from 2015 and was the practice followed by Wolf Creek's predecessor contractor (CSR) and the Ascension Island government. This practice is supported by the Bahamas Agreement, ratified on June 25. 1956. as amended; in particular. Article XII, Immigration, and Article XV, Taxation (exempting U.S. contractors from paying Ascension Island income tax on wages earned, "by reason only of such employment.').

40. Mr Rogers therefore submitted that an appropriate remedy would be, consistent with the Bahamas Agreement and for the preservation of good and friendly international relations between Ascension Island, the UK, and the U.S., refer this matter to the respective diplomatic channels by way of demarche to negotiate an amendment to the international agreements between the respective sovereigns.

The Plaintiffs' submissions

41. Mr Toms submitted that the Supreme Court does have jurisdiction to determine the disputed breach of contract Plaints. I have adopted a fair proportion of Mr Tom's argument in my analysis below so do not repeat it.

Discussion and Analysis

Does the Supreme Court of St Helena have authority and jurisdiction over employment matters regarding United States (U.S.) citizens employed by U.S. Contractor Companies conducting business on Ascension Island solely for the purpose of supporting the U.S. Government pursuant to an International Agreement between inter alia the U.S. and United Kingdom (UK)

42. I am satisfied that the Supreme Court has the requisite jurisdiction to determine these disputes.

43. The Plaintiffs were employed by a US civilian contractor on Ascension Island, not the US Government nor US Air Force and are entitled to protection under Ascension Island law. No other law applies to them.

44. The Bahamas Long Range Proving Ground to Ascension Island, 25th June 1956 between the Government of the United States of America and the Government of the United

Kingdom of Great Britain and Northern Ireland ('Bahamas Agreement') provides for the jurisdiction of the courts of Ascension Island and the US in relation to criminal offences (Article V), immigration status (Article XII) and taxation (XV).

45. It gives jurisdiction to the Supreme Court of St Helena (with jurisdiction for Ascension Island) to hear civil claims under the contract of employment by virtue of Article V(8) and does not contain any provision expressly ousting the Ascension Island civil courts from having any jurisdiction over any type of civil claims. The Bahamas Agreement has been amplified in the years between 1956 and 2016, including by the way of Exchange of Notes, but not in any way relevant to this dispute.

46. The express terms of the First Plaintiff's contract are consistent with this analysis. The Second Plaintiff's contract is merely silent on the issue.

47. Article V of the Bahamas Agreement is the only Article which governs jurisdiction of the US Courts or the Supreme Court of St Helena with jurisdiction for Ascension Island. It relates to proceedings for criminal offences (offenses in American spelling) and provides relevantly:

> Article V
>
> Jurisdiction
>
> (1) The Government of the United States of America, shall have the right, to exercise the following jurisdiction over offenses committed in Ascension Island:
>
> (a) Where the accused is a member of the United States Forces,
>
> (i) A state of war exists, exclusive jurisdiction over all offenses wherever committed;
>
> (ii) if a state of war does not exist, exclusive jurisdiction over security offenses wherever committed and United States interest offenses committed inside the Sites; concurrent juris-diction over all other offenses wherever committed.
>
> (b) Where the accused is a British national or a local alien and a civil court of the United States is sitting in Ascension Island,
>
> (i) if a state of war exists, exclusive jurisdiction, and
>
> (ii) if a state of war does not exist, concurrent jurisdiction, over security offenses committed inside the Sites.
>
> (c) Where the accused is not a member of the United States Forces, a British national or a local alien, but is a person subject to the United States Uniform Code of Military Justice,
>
> (i) if a state of war exists, exclusive jurisdiction over security offenses committed inside the Sites and United Stales interest offenses committed inside the Sites; concurrent jurisdiction over all other offenses wherever committed;

(ii) if a state of war does not exist and there is no civil court of the United States sitting in Ascension Island, exclusive jurisdiction over security offenses which are not punishable under the law of Ascension Island; concurrent jurisdiction over all other offenses wherever committed;

(iii) if a state of war does not exist and a civil court of the United States is sitting in Ascension Island, exclusive jurisdiction over security offenses committed inside the Sites; concurrent jurisdiction over all other offenses wherever committed.

(d) Where the accused is not a member of the United States Forces, a British national or a local alien, and is not a person subject to the United States Uniform Code of Military Justice, and a civil court of the United States is sitting in Ascension Island, exclusive, jurisdiction over security offenses committed inside the Sites; concurrent jurisdiction over all other offenses Committed inside the Sites and, if a state of war exists, over security offenses committed outside the Sites.

…….

(3) In every case in which, under this Article the Government of the United States of America has the right to exercise jurisdiction and the accused is a British national, a local alien or, being neither a British national nor a local alien, is not a person subject to the United States Uniform Code of Military Justice, such jurisdiction shall be exercisable only by a civil court of the United States sitting in Ascension Island.

(4) In every case in which under this Article the Government of the United States of America has the right, to exercise exclusive jurisdiction, the following provisions shall have effect:

(a) The United States authorities shall inform the Government of Saint Helena as soon as is practicable whether or not they elect to exercise such jurisdiction over any alleged offenses which may he brought to their attention by the competent authorities of Ascension Island or in any other case in which the United States authorities are requested by the competent authorities of Ascension Island to furnish such information.

(b) If the United States authorities elect to exercise such jurisdiction, the accused shall be brought to trial accordingly, and the courts of Saint Helena or of Ascension Island shall not exercise jurisdiction except in aid of a court or authority of (the United States, as required or permitted by the law of Saint Helena or the law of Ascension Island, as the case may be.

(c) If the United States authorities elect not to exercise such jurisdiction, and if it shall be agreed between the Government of Saint Helena and the United States authorities that the alleged offender shall be brought to trial, nothing in this Article shall affect the exercise of jurisdiction by the courts of Saint Helena or of Ascension Island in the case.

…..

(8) Nothing in this Article shall affect the jurisdiction of court of Saint Helena or of Ascension Island except as expressly provided in this Article.

(9) In this Article the following expressions shall have the meaning hereby assigned to them:

(a) "Security offense" means any of the following against the Government of the United States of America punishable under the law of the United States of America

(i) treason;

(ii) any offense of the nature of sabotage or espionage against any law relating to official secrets;

(iii) any other offense relating to operations in Ascension Island of the Government of the United States of under this Agreement, or to the safety of any equipment or other property of the Government of the United States America in Ascension Island under this Agreement.

(b) "State of war" means a state of actual hostilities in either the Government of the United States of America Government of the United Kingdom is engaged and which not been formally terminated, as by surrender.

48. It can be seen that 'security offenses' are defined very narrowly under Article V(9) as specific types of criminal offences punishable under U.S. law. The US has not brought any criminal proceedings for a security offense against either Plaintiff and not sought to exercise jurisdiction as it would be required to do under the procedure contained in Article V(4). The Plaintiffs' plaints are civil claims and jurisdiction over these is granted to the Supreme Court of St Helena or Ascension Island by virtue of Article V(8).

49. The reason for termination of the Second Plaintiff's contract is in relation to the location of his personal computer but it does not fall within Article V(9)(iii) as being an offence relating to the safety of any equipment or property of the US Government. The US has not sought to prosecute this incident as a criminal offence against security (even if it might be capable of constituting such in US law). None of the other conditions in Article V(1)(d) apply to either Plaintiffs who were not US Government nor Air Force employees, where they are not being prosecuted for any offence, security or otherwise and no US civil court is sitting in Ascension Island.

50. The UK Government, through the Foreign Commonwealth and Development Office, aware of the argument that the Defendant was pursuing in these proceedings, chose not to intervene. This is noteworthy only in the sense that the FCDO has not presented an argument on behalf of the UK Government that the Supreme Court had no jurisdiction and the Bahamas Agreement ceded jurisdiction over these claims to the US courts.

The Workmen's Protection Ordinance

51. My interpretation that the Supreme Court has jurisdiction to determine these plaints alleging breaches of employment contracts is also consistent with the Workmen's Protection Ordinance 1926 for Ascension Island which is the only legislation that is in force (and was in force at the relevant times) that addresses the court's jurisdiction over employment disputes.

52. Sections 3, 4 & 6 govern employment contracts:

Contracts of service compulsory

3. (1) Subject to subsection (2), every employer desirous of engaging a workman or workmen for service in Ascension must enter into a separate contract of service in accordance with the provisions of this Ordinance with each workman so engaged:
(2) The Governor may, on the application of any workman, exempt the engagement of such workman for service in Ascension from the provisions of this Ordinance if the Governor is of the opinion that such exemption is in the circumstances of the case desirable.

Contracts to be in writing in prescribed forms
4. Every contract of service entered into as provided in section 3 must be in writing in the form prescribed in the Schedule, or to the like effect, and signed by the parties to it, and be attested by a Justice of the Peace or some Government officer duly appointed by the Governor.

Contract accurately to set out terms

6. No contract of service is enforceable as against a workman unless it specifies as accurately as may be—

(a) the nature of the service;

(b) the place or limits within which the service is to be performed;

(c) the duration of the contract;

(d) the remuneration to be paid;

(e) the provision to be made by the employer for the return of the workman at the termination of the contract to the place whence he or she was engaged; and

(f) an undertaking to provide any medical or dental attention for the workman prescribed by regulation made by the Governor.

53. Section 8(1)(a) & (b) specifically contemplate litigation in relation to employment contracts brought by a 'workman' (as defined in section 2) before the Supreme Court of St Helena for Ascension Island and that the employer may be a company or corporation registered outside St Helena or Ascension (such as the Defendant in this case):

2……..

"employer" includes any person, firm, corporation or company employing workmen and

also the attorney, agent, manager, factor or foreman of any such person, firm, corporation or company;

"workman" means any person who ordinarily gains his or her livelihood by performing

manual or clerical work for hire and includes any person who in fact is hired to perform manual or clerical work or as foreman, ganger, or in any like capacity directly to supervise the performance of manual or clerical work by other persons.

Institution of proceedings

8(1) If – *(a)* a workman institutes legal proceedings in a court of competent jurisdiction in St Helena or Ascension to recover from an employer any sum alleged to be due by way of wages or otherwise under a contract of service or by way of damages for loss sustained or injury received during the period of duration of a contract of service; and

(b) the employer is a corporation or company registered outside St Helena or Ascension, and the court is satisfied that at the time the proceedings are taken the employer is not resident in St Helena or Ascension and is not likely to return to St Helena or Ascension within a reasonable time,

the court may direct that notice of the proceedings is to be sent to the employer by registered letter directed to the registered office of such corporation or company or to the address given by such employer pursuant to section 7 *(a)*.

(2) If, after the lapse of a time the court considers reasonable (to be stated in the notice) the employer does not enter an appearance to the action, the court must hear and adjudicate on the matter without further delay and may direct that any sum found to be due to the workman is to be recovered under the security entered into in accordance with section 7 *(b)*.

54. Regulation 5 of the Workmen's Protection Regulations (made under section 12 of the Ordinance) provides for the right to housing for 'workmen':

Housing accommodation

5. An employer must provide suitable housing accommodation for the workman and for members of his or her family who accompany him or her. The accommodation provided must have been approved by the Governor or other officer appointed by him or her for the purpose before such workman or member of his or her family is permitted to land.

The Employment Ordinance 2022

55. Further, my interpretation that the Supreme Court has jurisdiction to determine these plaints alleging breaches of employment contracts is consistent with the Employment Ordinance 2022 of Ascension Island and Regulations made thereunder. The Ordinance came into force on 20 June 2022 (see section 1(2)) as did the five sets of Regulations made thereunder.

56. In relation to some types of employment contracts (Primary Contracts), the Employment (End of Contract) Regulations 2022 require the employer to have a policy establishing the grounds on which a Primary contract can be terminated and the procedure to be followed prior to any termination (see Regulation 6(2)). Regulation 7 provides for protection against 'unlawful dismissal' and for claims for unlawful dismissal (including unfair dismissal claims) to be brought as breach of contract claims. This applies only in respect of contracts entered into on or after 20 June 2022 (see section 5(2) of the Ordinance).

57. The 2022 Ordinance repeals and replaces the Workmen's Protection Ordinance of 1926 (see section 18 of the Ordinance). However, the 1926 Ordinance will continue to apply in respect of workers under a contract of employment entered into before the Ordinance comes into force (ie. it will not have retroactive effect).

58. The central point is that the 2022 Ordinance, as now in force, does not apply to the Plaintiffs' plaints as their employment contracts were entered into (and they were dismissed) many years before the Ordinance and Regulations came into force.

59. The 2022 Ordinance provides the codification of the policy proposed in respect of the Ascension Island Government's understanding and protection of employment rights on the Island first published in 2021. It also gives insight into the AIG's understanding of the jurisdiction.

60. The background to the enactment of the 2022 Ordinance is set out in a policy document of the Ascension Island Government (First draft dated January 2021) titled 'The Regulation of Employment in Ascension' ('the Government's policy). The introduction to this document sets out the context of the Government's policy which led to the enactment of the Ordinance. It is as follows:

> Introduction
>
> 1.Ascension is a working island. With the exception of a small number of tourists, everyone in Ascension is here for the reason that they are working, or because they are an accompanying dependant of a person who is working.
>
> 2. There is a small number of large Employing Organisations who make use of the island's strategic location, be that the US Space Force, the Royal Air Force supporting British Forces in the Falkland Islands, or the BBC's Atlantic Relay Station. There is a number of other, smaller employers providing services to the large Employing Organisations and to the community. Activity on the island is also supported by a flow of contractors who move on and off the island, providing specialist services.
>
> 3. Given the island's status as a working island, it is important that the Ascension Island Government provides a safe and stable environment which facilitates, supports and regulates the activities of the Employing Organisations, other employers, and their workers. Part of providing that environment means ensuring a stable and well regulated employment

market that supports the bringing to Ascension of outside expertise as well as enabling employers to make best use of the individuals who are already on island.

4. Any policy concerned with regulating the employment market has to take account of Ascension's unique circumstances. It is an exceptionally remote and barren island. First and foremost therefore, it must ensure that employers are responsible for the basic welfare needs of their employees (and accompanying dependants) and contractors.

5. This policy also recognises that there is no right of abode in Ascension, and that consequentially contracts of employment must be limited in length. It seeks to recognise that individuals may be employed by the same employer on a series of separate but successive contracts, or may move between employers, thereby remaining employed on the island for a number of years.

6. In respect of dismissal and the expiry of contracts, the policy seeks to recognise the upheaval of being obliged to leave Ascension sooner than intended. In that regard the policy seeks to strike a balance between the interests of employers and the interests of their employees, ensuring that employers continue to have the ability to manage their workforces whilst obliging them to treat employees fairly in doing so.

7. Finally, no rights are meaningful without means by which they can be enforced, including access to an independent and impartial forum in which disputes can be resolved, and to effective remedies. This policy seeks to take an approach to enforcement and dispute resolution which recognises Ascension's unique circumstances. It does this by making best use of existing legal mechanisms to enable disputes to be resolved quickly, simply and cheaply.

Context

8. The Workman's Protection Ordinance, 1926 (WPO) regulates employment in Ascension. UK employment legislation does not apply in Ascension. St Helena's Employment Rights Ordinance, 2010 does not apply in Ascension and was expressly disapplied in 2017.

9. The WPO is outdated, no longer reflects the reality of employment in Ascension, and has a number of shortcomings. Taken in combination, this results in lack of clarity within the employment market, leading to undesirable outcomes for both employees and employers.

10. In order to seek to address this, officers from the Ascension Island Government (AIG) and the elected members of the Ascension Island Council sit on an Employment Reform Working Group (ERWG). The ERWG has been tasked with identifying key issues that require addressing and to propose policy options by which to address these.

11. This policy is the output of the ERWG's work to date. This is not a final policy document and will be subject to consultations with stakeholders, and further refinement in response to feedback.

12. Noting that the last significant update to employment legislation in Ascension was 1926, this policy is designed to be the first attempt at modernising the regulation of

employment in Ascension, but certainly not the last. This policy – and any resulting changes to employment legislation – will be part of an iterative process which will seek to review and adapt regulation of employment in a timely and regular fashion based on the requirements of the market.

61. Section 4 of the 2022 Ordinance, and the Schedule thereto, provides for certain employees to be exempt from its application, including employees of UK and US governments, as follows:

> **Exempted persons**
> **4. (1)** A person specified in the Schedule is exempt from the application of this Ordinance.
> **(2)** The Schedule may be amended by Order published in the *Gazette* by the Governor after consultation with the Island Council
>
> **Schedule**
>
> ***Exempt persons***
> **(Section 4(1))**
> *(a)* a person employed directly by the government of the United Kingdom or the United States of America, including members of the armed forces of the government of the United Kingdom or the United States of America, who are posted to Ascension for a fixed period (including but not limited to the Foreign Commonwealth and Development Office, Ministry of Defence, Royal Air Force of the United Kingdom and the Space Force and Air Force personnel of the United States of America); and
>
> *(b)* a person employed by any other government or by an international or intergovernmental organisation who is employed on a short-term basis (including but not limited to the St Helena Government, or the North Atlantic Treaty Organisation (NATO)).

62. This exemption would not apply to the Plaintiffs as the Defendant is a civilian contractor of the US Government or armed forces - the Plaintiffs were not employees of either.

63. In addition, the Government's policy, as updated on 5 July 2022, provides as follows:

> Category B: mandatory welfare obligations only
> 20. The following classes of individuals are covered by the mandatory welfare obligations only:
> a. individuals employed by a non-governmental overseas employer under a contract which is enforceable in that jurisdiction (e.g. the UK or the USA) and who are posted to Ascension for a fixed period; [See Attachment 1, Page 11]….d

64. The policy refers to 'mandatory welfare obligations only' (a term of art used in the 2021 Ordinance) and therefore seeks to exclude unfair dismissal rights from applying to individuals employed by a non-governmental overseas employer under a contract which is enforceable in that jurisdiction (e.g. the UK or the USA) and who are posted to Ascension for a fixed period.

65. It is notable that the same exclusion does not appear in the Schedule to the Ordinance but only in the Government's policy so it is does not have legal force. This part of the policy is also inconsistent with the provisions of the 2022 Ordinance and the Regulations thereunder – however it was drafted to be consistent with the 2021 Ordinance (see section 3) which never came into force.

66. Further, the 2022 Ordinance and the Government policy do not apply to the Plaintiffs' cases as they are not of retroactive application. Nonetheless the Ordinance policy are still instructive.

67. First, the Ordinance and the Employment (End of Contract) Regulations are by no means identical to the Employment Rights Act 1996 in the UK and provides for differing rights and obligations in relation to employment and dismissal.

68. Second, none of the employment rights contained within the 2022 Ordinance and the Regulations thereunder will apply to UK, St Helena nor US Government employees nor UK or US armed forces nor Air Force employees by virtue of section 4(1) and the Schedule to the Ordinance.

69. Third, to the extent that the provisions in the Government policy regarding 'mandatory welfare obligations only' have any lawful application, and I am not satisfied that they do, some contractors would be excluded from the protection equivalent to unfair dismissal rights as provided under Regulation 7 of the Employment (End of Contract) Regulation.

70. However, the exclusion in the policy would not apply to the Plaintiffs – even if the Government policy had the force of law and even if it had been in force at the time of their employment or dismissal. They would have been covered by the protections under Regulation 7 (including something equivalent to protection against unfair dismissal) had they entered into a contract of employment when it came into force.

71. The exclusion of the equivalent of unfair dismissal protection would only apply to those employees who did not have Primary Contracts or those who exempted by virtue of the Schedule to the Ordinance eg. where employed by a non-governmental overseas employer under a contract which is enforceable in that jurisdiction (e.g. the UK or the USA) and who are posted to Ascension for a fixed period.

72. The Plaintiffs' employment contracts were not said to be enforceable (only or at all) in the US (or oust the Ascension Island courts) and the Plaintiffs were not posted to Ascension Island for a fixed period.

73. Indeed, the First Plaintiff's contract was specifically made subject to local rather than U.S. law. As Mr Toms also submitted, there was nothing in the Bahamas Agreement that deals with employment claims or those relating to civil subcontractors of the USAF and nothing that prevents the Ascension Island courts hearing their claims. Likewise, there was nothing in their employment contracts stipulating that any disputes were only to be dealt with by US courts

74. The Plaintiffs were not contractors nor were they in Ascension for a fixed period to provide services. The Plaintiffs were not posted for fixed periods nor contractors for a fixed period – they had employment contracts with a US Civilian Contractor.

75. Therefore, even if the policy was incorporated into the law and even if the policy is retroactive, neither of which is correct, the policy would not exempt the Defendant from its obligations for the three reasons set out above:

(a) neither Plaintiff was employed by the Defendant under a contract whereby they were posted to Ascension for a fixed period.

(i) the First Plaintiff was not posted to Ascension by the Defendant from the USA on a fixed term basis. Instead, she was born on St Helena. She was employed on Ascension previously by a different company, CSR, in April 2012. Her contract transferred to the Defendant on the 1st October 2015 under TUPE. She remains living on Ascension Island with her partner as an accompanying dependant;

(ii) the Second Plaintiff was first employed by CSR in August 2010. He was not posted by them to Ascension Island on a fixed term basis. His contract was also transferred to the Defendant on the 1st October 2015 under TUPE. His contract at page A19 of the preliminary hearing bundle does not say it is for a fixed term and he was not posted to Ascension by the Defendant;

(b) there is nothing in the Plaintiff's contracts that suggests they can be enforced in the Courts of the UK and/or US,

(i) the First Plaintiff's contract specifically states it is to be interpreted and enforced in accordance with the laws for the time in force in the Colony of St Helena (note for the time in force and not future laws); see page A66 of the of the preliminary hearing bundle under the heading 'General'.

(ii) the Second Plaintiff's contract is silent as to the relevant applicable law and place of enforcement. However, the Defendant has still not produced any evidence that a contract made outside US jurisdiction and performed wholly outside US jurisdiction can nevertheless be enforced in the Courts of the US. In any event, the Defendant accepted the jurisdiction of the Supreme Court and this issue has already been determined against them;

(c) the Plaintiffs were both employees and not contractors.

76. Mr Rogers at one point during the hearing suggested that the Second Plaintiff was not an employee (although he went on to retract this and the Defence to the Second Plaintiff's plaint accepted he was an employee). At all times Mr Rogers accepted the First Plaintiff was an employee.

77. I am satisfied that both Plaintiffs benefited from contracts of service in the *Ready Mixed Concrete* sense rather than contracts for services and were therefore employees. Employment means a contract of service between an individual employee and an employer under which satisfies the three requirements of the common law:

(a) the employee is required to provide the service personally to the employer;
(b) the employer has control over the employee in respect of the performance of the service;
(c) there is a mutuality of obligation between the employer and the employee.

78. The Plaintiffs were therefore employees of the Defendant. They were even described as employees of the Defendant in their contracts as is set out above (they were not merely contractors). They had the benefit of employment contracts and would also be employees as defined in the Interpretation section of the 2022 Ordinance (section 2) rather than being contractors:

> **"employee"** means, subject as prescribed, a person who provides services to an employer under a contract of employment;
> **"contractor"** means an individual engaged directly or indirectly by an individual or organisation in Ascension, otherwise than under a contract of employment, to provide

services which are wholly or mainly provided in Ascension, and includes any sub-contractor engaged by a contractor to assist in the provision of those services;

Protection from unlawful dismissal for employees under Primary Contracts from 20 June 2022 who are not exempted under the Schedule to the Ordinance

79. Even though this does not apply to the Plaintiffs, it is worth pausing at this point to consider the nature of the statutory employment protection against unlawful dismissal for employees under Primary Contracts from 20 June 2022 who are not exempted under the Schedule to the Ordinance by virtue of the Employment (End of Contract) Regulations 2022.

80. Regulation 2 of the Employment (End of Contract) Regulations**,** and section 6 of the Ordinance provides for the definition of Primary Contracts.

Regulation 2

…

Primary Contract" means a contract of employment which satisfies the mandatory obligations set out in section 6 of the Employment Ordinance, 2022;

Ordinance
S.6. (1) Unless otherwise prescribed, an employer must, at the employer's expense and in the manner prescribed, make provision and payment for—
(a) the transportation of an employee or contractor to Ascension at the commencement of a term of employment;
(b) transport of an employee or contractor from Ascension at the end of the term of employment;
(c) transport of an employee or contractor from, and their return to, Ascension before the end of the term of employment, if the employee is entitled to off island leave and as agreed between the employer and employee;
(d) medical and dental care of an employee or contractor;
(e) accommodation and utilities for an employee or contractor; and
(f) food and messing facilities for an employee or contractor.
…
(4) Subject to section 5(4), the obligations of the employer specified in subsection (1) are considered to be mandatory obligations that an employer is required to perform in respect of an employee.

81. Regulation 6 of the Employment (End of Contract) Regulations provides for termination of a Primary Contract and for employers to have policies in place regarding an

employee's ability to perform their duties, the grounds on which the contract can be terminated and the procedure to be followed. It provides relevantly as follows:

> **Termination of a Primary Contract**
> **6**. **(1)** Employers must have in place policies concerning an employee's ability to perform the duties of their Primary Contract, including—
> *(a)* capability and performance management;
> *(b)* conduct and discipline;
> *(c)* requirements and assessments of fitness to work;
> *(d)* the reporting, investigation, and resolution of grievances; and
> *(e)* circumstances in which—
> *(i)* poor performance;
> *(ii)* misconduct;
> *(iii)* inability to physically perform the role; or
> *(iv)* any other matter;
> may lead to the Primary Contract being terminated;
> which forms part of the statement of the particulars of the Primary Contract.
>
> **(2)** Employer's policies concerning the Primary Contract must establish—
> *(a)* the grounds on which a Primary Contract can be terminated;
> *(b)* the procedure to be followed prior to any termination, including—
> *(i)* any requirement to give written or verbal warnings;
> (*ii*) the right to be accompanied to meetings, interviews or hearings by a person of the employee's choice (including a lay advocate); and
> *(iii)* the right to be given sufficient notice of any meeting, interview or hearing to be able to prepare for it and to make arrangements to be accompanied; and
> *(c)* in the event of the termination of the Primary Contract—
> *(i)* the right to be given reasons in writing, including a reference to the relevant policy;
> *(ii)* the right to appeal the decision through the employer's internal appeal system; and
> *(iii)* the employees right to appeal the decision externally.
>
> **(3)** The requirements of this section do not apply to an employer in respect of any period during which the employer qualifies as a small employer.

82. Regulation 7 provides for 'unlawful dismissal' and bringing breach of Primary Contract claims for breach of the policies contained in Regulation 6. Unlawful dismissal claims include claims equivalent to unfair dismissal – see Regulation 7(2)(c) and 7(3)(b)(i). Regulation 7 (3) provides for employment disputes and breach of Primary Contract claims to be determined in a 'court' (which must include the Supreme Court although use of the words 'court' is wider in this provision than in Regulation 5 of the Employment (Statement of Particulars) Regulations which stipulates the Supreme Court):

> **7. (1)** A person who has their Primary Contract terminated not in accordance with a policy which applies to them—
> *(a)* will be considered unlawfully dismissed;
> *(b)* be considered subject to a breach of contract; and
> *(c)* may bring a claim for damages against the employer.

(2) A decision to terminate a person's Primary Contract will not be unlawful if the employer can show the decision was—
(a) made in accordance with a relevant policy that applied to that person;
(b) related to a relevant policy that applied to that person;
(c) made following a fair process; and
(d) based on evidence the employer considered to be reliable.

(3) When considering a claim of unlawful dismissal, the court may not consider—
(a) the merits of the employer's policy; or
(b) whether the employer acted reasonably in dismissing the employee, unless—
(i) the procedure followed by the employer was unfair;
(ii) the facts relied upon were plainly wrong; or
*(iii)*the employer acted in a legally irrational way.

83. Thus, it can be seen by virtue of the lack of exemption in the Schedule to the Ordinance and by virtue of Regulation 7 that the Supreme Court may, in the future, have jurisdiction to determine unlawful or unfair dismissal breach of contract claims in relation to employment on Ascension Island by US civilian contractors. However, this will be subject to the terms of the contracts and the many conditions and provisos as to eligibility and classification as set out in the Ordinance and Regulations thereunder (eg. that they are employees under Primary Contracts or the employer is a small employer etc).

84. I am satisfied that the legislature is unlikely to have passed legislation which has the potential to allow for US civilian employment disputes in Ascension Island (involving non US Government or non-USAF employees) to be subject to the jurisdiction of the Supreme Court if it considered the Bahamas Treaty prevented the Ordinance having effect. The Ascension Island legislature consists of the Governor acting on advice or in consultation with the Island Council by virtue of section 151 of the Constitution (the Governor also having the potential to receive advice from the UK Government via the FCDO).

85. Thus, whilst the Employment Ordinance 2022 does not apply to the Plaintiff's plaints and is not in issue in these Plaints, I am satisfied that the Supreme Court accepting jurisdiction in this case is not outwith the will of the legislature for future cases of a similar nature. Of course, whether the Supreme Court will in fact have jurisdiction in any future case will depend on the precise facts of each case, the nature of the contractor and employees and the terms of their contracts.

86. For all these reasons, I am satisfied that the Supreme Court of St Helena for Ascension Island has jurisdiction to hear the Plaintiffs' plaints and jurisdiction is not ceded to the United States Government nor its courts.

Alternative basis on which the Supreme Court has Jurisdiction in relation to the Second Plaintiff – Defendant accepting jurisdiction by filing a substantive defence

Second Plaintiff's argument on the Defendant submitting to jurisdiction

87. Alternatively, even if my understanding of the Supreme Court's jurisdiction were wrong, Mr Toms submits that the Defendant has, in any event, submitted to the jurisdiction of the Supreme Court by entering a Defence on the merits to the Second Plaintiff's plaint and not objecting to the Court's jurisdiction.

88. It is the Second Plaintiff's case that the Defendant has accepted the jurisdiction of the Supreme Court of St Helena through filing a Defence to the merits of the plaint on the 19th August 2020 (albeit that the amended defence of 2021 did raise jurisdictional issues). Consequently, it is not now open to it to contest the jurisdiction of the Court and/or to contend the Supreme Court should not exercise its jurisdiction in favour of the courts of the USA; see Dicey & Morris, The Conflict of Laws, 15th ed (2012) at 14-069.

89. In *Golden Endurance Shipping SA v RMA Watanya SA [2016] EWHC 2110* at para. 28, Phillips J described the theoretical basis for such a submission as being that:

> "a party who voluntarily appears or participates in proceedings is considered by the common law to have accepted an offer from the opposing party who commenced the proceedings to accept the jurisdiction and be bound by its judgment. The touchstone of submission on this basis is therefore consent, although the question of whether consent has been given is to be judged objectively."

90. In *Williams & Glyn's Bank Plc. v. Astro Dinamico Compania Naviera S.A. [1984] 1 W.L.R. 438* the House of Lords described the test for implying such consent as being:

> "in order to establish a waiver, you must show that the party alleged to have waived his objection has taken some step which is only necessary or only useful if the objection has been actually waived, or if the objection has never been entertained at all."

91. Mr Toms submits that there can be little doubt that submitting a defence on the merits is sufficient for the Defendant to be deemed to have accepted the jurisdiction of the Supreme Court.

92. Further and/or alternatively, he submits it is now too late for the Defendant to contest the jurisdiction of the Supreme Court and/or to contend the Court should not exercise its jurisdiction in favour of the courts of the USA, as it has failed to comply with the Civil Procedure Rules governing the jurisdiction of the Courts.

93. Pursuant to the Civil Procedure Ordnance Cap 322 of 1968 ("the Ordinance"), where no or insufficient provision is made by Ordinance or any other Ordinance or by rules of court in relation to the procedure to be observed in any cause or matter, such cause or matter may be—

(a) instituted and continued; and

(b) heard and determined, according to the procedure and practice of and in courts of justice in England according to their respective jurisdiction and authorities.

94. Neither the Ordinance nor any other Ordinance and/or rules of court contain a procedure for challenging the jurisdiction of the Court. Consequently, the matter is governed by the UK Civil Procedure Rules ("CPR") Part 11. Under CPR Part 11, a party may contest the jurisdiction of the Court and/or argue that the Court should not exercise its jurisdiction by,

(a) filing an acknowledgment of service; and

(b) make an application contesting the jurisdiction of the Court supported by evidence within 14 days; see CPR Part 11(4).

95. If a party fails to make an application within the specified period, they are treated as having accepted that the Court has jurisdiction to try the claim.

96. Mr Toms therefore submits that the Defendant has failed to:

(a) make an application contesting the jurisdiction of the Court within the 14 day period specified in CPR Part 11(4)(a); and/or

(b) support the application in their Amended Defence with evidence as per CPR Part 11(4)(b).

97. Consequently, by virtue of CPR Part 11(5) the Defendant is deemed to have accepted the jurisdiction of the Supreme Court.

Appropriate forum and Forum non conveniens

98. Further, Mr Toms submits that the Defendant has provided no evidence that the courts of the U.S. are an appropriate forum including the possibility of them entertaining the claims

currently being pursued by the Second Plaintiff. They would not be an appropriate form if, in law, they would not accept his claim.

99. Further and/or alternatively, it is the Plaintiffs' case that the Supreme Court of St Helena is the appropriate forum given:
(a) the entirely of their employment contracts were performed on Ascension Island; and
(b) the availability of modern video platform technology for hearing cases.

100. Based on the above, Mr Toms asked the Court to dismiss the Defendant's contention based on *forum non conveniens* and to confirm it has jurisdiction to deal with the Plaintiffs' claims or plaints.

Discussion and Analysis

101. Had I needed to decide these two points, I would have accepted Mr Toms' submissions in relation to the Defendant submitting to the jurisdiction and rejected the Defendant's argument on forum non conveniens for the reasons set out above.

102. However, given my determination above, I am satisfied the Supreme Court has jurisdiction to hear both plaints.

Second Issue

The Plaintiffs plaints for breach of contract – implying terms as to good faith / fairness / non-discrimination in dismissal

103. The second key issue is whether the Supreme Court can imply terms into the Plaintiffs' employment contracts as suggested. However, Mr Rogers raised two prior questions by way of objection which he suggested needing answering first:

(1) Does the Supreme Court of St Helena have Constitutional authority to create substantive law in areas where the controlling law is silent?

Defendant's argument

104. Mr Rogers submitted that clearly, the Ascension Constitution vests in the Governor the authority to, 'make laws for the peace, order and good government of Ascension and Tristan da Cunha, respectively.' See Constitution, Part V, para. 27. The Governor's authority is granted neither by convenience nor default; rather, the Governor is acting on his grant of

authority from Her Majesty. While the Governor can only make laws after consulting the Island Council, local laws are made under the authority of the Constitution, which also flows from the sovereign authority of Her Majesty.

105. Mr Rogers submitted that as a consequence of Ascension being a part of world's most remote inhabited island group and there being neither a right of abode on Ascension Island nor an indigenous population, a large percentage of the island's population, at any moment in time is transient. While there are some notable exceptions, it is not uncommon for Ascension Island Government positions to be filled for relatively short periods of time by professionals taking a leave of absence from their jobs in the UK or elsewhere. This transience generally means that things often take longer to bring to fruition on the island as officials come and go at irregular intervals and it takes time to pick up where one's predecessor left off. Relevant to this litigation is the ongoing effort to update the Workmen's Protection Ordinance 1926 because it is, 'outdated, no longer reflects the reality of employment in Ascension, and has a number of shortcomings. Taken in combination, this results in lack of clarity within the employment market, leading to undesirable outcomes for both employees and employers.'

106. He submitted that those words were not his: they are the words of the Ascension Island Government (AIG) when responding to formal consultation with the major employers on island in February 2021. The AIG formed the Employment Reform Working Group (ERWG) to ensure that the new employment ordinance would not perpetuate or lead to, 'undesirable outcomes for both employees and employers.' As stated, things on Ascension Island tend to take time.

107. While the Supreme Court could fashion a remedy which would suit the Plaintiffs, it likely would not suit the employers. While the Plaintiffs invite the Supreme Court to create common law, what they really seek is convenient law. Common law, as defined by Black's Law Dictionary, is:

> A body of rules and principles, written or unwritten, which are of fixed and immutable authority, and which must be applied to controversies rigorously and in their entirety, and cannot be modified to suit the peculiarities of a specific case, or coloured by any judicial discretion, and which rests confessedly upon custom or statute, as distinguished from any claim to ethical superiority. Black's Law Dictionary, Fourth Edition.

108. Mr Rogers submitted that the Ascension Island legislative authority, the Executive in the form of the Governor, and the Legislature, in the form of the Island Council, had actively evaluated establishing an Employment Ordinance for the island; it is just took longer than the Plaintiffs cared to wait. As recently as 18th November 2021, the Ascension Island Council recognized that the consultation period was to end on 29th November 2021, and an implementation schedule was to soon follow.

109. Consequentially, there was no need to, 'develop a common law remedy unless and until statutory rights are introduced' as the Ordinance appears to be imminent but, should the Supreme Court elect to fashion a judicial remedy, it would thwart the efforts of the legislature while making its ruling likely precedential, which would bind all employers.

110. Mr Rogers originally submitted that an appropriate remedy would be, consistent with the Constitution, formally refer this issue to the Governor on the question or simply wait for the Island Council to enact and bring into force the Employment Ordinance 2021. In any event, resolving the question in favour of the Plaintiffs would be inconsistent with the Constitution and patently unfair, not only to the named Defendant, but to all employers, past and present.

111. Although he did not make the point in his submissions, a powerful argument that Mr Rogers could have made by extension to his original argument is this. Now the 2021 Ordinance is enacted and soon to be in force, the will of the legislature is clear – that the equivalent of unfair dismissal protection is to be granted only in respect of employment contracts entered into after it comes into force. To imply equivalent terms into the contracts of the Plaintiffs is effectively to thwart or subvert the will of the legislature that this type of employment right or protection is to be prospective and is not to apply retrospectively to the old contracts that the Plaintiffs entered into and their dismissals some time ago.

112. Mr Rogers further submitted that the Plaintiffs would inappropriately invite the Supreme Court to create substantive law in several areas, notably by fashioning a definition of what constitutes a disability in this jurisdiction. Not only would this be contrary to the Constitution, it would give the Plaintiffs the benefit of picking and choosing when non-precedential law from St Helena, the UK, or the European Union (despite the break between the UK and EU) would and would not apply to their plaints.

113. He additionally, referred to the Plaintiffs' submission, paragraph 49, in which Plaintiffs concede that the Equality Act 2010, 'is not part of the law of St Helena and/or Ascension' but, nonetheless, seeks to have the Supreme Court use a convenient definition from the EA to define disability and, by stretching an extension to its furthest extreme, refer to an inapplicable case citation to establish dispositively in this jurisdiction that a precancerous skin condition falls within the ambit of cancer which then falls within the definition of disability.

114. Mr Rogers agreed with the Plaintiffs' contention that, 'The Court clearly has to have some means of evaluating disability' but, rather than set precedent by incorporating an inapplicable definition from an inapplicable Act from an inapplicable case and engaging in substantive law-making, he submitted that, consistent with the Constitution, this issue also should formally be referred to the Governor on the question or simply wait for the Island Council to enact the Employment Ordinance.

115. In any event, resolving the question in favour of the Plaintiffs would be inconsistent with the Constitution and patently unfair, not only to the named Defendant, but to all employers past and present.

Discussion

116. The powers of the Supreme Court of St Helena for Ascension Island are found in sections 153 & 155 of the St Helena, Ascension and Tristan Da Cunha Constitution Order 2009 ('the Constitution'). Sections 153 & 155 provides:

> **The Courts of Ascension**
>
> **153. (1)** The courts of Ascension shall be the Supreme Court of St Helena, the Court of Appeal of St Helena, and such courts subordinate to the Supreme Court as may be established by law.
>
> **(2)** Her Majesty in Council continues to have such jurisdiction in respect of Ascension as is provided by law.
>
> ***Supreme Court***
>
> **Jurisdiction of Supreme Court**
>
> **155.** "(1) Subject to this Constitution, the Supreme Court shall have and may exercise all such jurisdiction in and in relation to Ascension as is necessary to administer the law of Ascension.
>
> (2) Without prejudice to the generality of subsection (1), the Supreme Court shall possess and may exercise in and in relation to Ascension, subject to this Constitution and to any other law, all the jurisdiction which is vested in, or is capable of being exercised by, Her Majesty's High Court of Justice in and in relation to England."

117. The High Court in England can and does interpret, develop and apply the common law along with the Court of Appeal of England of Wales and Supreme Court of the United Kingdom as set out above. There is no reason in law why the Supreme Court in St Helena / Ascension Island is not able to do the same. It has the jurisdiction to imply terms into employment contracts and develop the type of terms that might be implied by considering precedent and authority.

118. I address the remainder of the arguments made by Mr Rogers when considering the implication of contractual terms. The ultimate question is not whether the Supreme Court has

the jurisdiction to imply the terms sought into the Plaintiffs' contracts but whether it should do so.

(2)Has the Ascension Island Government (AIG) been silent on the need to update antiquated employment law, the Workman's Protection Ordinance 1926, as it is outdated, no longer reflects the reality of employment on Ascension Island, and has a number of shortcomings, leading to undesirable outcomes for both employees and employers?

Defendant's argument

119. Mr Rogers submits that contrary to the Plaintiff's assertion that, 'the absence of any form of statutory employment rights means that it is open to the Supreme Court in Ascension to develop a common law remedy unless and until statutory rights are introduced', there are, in fact, statutory employment rights codified in the Workman's Protection Ordinance of 1926 (WPO).

120. Merely because the Plaintiffs' circumstances are not addressed by the Ordinance does not provide a basis to for the Supreme Court to ignore the temptation of *judicial restraint* and, in a democratic system of government with a tripartite balance of power, engage in substantive due process to fill in the gaps where the law is silent.

Discussion

121. Whether or not the Ascension Island Government has been silent and/or has now proposed to update the Workman's Protection Ordnance (by replacing it with the Employment Ordinance 2022) is not relevant to the Plaintiffs' claim.

122. The Plaintiffs bring their claim under the common law. They are plaints for breach of contract based on implied terms drawn from or suggested by previous authority.

123. The common law is not a static body of ossified rules. Instead, it is a living process that provides unique flexibility to adapt to the modern world as circumstances change. As Lady Hale stated in *Woodland v Essex County Council (2014) 1 AC 537*:

> "The common law is a dynamic instrument. It develops and adapts to meet new situations as they arise. Therein lies its strength. But therein also lies a danger, the danger of unbridled and unprincipled growth to match what the court perceives to be the merits of the particular case. So it must proceed with caution, incrementally by analogy with existing categories, and consistently with some underlying principle (see *Caparo Industries plc v Dickman* [1990] 2 AC 605). But the words used by judges in explaining why they are deciding as they do

> are not be treated as if they were the words of statute, setting the rules in stone and precluding further principled development should new situations arise. These things have been said many times before by wiser judges than me, but are worth repeating in this case, where we are accepting an invitation to develop the law beyond the point which it has currently reached in this jurisdiction. It is because we are doing that, and thus disagreeing with the conclusions reached in the courts below, that I am adding a few thoughts to the judgment of Lord Sumption, with which of course I agree."

124. That development and adaptation can and must proceed with caution. However, in appropriate circumstances, as Lady Hale expressly states, it can include the creation of new rights and obligations; see also, as set out below, *Johnson v Unisys Ltd* [2001] UKHL 13 *(2003) 1 AC 510; R v R (1992) 1 AC 599*.

125. I am satisfied that the common law of England and Wales applies to Ascension Island pursuant to the English Law (Application) Ordnance 2005; see Sections 2(a), 3(1). It is accepted this is subject to possible exclusions

(a) it must be suitable to local circumstances and subject to such modifications, adaptations, qualifications and exceptions as local circumstances render necessary (such as those set out in the Ordinances of Ascension Island); see Section 3(2); and
(b) it must not be inconsistent with any Act of Parliament of the UK which extends to Ascension Island. Nor must it be inconsistent with any Order of Her Majesty in Council which extends to St Helena or any provisions made by the local legislature; see Section 4.

<u>Implying terms into the employment contract</u>

126. The Plaintiffs bring their plaints for breach of contract based on their contention that their contracts of employment contained implied terms that the power of dismissal should be exercised in good faith and/or fairly and/or in a way that does not involve discrimination including on grounds of disability.

127. The issue is whether the Supreme Court should imply such terms, having found that it can – that it has the jurisdiction to do so if it considers it lawful to do so.

The Plaintiffs' submissions

128. Mr Toms submitted that had the Plaintiffs' dismissals taken place in the UK, they would have been able to bring a claim in the employment tribunal for unfair dismissal relying on the provisions of Part X of the Employment Rights Act 1996 ('ERA'). Further, they would also have been able to bring claims for disability discrimination under the Equality Act 2010 ('EA'). However, on Ascension Island these options are not currently open to them. He

submitted that, following the Court of Appeal of St Helena's judgment in *Francis v the Attorney General (2008) Case No. 1/2008 ('Francis')*, the ERA clearly does not apply to Ascension. Similar reasoning would also exclude the Plaintiffs from being able to rely on the EA.

129. He submitted that the existence of the statutory claims for unfair dismissal and/or disability discrimination in UK law has restricted the possibility of developing a common law remedy dealing with the manner of an employee's dismissal; see *Johnson v Unisys Ltd (2003) 1 AC 510 ('Johnson v Unisys')*. A similar argument might also apply to St Helena (at least in relation to dismissal) based on Part V of the *Employment Rights Ordinance 2010*.

130. However, the St Helena Ordinance does not apply to Ascension Island by virtue of the *St Helena (Employment Rights Ordinance) (Disapplication) Order 2017* (and the Employment Ordinance 2022 which has been enacted for Ascension does not have retroactive effect so could never apply to the Plaintiffs' plaints).

The Defendant's submissions

131. The Defendant's submissions opposing the implication of the pleaded contractual terms are those that have been set out.

132. The most powerful arguments against implying the terms sought, were not made by Mr Rogers, or at best they were made by implication. They are that:

i) that the implied terms sought are inconsistent with the express terms of the Plaintiffs' contracts;
ii) the only direct authority on implying the contractual terms sought is that the courts should not do so – see *Johnson v Unisys*; and
iii) implying the terms sought would be contrary to the will of the legislature given that it has recently enacted employment rights equivalent to unfair dismissal in the 2022 Employment Ordinance but these rights are only to apply to contracts entered into once the Ordinance is in force (from 20 June 2022), whereas the Plaintiffs' contracts were entered into a long time ago and the 2022 legislation is not retroactive. The Workmens Protection Ordinance of 1926 was the only statutory protection that applied to the Plaintiffs' employment contracts and it did not provide the unfair dismissal terms they seek to imply into their contracts.

Discussion and decision

133. I agree with the Plaintiffs' case that the absence of any form of statutory employment rights in force at the relevant time of the termination of or dismissal from their contracts does

not mean that it is not open to the Supreme Court in Ascension to imply terms into employment contracts relating to good faith and fairness of dismissal as sought.

134. The Judicial Committee of the House of Lords refused to imply such terms into employment contracts in England in the case of *Johnson v Unisys*, primarily because there already existed a statutory protection under the Employment Rights Act 1996. Their Lordships' reasons included the following obiter dicta from Lord Hoffman at [37]-[58] which are worth quoting from extensively:

> '37. The problem lies in extending or adapting any of these implied terms to dismissal. There are two reasons why dismissal presents special problems. The first is that any terms which the courts imply into a contract must be consistent with the express terms. Implied terms may supplement the express terms of the contract but cannot contradict them. Only Parliament may actually override what the parties have agreed. The second reason is that judges, in developing the law, must have regard to the policies expressed by Parliament in legislation. Employment law requires a balancing of the interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also to the general economic interest. Subject to observance of fundamental human rights, the point at which this balance should be struck is a matter for democratic decision. The development of the common law by the judges plays a subsidiary role. Their traditional function is to adapt and modernise the common law. But such developments must be consistent with legislative policy as expressed in statutes. The courts may proceed in harmony with Parliament but there should be no discord.
>
> …
>
> **42.**My Lords, in the face of this express provision that Unisys was entitled to terminate Mr Johnson's employment on four weeks' notice without any reason, I think it is very difficult to imply a term that the company should not do so except for some good cause and after giving him a reasonable opportunity to demonstrate that no such cause existed.
>
> 43.On the other hand, I do not say that there is nothing which, consistently with such an express term, judicial creativity could do to provide a remedy in a case like this. In *Wallace v United Grain Growers Ltd* (1997) 152 DLR (4th) 1, 44-48, McLachlin J (in a minority judgment) said that the courts could imply an obligation to exercise the power of dismissal in good faith. That did not mean that the employer could not dismiss without cause. The contract entitled him to do so. But in so doing, he should be honest with the employee and refrain from untruthful, unfair or insensitive conduct. He should recognise that an employee losing his or her job was exceptionally vulnerable and behave accordingly. For

breach of this implied obligation, McLachlin J would have awarded the employee, who had been dismissed in brutal circumstances, damages for mental distress and loss of reputation and prestige.

44.My Lords, such an approach would in this country have to circumvent or overcome the obstacle of *Addis v Gramaphone Co Ltd* (1909) AC 488 in which it was decided that an employee cannot recover damages for injured feelings, mental distress or damage to his reputation, arising out of the manner of his dismissal. Speaking for myself, I think that, if this task was one which I felt called upon to perform, I would be able to do so. In M*ahmud v Bank of Credit and Commerce International SA* [1998] AC 20, 51 Lord Steyn said that the true ratio of *Addis's* case was the damages were recoverable only for loss caused by a breach of contract, not for loss caused by the manner of its breach. As McLachlin J said in the passage I have quoted, the only loss caused by a wrongful dismissal flows from a failure to give proper notice or make payment in lieu. Therefore, if wrongful dismissal is the only cause of action, nothing can be recovered for mental distress or damage to reputation…..

….

46. It may be a matter of words, but I rather doubt whether the term of trust and confidence should be pressed so far. In the way it has always been formulated, it is concerned with preserving the continuing relationship which should subsist between employer and employee. So it does not seem altogether appropriate for use in connection with the way that relationship is terminated. If one is looking for an implied term, I think a more elegant solution is McLachlin J's implication of a separate term that the power of dismissal will be exercised fairly and in good faith. But the result would be the same as that for which Mr Johnson contends by invoking the implied term of trust and confidence. As I have said, I think it would be possible to reach such a conclusion without contradicting the express term that the employer is entitled to dismiss without cause.

47. I must however make it clear that, although in my opinion it would be jurisprudentially possible to imply a term which gave a remedy in this case, I do not think that even if the courts were free of legislative constraint (a point to which I shall return in a moment) it would necessarily be wise to do so……

…

56. Part X of the Employment Rights Act 1996 therefore gives a remedy for exactly the conduct of which Mr Johnson complains. But Parliament had restricted that remedy to a maximum of £11,000, whereas Mr Johnson wants to claim a good deal more. The question is whether the courts should develop the common law to give a parallel remedy which is not subject to any such limit.

57. My Lords, I do not think that it is a proper exercise of the judicial function of the House to take such a step. Judge Ansell, to whose unreserved judgment I would pay respectful tribute, went in my opinion to the heart of the matter when he said:

> "there is not one hint in the authorities that the...tens of thousands of people that appear before the tribunals can have, as it were, a possible second bite in common law and I ask myself, if this is the situation, why on earth do we have this special statutory framework? What is the point of it if it can be circumvented in this way? .... it would mean that effectively the statutory limit on compensation for unfair dismissal would disappear."

58. I can see no answer to these questions. For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent. [Emphasis Added]

135. Likewise, in *Johnson v Unisys*, Lord Millett, who agreed with Lord Hoffman, provided a similar line of reasoning at [77]-[80]:

> **"**77. But the common law does not stand still. It is in a state of continuous judicial development in order to reflect the changing perceptions of the community. Contracts of employment are no longer regarded as purely commercial contracts entered into between free and equal agents. It is generally recognised today that "work is one of the defining features of people's lives"; that "loss of one's job is always a traumatic event"; and that it can be "especially devastating" when dismissal is accompanied by bad faith: see *Wallace v United Grain Growers* Ltd (1997) 152 DLR (4th) 1, 33 per Iacobucci J. This change of perception is, of course, partly due to the creation by Parliament of the statutory right not to be unfairly dismissed. If this right had not existed, however, it is possible that the courts would have fashioned a similar remedy at common law, though they would have proceeded by implying appropriate terms into the contract of employment. It would have been a major step to subject the employer's right to terminate the relationship on proper notice to an obligation not to exercise the right in bad faith, and a still greater step to subject it to an obligation not to exercise it without reasonable cause: (a difficult distinction, but one drawn by McLachlin J in *Wallace's* case, at p 44). Even so, these are steps which, in the absence of the statutory right, the courts might have been prepared to take, though there would have been a powerful argument for leaving the reform to Parliament. If the courts had taken the step themselves, they could have awarded common law damages for unfair dismissal consistently with *Addis's* case [1909] AC 488, because such damages would be awarded for the breach of an implied but independently actionable term (as in *Mahmud's* case [1998] AC 20) and not for wrongful dismissal. But the courts would have been faced with the difficult task of distinguishing between the mental distress and other non-pecuniary injury consequent upon the unfairness of the dismissal (for which the employer would be liable) and the similar injury

consequent upon the dismissal itself (for which he would not). In practice, they would probably have been reduced to awarding conventional sums by way of general damages much as the industrial tribunals do.

78. I agree with Lord Hoffmann that it would not have been appropriate to found the right on the implied term of trust and confidence which is now generally imported into the contract of employment. This is usually expressed as an obligation binding on both parties not to do anything which would damage or destroy the relationship of trust and confidence which should exist between them. But this is an inherent feature of the relationship of employer and employee which does not survive the ending of the relationship. The implied obligation cannot sensibly be used to extend the relationship beyond its agreed duration. Moreover, manipulating it for such a purpose would be unrealistic. An employer who summarily dismisses an employee usually does so because, rightly or wrongly, he no longer has any trust or confidence in him, and the real issue is: whose fault is that? That is why reinstatement or re-engagement is effected in only a tiny proportion of the cases that come before the industrial tribunals.

79. But the Courts might well have developed the law in a different way by imposing a more general obligation upon an employer to treat his employee fairly even in the manner of his dismissal. They could not, of course, have overridden any express terms of the contract or have held the dismissal itself to be invalid. As in the case of the statutory right, employers would probably have responded by introducing their own procedures of complaint and warning before eventual dismissal. But there would have been this difference; they would surely have taken care to incorporate such procedures into the contract of employment so that an employee who was dismissed in accordance with the procedure laid down in his contract could not claim damages for breach of an implied term.

80. But the creation of the statutory right has made any such development of the common law both unnecessary and undesirable. In the great majority of cases the new common law right would merely replicate the statutory right; and it is obviously unnecessary to imply a term into a contract to give one of the contracting parties a remedy which he already has without it. In other cases, where the common law would be giving a remedy in excess of the statutory limits or to excluded categories of employees, it would be inconsistent with the declared policy of Parliament. In all cases it would allow claims to be entertained by the ordinary courts when it was the policy of Parliament that they should be heard by specialist tribunals with members drawn from both sides of industry. And, even more importantly, the co-existence of two systems, overlapping but varying in matters of detail and heard by different tribunals, would be a recipe for chaos. All coherence in our employment laws would be lost.'

[Emphasis Added]

136. Lord Bingham agreed with the speeches of Lord Hoffman and Lord Millett. In making the observations as to the possibility of implying such terms, the House of Lords also made

clear that implying unfair dismissal terms would have to be consistent with the express terms of the contract. The reasons the House of Lords refused to imply unfair dismissal terms into employment contracts were various but the primary reasons relied upon were a) that it was unnecessary and undesirable for the judiciary to do so where equivalent statutory rights had been created and existed; and b) it was contrary to the will of parliament. For courts to imply terms for the purposes of breach of contract claims would create a parallel and inconsistent system to the unfair dismissal regime established to be heard by the employment tribunal. In creating a statutory regime parliament must also have recognised the unequal bargaining power in the employer / employee relationship.

137. Nonetheless, the Court of Appeal of St Helena in *Francis* contemplated the possibility of implying terms into employment contracts in Ascension Island some seven years later. Woodward J, whilst rejecting the application of the UK Employment Rights Act 1996 to Ascension Island, made the following observation and distinction from *Unisys* at paragraph 62 of his judgment,

> "The observations of the House of Lords in *Johnson v Unisys Ltd* are interesting. It is clearly indicated that, but for the existence of the statutory provisions relating to employment with jurisdiction to the Employment Tribunals, the common law might have been developed. That would not avail this Appellant for he had compromised such claims as he had."

138. As is apparent from this paragraph, Woodward J was unable to advance this possibility any further as there was no common law claim before the Court. By contrast, the Plaintiffs' plaints in these two cases are based on the common law claim for breach of contract (and a separate basis, namely breach of rights provided under the Constitution).

139. There is therefore some judicial authority (albeit no more than *obiter dicta*) for the Ascension Island Supreme Court exercising the power to imply into the Plaintiffs' employment contracts terms as to fair treatment by the Defendant in relation to their dismissal and/or for it to only exercise the right of dismissal in good faith. This is particularly so in the absence of there being any equivalent statutory rights in Ascension Island currently in force or in force at the time of the Plaintiffs' contracts being made or at the time of their dismissal.

140. I am satisfied that the Court should extend the reasoning from the above dicta in order to imply terms into the Plaintiffs' employment contracts on Ascension Island (they being US nationals and former employees and the Defendant being a US civilian contractor company).

141. I do so for the following reasons.

142. The starting point is that the Court in determining the nature and extent of any implied term should also take into account that the Plaintiffs' contracts of employment are already

subject to an implied term to treat the employee with trust and confidence. This was expressed in by the House of Lords in *Malik v BCCI (1998) AC 20* as:

> "the employer must not with reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."

143. I am satisfied that the existence of the implied term of trust and confidence further supports the importation of the implied term contended for by the Plaintiffs which might be seen as a hybrid or extension of the implied term in the absence of any statutory procedure existing for unfair dismissal claims or the equivalent.

144. I am satisfied that on the facts of these cases, this implied term can be extrapolated to apply where an employer uses disciplinary or dismissal procedures oppressively or unfairly, such as not conducting an adequate investigation or finding an employee guilty of gross misconduct when they do not believe they committed gross misconduct, or imposing a punishment that is disproportionate to the offence; see e.g. *Retirement Security Ltd v Wilson (2019) UKEAT/0019/19*; *Rawlinson v Brightside Group Ltd (2017) UKEAT/0142/17*.

145. I rely on the following further reasons.

146. First, is the point I have highlighted above – the dicta of the UK's House of Lords and St Helena's Court of Appeal support the possibility of implying terms into a contract of employment, where there is no statutory or other remedy available to bring a claim for unfair dismissal in the jurisdiction. Therefore, the contrary authority to the implication of the terms sought is highly distinguishable and supported by obiter dicta.

147. Second, the implication of such terms is not inconsistent with the will of the Ascension legislature – the Employment Ordinance 2022 and Regulations thereunder will grant similar but stronger rights to those sought to be implied. The fact that the Ordinance is only to apply to contracts entered into once in force, prospectively rather than retrospectively, is not evidence that the legislature wanted to preclude existing or previous contracts from being made subject to some form of unfair dismissal protection (the terms sought to be implied into the Plaintiff's contracts do not create as powerful unfair dismissal rights as the 2022 Ordinance does. They simply introduce a form of procedural fairness).

148. Third, the terms to be implied should go no further than the rights and remedies which are to be brought into force by the Ordinance and Regulations so as to be consistent with the will of the legislature. Indeed, as suggested above, the implied terms go less far.

149. Fourth, the terms to be implied are not in direct contradiction to express terms of the Plaintiff's contracts. They are to be introduced where the express terms are silent on the point

as to the manner of dismissal and procedural safeguards. The implication of the terms the Plaintiffs seek would not prevent any employer from relying on the provisions of the contract in relation to termination. However, it would recognise that employment is an extremely important part of any employee's life. It enables them to contribute to society and to pay their way. It gives them respect and standing. It recognises an unequal bargaining power of employers and employees on Ascension Island in agreeing the express terms of employment contracts and the effect of dismissal.

150. Fifth, and most importantly, the loss of employment in Ascension Island leads to the loss of residence in very many cases, indeed in almost all circumstances (except where the employee has a separate right of residence by virtue of being a dependant or family member of another employee). The consequences of dismissal are far more serious than simply a loss of income or pecuniary damages. The stakes are therefore even higher than in most employment disputes in other jurisdictions.

151. I am therefore satisfied that the common law should provide for the implied terms – it is the proper development and adaptation in the twenty first century in the particular circumstances of this jurisdiction and on the facts of these cases. Natural justice requires that a termination or dismissal that may well lead to loss of residence as an inevitable consequence should be subject to a measure of procedural fairness.

<u>The nature of the terms to be implied</u>

152. I am satisfied that the implied terms in the Plaintiff's employment contracts should provide that the Defendant be subject to the following duties:

(a) to exercise the power of dismissal in good faith;

(b) be honest with the employee and to refrain from untruthful, unfair or irrational conduct when exercising the power of dismissal and/or any of the rights under their contract;

153. Term (b) imports a measure of natural justice or procedural fairness in dismissal, (equivalent to but lesser than that to be provided under section 48(2) of the 2021 Ordinance) for example: a basic level of investigation by the employer, particularly if misconduct is to be relied upon; advance notice of the grounds for dismissal to be relied upon by the employer to be given to the employee; a fair hearing at which the employee may answer the case with an opportunity to make written or oral representations; and some written reason(s) given for dismissal. However, the implied terms do not require the Defendant to hold any policy on these matters as Regulation 6 of the Employment (End of Contract) Regulations will require. There are no presumptions to be imported as Regulation 7(1) will provide.

154. I am further satisfied, as Mr Toms submitted, that a further term should be implied into the employment contracts as including a duty upon the Defendant:

(c) not to discriminate against the employee (the Plaintiffs) including on grounds of disability.

155. I go on to explain my reasons for this third term in more detail below.

Whether the implied terms are suitable for local circumstances

156. In addition, I am satisfied that the Court can properly determine the plaints or claims for breach of contract based on the implied terms. To develop the common law in this way would be suitable for the local circumstances on Ascension Island because:

(a) the Plaintiffs are not advancing any positive right that might place a burden on employers e.g. the right to a redundancy payment, sick pay etc. Instead, their claim is based on the fundamental concepts of procedural fairness, non-discrimination, equality before the law and natural justice which form part of the legal system of democratic countries subject to the rule of law;

(b) the implied terms relied on by the Plaintiffs are that the Defendant (or any employer) should,

(i) exercise the power of dismissal in good faith;

(ii) be honest with the employee and to refrain from untruthful, unfair or irrational conduct when exercising the power of dismissal and/or any of the rights under their contract;

(iii) not discriminate against employees including on grounds of disability.

(c) I agree with Mr Toms that it is not easy to see why a reasonable person would object to these basic duties. Acting in good faith and with honesty is part of the fabric of any democratic society. It is consistent with treating and employee with trust and confidence, a duty that has long been held to apply to the employment contract. It is certainly part of the common law as is the concept of natural justice; see *Ridge v Baldwin* (1964) AC 40, *Lawlor v Union of Post Office Workers* (1963) Ch 712.

(d) provisions against discrimination are also now a widely accepted part of legal systems across the world including: the UK (Equality Act 2010); EU Directive on Equal Treatment EC 2006/54; Art 14 European Convention on Human Rights; United Nations Convention on the Rights of People with Disabilities;

(e) the USA signed the above UN Convention on the 30th July 2009. The Court is asked to note Article 5 which provides,

> **"1.** States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
>
> 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds."

(f) further, discrimination is also addressed specifically by the constitution of Ascension Island at sections 122 and 137.

157. Most importantly, the implied terms are consistent with and go no further than the will of the legislature and the rights to be provided under the Employment Ordinance 2022 and Regulations thereunder (indeed, the terms are lesser than the full panoply of rights to be provided under the Ordinance – for example the implied terms do not require the employer to have a published policy and there is no presumption attached to non-compliance with any policy etc).

158. I am therefore satisfied that the implied terms asserted by the Plaintiffs' are suitable for Ascension Island as, whilst not imposing any significant burden on employers, they provide a minimum protection for employees which is essential given:

(a) Ascension Island is a working island as the Defendant asserts;

(b) consequently, the loss of employment on Ascension Island has consequences far beyond simply the loss of a job. The employee also stands to lose their home and right to even live on the Island.

159. Finally, the implied terms asserted by the Plaintiffs are also not inconsistent with any statute or Order in Council either in the UK or in St Helena and Ascension Island.

(a) there is no other statutory provision which ensures this very limited protection of employees right on Ascension Island. The Defendant refers to the *Workman's Protection Ordinance 1926*. However, this Ordnance:

(i) is not in any way inconsistent with the Plaintiffs' case. It provides a right for employees on Ascension Island to have a contract; see Section

3. It also expressly provides for the institution of proceedings for breach of contract; see Section 8.

(ii) does not otherwise provide for a comprehensive statutory alternative scheme for enforcing employment rights that might mean it is no longer necessary or, indeed, inconsistent to have separate common law rights as per Woodward J in *Francis v the Attorney General (2008) Case No. 1/2008.*

(b) although it is the case that the Ascension Island Government has, introduced its more comprehensive scheme for protecting employment rights on the Island by bringing into force the Employment Ordinance 2022, and Regulations thereunder:

(i) the legislation will address and incorporate equivalent and greater rights than the common law does in relation to termination of employment contracts;

(ii) in relation to contracts that do not benefit from statutory protection, it is not just or fair that employees are left without any protection at all as the Defendant seems to consider appropriate;

(iii) the implied terms will provide no greater rights, but lesser rights, than the Employment Ordinance 2022 and Regulations thereunder provide;

(iv) There is no other law or provision relating to the manner of dismissal on Ascension of any sort currently in force, because the Workmen's Protection Ordinance 1926 does not provide any relevant rights, until the statutory rights having been introduced.

160. I am satisfied that the implied terms contended for by the Plaintiffs are necessary and just. They do not represent unbridled or unprincipled development of the common law but have been foreshadowed by the House of Lords of the UK, the Court of Appeal of St Helena and the legislature of Ascension Island.

161. I accept that the common law of Ascension Island requires that the terms asserted in the plaints should be implied into the Plaintiffs' contracts of employment.

A Constitutional basis for unfair dismissal rights or the implication of such contractual terms?

The Plaintiffs' submissions

162. Mr Toms argues that the Supreme Court should also imply the terms sought into the employment contracts given the nature of employment on Ascension and the Plaintiffs' rights under sections 122, 129 and 137 of the St Helena, Ascension And Tristan Da Cunha Constitution Order, 2009 (Statutory Instrument 2009 No. 1751 (UK)) as amended by Statutory Instrument 2021 No. 895 (In Force 25 October 2021) ('the Constitution').

163. Section 122 of the Constitution provides:

> **122.** Whereas every person in Ascension is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, without distinction of any kind, such as sex, sexual orientation, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, age, disability, birth or other status, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following—
> *(a)* life, liberty, security of the person and the protection of the law;
> *(b)* freedom of conscience, of expression and of assembly and association;
> *(c)* protection for his or her private and family life, the privacy of his or her home and other property; and
> *(d)* protection from deprivation of property save in the public interest and on payment of fair compensation,
> this Part shall afford protection to these rights and freedoms, and to related rights and freedoms, subject to the limitations contained in this Part, being limitations designed to ensure that the enjoyment of the protected rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

164. Section 129 of the Constitution provides,

> "Every person shall have the right to respect for his or her private and family life, his or her home and his or her correspondence or other means of communication, and, except with his or her own free consent, no person shall be subjected to the search of his or her person or property or the entry by others on his or her premises."

165. As noted above, the consequences of dismissal from employment on Ascension are not limited to the termination of the employee's employment. They are also likely to lose their home and right to live on the island (residence).

166. Mr Toms submits that sections 122 & 129 of the Constitution are engaged by termination / dismissal from employment in Ascension. He argues that these sections must apply to the Second Plaintiff who had to leave the Island when he lost his employment.

167. In relation to the First Plaintiff, she did not lose her home and right to live on Ascension given the fortuitous circumstance of her husband also being employed on Ascension with a right of accompaniment.

168. However:

(a) the First Plaintiff did lose her own personal right to enjoy her own home and to live on Ascension and now is entirely reliant on her husband. Consequently, section 129 is also likely to be engaged in her case; and

(b) in any event, whether any form of implied contractual term relating to dismissal from employment exists as a matter of law cannot be determined based on the individual circumstances of any particular individual plaintiff.

169. Mr Toms notes that section 129 is similar but does not wholly mirror Article 8 of the *European Convention on Human Rights* which forms part of UK law through the *Human Rights Act 1998* ("HRA"). The HRA is not part of the law of St Helena and Ascension as it has been specifically disapplied. Consequently, decisions of the European Court of Human Rights ("ECtHR") are not binding on the Supreme Court[1].

170. However, he argues that ECtHR judgments are of persuasive authority and in this regard it is to be noted that the Court of Appeal of England and Wales has held that Article 8 applies to dismissal from employment where someone's reputation is potentially damaged; see *Turner v East Midlands Trains Ltd (2013) IRLR 107*; see also the decision of the ECtHR in *Barbulescu v Romania (2017) ECHR 742*. In *Turner*, the Court of Appeal accepted that the range of reasonable responses test in a claim of unfair dismissal was sufficient to satisfy the balancing of rights under Article 8 ECHR.

171. He submits that this further supports the Plaintiffs' contention as to the extent and nature of the terms to be implied into their contracts of employment.

Discussion and analysis

172. I have not reached a concluded view on these arguments on behalf of the Plaintiffs and it is unnecessary for me to do so. For the reasons set out above, I am satisfied that the very

[1] The position may be complex in relation to Ascension Island. The European Convention on Human Rights was extended, as a matter of international law, to St Helena. The position for the 'dependencies' is said to be anomalous, however by inference of later extension of the rights to individual petition and of the First Protocol to the Overseas Territories too it appears that the ECHR is applied to the Territories. The Human Rights Act 1998 is dis-applied to all three islands. 'ECHR rights' are delivered through the Territories' constitutions.

significant power of an employer to terminate someone's employment on Ascension Island should be exercised fairly and in good faith by implying terms to this effect into the employment contract. This can be effected by the common law without needing to rely on Constitutional rights.

173. In the absence of further authority, I would reserve my position for a case where it was determinative before deciding whether sections 122 & 129 of the Constitution provide any right to fair treatment on dismissal (or support the implication of equivalent contractual terms) where these sections of the Constitution do not provide for any free standing rights for those without Ascension Island citizenship (which is protected under on Ascension) to: employment, housing nor residence (although they may provide for protection against unnecessary or unjustified interference with these benefits).

Non-discrimination

The Plaintiffs' arguments

174. Mr Toms, on behalf of the Plaintiffs, accepts that they cannot rely on Section 137 of the Constitution directly against the Defendant given the Defendant is a private body.

175. Section 137(2) provides,

> "Subject to subsections (4) and (6), no person shall be treated in a discriminatory manner by any organ or officer of the executive or judicial branches of the government or any person acting in performance of the functions of the Ascension Public Service or any public authority."

176. Section 137(3) defines the term 'discriminatory' as including affording different treatment to different persons on the ground of disability.

177. It is the Plaintiffs' case that section 137 of the Order is relevant to their plaints as it applies to the Court itself and, consequently, when determining the Plaintiffs' rights under their contracts (or under section 129 of the Order), the Supreme Court should take into account its obligation to ensure they do not suffer from discrimination due to their disabilities.

Discussion and Analysis

178. The Court reminds itself that in *Joshua v The Attorney General of Ascension Island (2019) Case No. 517-2019* the Supreme Court of St Helena held that,

> **"**The rights and freedoms provided for by the Constitution are fundamental; and the Supreme Court is vested with the ultimate jurisdiction to uphold those rights ever subject to a discretion to decline to do so where an adequate alternative remedy exists or existed."

179. Even though section 137 does not provide the necessary protection, section 122 of the Constitution, as set out below, provides for protection against discrimination on the grounds of disability in relation to the rights to private and family life provided under section 129:

> Whereas every person in Ascension is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, without distinction of any kind, such as sex, sexual orientation, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, age, disability, birth or other status, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following—
> ….
> *(c)* protection for his or her private and family life, the privacy of his or her home and other property; and

180. Therefore, this provision demonstrates that, in contemporary times, protection from discrimination is seen and accepted as being a very important element of civilised society on Ascension Island. Further, I am satisfied that provisions protecting persons including employees from discrimination should be interpreted widely and purposively.

181. Further, discriminating against an employee when exercising any power under the contract of employment is a breach of the duty to treat them with trust and confidence.

182. Again, the common law can provide this protection. Based on the above, I am satisfied that the Court should conclude that the implied contractual terms to exercise the power of dismissal in good faith and fairly should include a further term imposing a duty not to discriminate against an employee when so doing.

Determining whether an employee is disabled

183. Section 137(3) does not define the meaning of disability. Nor is any definition found elsewhere in the Constitution.

184. The Court does have to have some means of evaluating disability. Although the UK Equality Act 2010 ('EA') is not directly part of the law of St Helena and/or Ascension, the approach to defining disability in Section 6 EA is useful guidance. I am satisfied that

equivalent definitions can be imported where the statute law in Ascension is short of a definition.

185. Section 6 EA defines disability as a physical or mental impairment which is long term and has a substantial adverse effect on a person's normal day to day activities. Further:

(a) long term means a condition that has lasted 12 months, is likely to last 12 months or the rest of a person's life;

(b) when evaluating disability, medical treatment is discounted; see EA Schedule 1, Part 1, para 5;

(c) the term substantial means more than minor or trivial; see Section 212 EA.

186. Certain conditions including cancer are deemed disabilities see EA Schedule 1, para 6. Further, the UK Employment Appeal Tribunal has determined that the term cancer includes a precancerous skin condition; see *Lofty v Hamis t/a First Café (2018) UKEAT/0177/17*.

187. The nature of disability is not defined in the Constitution and, consequently, can be interpreted more widely still than the definition in the EA.

Conclusion on First and Second Issues

188. I am satisfied that, in principle, the cause of action in the Plaintiffs' plaints is well founded in law based on the existence of the implied terms as set out above.

189. Consequently, their plaints should proceed to be tried on the facts to establish whether, in each case, there was a breach of any of the implied terms.

Consequential Issues

(i) Unfair dismissal under the ERA

190. I am satisfied that the Plaintiffs are not seeking to bring their claims for unfair dismissal under the UK statute, the Employment Rights Act 1996 ('ERA'). The ERA does not apply to Ascension; see *Francis v the Attorney General (2008) Case No. 1/2008* per the St Helena Court of Appeal. Further, there is no other statutory provision on Ascension Island equivalent to unfair dismissal in the ERA.

191. Both St Helena and Ascension Island lack an employment tribunal system and the Court of Appeal ruled in that the functions of the employment tribunal could not be taken on by the

Supreme Court. Some of the equivalent functions may yet be performed by the Supreme Court now the 2022 Ordinance is in force.

(ii) ACAS Early Conciliation

192. The Plaintiffs did not have to engage with the ACAS early conciliation scheme. This is a statutory requirement in the UK for most claims that are brought in the employment tribunal system. It is contained in Sections 18 and 18A of the *Employment Tribunals Act 1996* ("ETA).

193. The provisions in these sections of the ETA only apply to employment tribunal claims in the UK. They do not apply to civil court claims e.g. breach of contract in the UK. They also do not apply to plaints in the Supreme Court of St Helena for Ascension Island.

(iii) Time limits

194. The time limits in the ERA or Equality Act 2010 ("EA") for bringing statutory unfair dismissal and discrimination claims (such as the usual three months unless it is extended) do not apply to breach of contract claims in the Supreme Court of St Helena for Ascension Island nor in the courts in the UK.

195. Instead, they are governed by the provisions of the Limitation Act 1980.

196. The Plaintiff's plaints are not brought under the provisions of the ERA which, as above, does not apply to Ascension Island. Consequently, the time limit for lodging a claim of unfair dismissal in the employment tribunal is not relevant.

197. The plaints for breach of contract and/or breach of the Plaintiffs' constitutional rights under sections 122 and 129 of the *St Helena, Ascension and Tristan Da Cunha Constitution Order 2009 S/I No. 1751 from 2009* ("the Order"). In both instances, the limitation period is 6 years as per Sections 5 and/or 9 Limitation Act 1980.

198. The *Limitation Act 1980* applies to St Helena and Ascension pursuant to the *English Law (Application) Ordinance 2005*. It predates the Ordinance and no order under Section 5 of the Ordinance has been made disapplying all or any of its provisions.

199. That means that the plaints in these cases can be made, even though they were filed one or two years after the events in question and even though they would be out of time as statutory unfair dismissal claims in English law.

200. Consequently, the plaints are in time.

(iv) Extending time

201. The powers of the UK employment tribunal to extend time in certain limited circumstances for a claim for unfair dismissal and/or discrimination are not relevant to the Plaintiffs' cases. As above, they are not bringing claims of unfair dismissal under the ERA or claims under the EA.

Conclusion on all three issues

202. Based on the above, the Supreme Court decides each of the preliminary issues in the Plaintiffs' favour. I order that the cases proceed for trial on their facts and merits.

The impact of this judgment and the commencement of the Employment Ordinance 2022

203. Mr Rogers, for the Defendant, submitted that a judgment in favour of the Plaintiff on these preliminary issues would open the flood gates to a range of arguments and potential claims in relation to the termination of employment contracts (current or historic). I am not satisfied that this argument has merit. It is right that there have not been many claims asserting equivalent implied rights in employment law on the island. This does suggest that there are no floodgates about to open because these arguments would have been attempted before if there were concern about unfair dismissals regularly occurring. There was no evidence of a large volume of cases waiting to be brought to court awaiting this decision. In any event, I must decide the preliminary issues based on matters of legal principle rather than concern for the practical consequences. Now the 2022 Ordinance and Regulations thereunder are in force they will provide a range of statutory employment rights and give greater rights in respect of a range of employment issues – far greater than the common law can provide.

204. Nonetheless, I should make clear that now the Employment Ordinance 2022 is fully in force, it would be wrong in principle for an employee to rely on this judgment where the Ordinance and Regulations will apply to them. For an employee to attempt to bring a claim in breach of contract relying on implied terms is likely to constitute an abuse of process where they could rely on the statutory employment rights enshrined in the 2022 Ordinance and Regulations.

205. Likewise, as set out above, any terms implied into these contracts could not seek to provide any greater protection for unfair dismissal than the rights that will be granted by the 2022 Ordinance and Regulations thereunder.

206. I should also make clear that only the 2022 Ordinance is to apply in relation to claims for dismissal in relation to employment contracts entered into from the time it came into force on 20 June 2022. Any rights implied in employment contracts by this judgment will be subsumed by the statutory rights then in force. Therefore, the implied contractual rights decided by this judgment will be superseded by the 2022 Ordinance and Regulations

thereunder, which will govern procedural and substantive rights under employment contracts entered into from its commencement.

207. Therefore, the effect of this judgment is likely to be superseded in relation to employment contracts to which the 2022 Ordinance applies. Claims or plaints for breaches of employment contracts entered into from 20 June 2022 should be brought relying upon statutory rights that will be available.

Rupert Jones, The Chief Justice
25th May 2022