

**Alex Shellum**

**The Case for a Human Rights Act Based Approach to Unfair Dismissals Engaging Convention Rights: Challenging Judicial Attitudes and Assessing Potential**  
**Article (Published version)**  
**(Refereed)**

**Original citation:**

Shellum, A (2017) *The Case for a Human Rights Act Based Approach to Unfair Dismissals Engaging Convention Rights: Challenging Judicial Attitudes and Assessing Potential*. [LSE Law Review](#), Vol 2, pp 1-22. ISSN 2516-4058

DOI: <http://dx.doi.org/10.21953/lse.l6iqa0ijw4ik>

© 2017 The Author

This version available at: <http://eprints.lse.ac.uk/87723/>

Available in LSE Research Online: May 2018

LSE has developed LSE Research Online so that users may access research output of the School. Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Users may download and/or print one copy of any article(s) in LSE Research Online to facilitate their private study or for non-commercial research. You may not engage in further distribution of the material or use it for any profit-making activities or any commercial gain. You may freely distribute the URL (<http://eprints.lse.ac.uk>) of the LSE Research Online website.

This document is the author's final accepted version of the journal article. There may be differences between this version and the published version. You are advised to consult the publisher's version if you wish to cite from it."

# The Case for a Human Rights Act Based Approach to Unfair Dismissals Engaging Convention Rights: Challenging Judicial Attitudes and Assessing Potential

Alex Shellum\*

---

## ABSTRACT

*The protection which the law of unfair dismissal offers to those dismissed in circumstances which engage their rights under the European Convention on Human Rights is anaemic. In such circumstances, judges continue to take a deferential approach to managerial discretion. This paper seeks to make the argument that judges should apply the same rigorous standards in unfair dismissal cases as they do in public law under the Human Rights Act. In doing so, the author challenges prevailing judicial attitudes in labour law, including a critical treatment of the judgment in *Turner v East Midlands Trains*, and assesses the impact that a genuine Human Rights Act based approach would have on this area.*

## INTRODUCTION

The law of unfair dismissal, legislated for in Part X, Employment Rights Act 1996 (ERA), favours the employer. It does so by restricting access to claims through a narrow personal scope;<sup>1</sup> through judges taking a *laissez-faire* approach to the reasons for, and reasonableness of, employers' decisions to dismiss;<sup>2</sup> and

---

\* The author is a part-time BPTC student and Bedingfield Scholar of Gray's Inn. Prior to commencing the BPTC, the author read for his BA in law at the University of Cambridge and then for an LLM, specialising in Human Rights Law, at the LSE, in which he was awarded a Distinction (2015 – 2016).

<sup>1</sup> Employment Rights Act 1996, s 94(1), s 108 (ERA 1996).

<sup>2</sup> *Ibid* s 98; *Iceland Frozen Foods Ltd v Jones* [1983] 1CR 17 (EAT); *Turner v East Midlands Trains* [2012] EWCA Civ 1470, [2013] ICR 525.

through an anaemic remedial regime.<sup>3</sup> These three principal imbalances in the law of unfair dismissal are shown at their most egregious when the dismissal in question is one that engages a dismissed employee's Convention rights.<sup>4</sup> This is the species of dismissal with which this essay is concerned – its purpose is to present the case for a Human Rights Act 1998 (HRA) based approach to dismissals engaging employees' Convention rights.

The case has been made by Collins that compulsory protection of job security, and the correlative ability to claim unfair dismissal – underpinned by the two values of dignity and autonomy – constitutes a right in and of itself.<sup>5</sup> The theory of dismissal law is beyond the scope of this essay, but the analysis within is written taking Collins' characterisation of the value of just dismissal law as sound. The principles of dignity and autonomy, which underlie many of the Convention rights upon which this paper's case for a more robust dismissal regime will be built,<sup>6</sup> are familiar terms to labour and human rights law scholarship alike.<sup>7</sup>

The reasons for advocating the present approach based on the HRA are threefold: firstly, it is more grounded in the plausible than a call for legislative intervention to a government which has orchestrated a drastic decline in the number of cases brought before employment tribunals;<sup>8</sup> secondly, as will be demonstrated below, there is no current statutory impediment to interpreting the law on unfair dismissal in light of the HRA where appropriate; and, thirdly, legislative intervention without challenging judicial attitudes, which have proven thus far to be resilient to legislative coaxing, may fail to effect any real change. As ACL Davies puts it, 'it seems to be quite difficult for Parliament to alter the judges' perception of their proper place in employment law'.<sup>9</sup>

This third reason alludes to the greatest obstacle to a HRA based approach to dismissals, and Part I of this essay will attempt to overcome it. This is the non-interventionist, deferential, and contractual view that judges have

---

<sup>3</sup> ERA 1996, ss 111-32.

<sup>4</sup> Human Rights Act 1998 (HRA 1998).

<sup>5</sup> Hugh Collins, *Justice in Dismissal: The Law of Termination of Employment* (Oxford monographs on labour law) (OUP 1992) 15-21.

<sup>6</sup> *Pretty v United Kingdom* (2002) 35 EHRR 1 [65].

<sup>7</sup> Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011) pt 2 ch 3; Jeremy Waldron, 'How Law Protects Dignity' (2012) 71(01) *The Cambridge Law Journal* 200.

<sup>8</sup> Ministry of Justice, 'Tribunal and Gender Recognition Statistics Quarterly: April to June 2015' <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/459787/tribunals-and-gender-recognition-bulletin.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/459787/tribunals-and-gender-recognition-bulletin.pdf)> accessed 1 May 2016.

<sup>9</sup> ACL Davies, 'Judicial Self-Restraint in Labour Law' (2009) 38(3) *Industrial Law Journal* 278, 304.

historically adopted with regards to labour law.<sup>10</sup> This judicial attitude may be challenged on two fronts: firstly, by *distinguishing* labour law from public law; and, secondly, by *analogising* labour law with public law (the challenge from analogy). The former is convincingly articulated by Davies – the constitutional constraints upon the judiciary in public law cases, which triggers judicial self-restraint and deference, are largely inapplicable to labour law cases.<sup>11</sup> In the interests of space, this essay takes Davies’ view to be correct and will refrain from further exposition. The challenge from analogy retrofits Gearty’s analysis of judicial restraint and deference where Convention rights are engaged, paradigmatically in the public context, and applies it to Convention rights sensitive dismissals.<sup>12</sup> It will be claimed that cases involving Gearty’s three principles of respect for human dignity, legality, and civil liberties – each of which he shows induce courts to robust engagement as opposed to restraint or deference – should give rise to similar levels of scrutiny and intervention in dismissals where those same principles are engaged.

In seeking to make the case for a HRA based approach to dismissals engaging Convention rights, this essay proceeds in three parts: Part I assesses the applicability of the HRA to unfair dismissal law and launches the challenge from analogy to propose a revised judicial methodology. Part II applies the HRA in conjunction with this revised methodology to problem areas in the current law of unfair dismissal – personal scope; the reasons for, and reasonableness of, decisions to dismiss; and, remedies. Part III offers concluding thoughts on the value to be gained from a HRA based approach to dismissals engaging Convention rights and suggests some areas for further fruitful research.

## I. DISMISSALS ENGAGING THE HUMAN RIGHTS ACT 1998

### The Horizontal Hurdle

‘The horizontal hurdle’ refers to the HRA’s lack of explicit provision for horizontal effect between employer and employee. On its face, the HRA is merely vertically effective between state and individual. The hurdle, however, is low – ‘There can be no doubt that the HRA is fully capable of application to

---

<sup>10</sup> Davies, *Judicial Self-Restraint* (n 9) 278, 287.

<sup>11</sup> *Ibid* 289-290.

<sup>12</sup> Conor Gearty, *Principles of Human Rights Adjudication* (OUP 2005).

employment law'.<sup>13</sup> The combination of the s 3 HRA interpretative obligation on courts, to read and give effect to legislation compatibly with Convention rights 'so far as it is possible to do so', and the s 6 HRA duty on courts and tribunals to act in a manner compatible with Convention rights, generates horizontal effect. Consequently, the HRA applies to unfair dismissal when Convention rights are engaged. Indeed, the fact that unfair dismissal is defined by flexible concepts of 'reasonableness' render it well-suited to interpretation under the HRA.<sup>14</sup>

This analysis is uncontroversial and enjoys explicit judicial approval in *X v Y*.<sup>15</sup> In *X*, the applicant, who was employed by a charity working with young offenders, was dismissed following discovery by a police officer of his engaging in consensual sex with another adult male in a public lavatory – a criminal offence. He complained that the dismissal involved a breach of his rights under Articles 8 and 14 of the European Convention on Human Rights (ECHR), scheduled to the HRA.<sup>16</sup> On the facts, the Court of Appeal found no breach of the applicant's rights due to the public nature of the lavatory – an approach which has received criticism.<sup>17</sup> What is important for present purposes, however, is that Mummery LJ accepted that the s 6(1) HRA duty requires courts and tribunals, as public authorities, to interpret existing employment legislation compatibly with the Convention rights.<sup>18</sup>

The effect of *X*, therefore, is to vault 'the horizontal hurdle' and demonstrate that there is no statutory impediment to interpreting the law on unfair dismissal in light of the HRA in appropriate cases – those with a 'human rights hook'.

### *Human Rights Hooks*

The purpose of this section is to demonstrate:

- A. The types of dismissal which engage Convention rights.

---

<sup>13</sup> Hazel Oliver, 'Employment Law' in David Hoffmann (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011), 345.

<sup>14</sup> *Ibid* 350.

<sup>15</sup> [2004] EWCA Civ 662, [2004] ICR 1634.

<sup>16</sup> European Convention on Human Rights 1950, Arts. 8 and 14 (ECHR).

<sup>17</sup> See Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71(6) *Modern Law Review* 912.

<sup>18</sup> *X* (n 15) [49], [58], [64].

- B. The challenge from analogy, which applies Gearty's methodological framework in *Principles of Human Rights Adjudication*, to dismissals engaging Convention rights.<sup>19</sup>

*Types of Dismissal Engaging Convention Rights*

In order for a dismissal to attract a HRA analysis the dismissal must engage the employee's Convention rights as provided for in the Act under Schedule 1. This is problematic as the HRA does not incorporate into domestic law the European Social Charter – the document which contains the right to protection in cases of termination of employment.<sup>20</sup> Moreover, the position that jobs constitute property rights does not enjoy significant support within the literature.<sup>21</sup> To contest otherwise would be to either unjustifiably tip the balance of the law in favour of the employee, or to corrupt the strength that characterises property rights by allowing for non-consensual deprivation in cases of rational dismissal. Consequently, a job does not come within the scope of the 'right to property' in the Convention.<sup>22</sup> This precludes a universal HRA based review in cases of unfair dismissal. There are, however, a number of instances in which Convention rights will be engaged by a dismissal.

The most relevant 'human rights hook' is the right to privacy under Article 8 ECHR, which extends to the workplace.<sup>23</sup> The right has, however, thus far alluded definition as to scope.<sup>24</sup> However, Strasbourg has clearly adopted an expansive approach to privacy. The right to privacy includes the maintenance of relationships with others and the ability to develop new relationships.<sup>25</sup> Given the amount of time spent at work during one's lifetime, it is clear that such a conception of privacy lends itself to engagement in dismissal. Moreover, Article 8 has been applied in cases where an employer has dismissed an employee owing to matters in the employee's private life outside of work, particularly in the context of sexual orientation.<sup>26</sup> The reputational element of privacy,

---

<sup>19</sup> Gearty, *Principles* (n 12).

<sup>20</sup> Council of Europe, European Social Charter (Revised) 1996, Art. 24.

<sup>21</sup> Collins, *Justice in Dismissal* (n 5) 9-12.

<sup>22</sup> ECHR, art 1 First Protocol.

<sup>23</sup> *Halford v United Kingdom* (1997) 24 EHRR 523.

<sup>24</sup> *Niemitz v Germany* (1992) EHRR 97 [29].

<sup>25</sup> *ibid*; *Connors v United Kingdom* (2005) 40 EHRR 9 [82]; *Sidabras v Lithuania* [2006] 42 EHRR 6 [48].

<sup>26</sup> *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.

established in *Pfeifer*, also has application to the employment context.<sup>27</sup> This may be seen by the judgment in *R (Wright)* where the stigma of the dismissal in the circumstances was a contributory factor to the breach of the right to privacy in that case.<sup>28</sup>

Although tangential to the present enquiry, it is noteworthy that domestic courts have, however, been reluctant to find the right to privacy engaged in certain circumstances.<sup>29</sup> For present purposes, it suffices to say that the Strasbourg court has subsequently offered clarification on the position in *Pay v UK* – acts need not necessarily take place in a private environment in order to be protected by the right to privacy.<sup>30</sup>

Article 10 ECHR, the right to freedom of expression, presents a further ‘human rights hook’. Dismissals for political speech and affiliation, in particular, have consistently been deemed to engage the right to freedom of expression at the Strasbourg level.<sup>31</sup> Dismissals relating to dress code are another scenario in which the right to freedom of expression may be engaged.<sup>32</sup> Although collective labour law is beyond the scope of this paper, it is also relevant that dismissals relating to trade union membership will engage Article 11 ECHR, the right to freedom of association, and are therefore susceptible to a HRA based approach.<sup>33</sup> Articles 10 and 11 ECHR, therefore, constitute further ‘human rights hooks’ upon which a HRA based approach to unfair dismissal may attach.

The example rights and scenarios given are by no means exhaustive.

### The Challenge From Analogy

The scenarios in the previous sub-section may also act as examples upon which the challenge from analogy with public law to judicial attitudes in dismissal cases, introduced above, may be built. Gearty presents a vision of the judiciary which sees judges more willing to engage in scrutinising public decisions under the HRA where any one of three principles are in play: ‘These are the principle

---

<sup>27</sup> *Pfeifer v Austria* (2009) 48 EHRR 8 [35].

<sup>28</sup> *R (Wright) v Secretary of State for Health* [2009] UKHL 3, [2009] 1 AC 739.

<sup>29</sup> *X* (n 15); *Pay v Lancashire Probation Service* [2004] ICR 187 (EAT); for criticism, see Mantouvalou (n 17).

<sup>30</sup> (2009) 48 EHRR SE2.

<sup>31</sup> *Vogt v Germany* (1996) 21 EHRR 205; *Aslef v UK* (2007) 45 EHRR 34; *Redfern v UK* (2013) 57 EHRR 2.

<sup>32</sup> *Kara v United Kingdom* (1999) 27 EHRR CD272, 274.

<sup>33</sup> *Young, James & Webster v United Kingdom* (1982) 4 EHRR 38.

of respect for civil liberties; the principle of legality; and the principle of respect for human dignity<sup>34</sup>.

This is not only because these are important principles in their own right, but also because they are principles which the judiciary feel empowered to adjudicate upon. To explain this, Gearty uses the metaphor of a swimming pool with the shallow end marked 'legal principle' and the deep end marked 'public policy'.<sup>35</sup> In the shallow end, dealing with legal principle, is where the judges are most at home. Conversely, in the deep end, adjudicating on public policy, the judges are out of their depth. When any one of these three principles are engaged, however, judges consider themselves to be in the shallow end.

This sub-section seeks to demonstrate that these three principles are sufficiently engaged in the dismissal scenarios in the previous sub-section and should therefore induce a similar response from judges in dismissal as they do in review of public action. Judges should consider themselves in the shallow end of the pool when analysing dismissals which engage Convention rights.

In fact, there is a case to be made that the lack of constitutional constraints on judges in labour law should lead to even greater intervention than in public law.<sup>36</sup> Consequently, the three principles are able to do more work in dismissals than in the vertical arena as the countervailing interest of managerial prerogative is not as weighty as the constitutional concern of ensuring proportionate intrusion into government business.<sup>37</sup> By presenting this challenge from analogy to judicial attitudes, the way is cleared for an analysis of what a HRA based approach to dismissal law has to add to the status quo.

## *Legality*

Gearty gives his definition of legality as "one that requires all official action in a democratic state to be positively authorized by law".<sup>38</sup> The principle of legality involves fair play and due process.<sup>39</sup> Legality in this sense is already found in the regime of unfair dismissal.

---

<sup>34</sup> Gearty, *Principles* (n 11) 4.

<sup>35</sup> *ibid* 121.

<sup>36</sup> Davies, 'Judicial self-Restraint' (n 9).

<sup>37</sup> Gearty, *Principles* (n 11) ch 7.

<sup>38</sup> Gearty, *Principles* (n 11) 60.

<sup>39</sup> *ibid* 128.



An employer's failure to follow a fair procedure is by far the most likely ground for a successful unfair dismissal claim ... The willingness to impose procedural standards has several explanations ... it may of course simply be that in addressing questions of procedural fairness the courts are dealing with familiar judicial principles of 'natural justice' or 'procedural due process'.<sup>40</sup>

The emphasis on due process is best shown by *Polkey v AE Dayton Services Ltd* – procedures must be complied with regardless of whether the eventual outcome will be identical.<sup>41</sup> The remedial inadequacy of *Polkey* from a human rights perspective is noted below under 'Remedies'. The fact that judges already robustly protect the principle of legality in dismissal cases, requiring that dismissals comply with positively authorised and fair procedures, adds credence to the challenge from analogy. What it shows is a judicial confidence to uphold the principle of legality wherever it is engaged. It is also reminiscent of the 'prescribed by law' requirement to be found in justifications for infringing Convention rights. The judicial propensity to protect due process in dismissal cases demonstrates that the judges feel comfortably in the shallow end of the pool.

### ***Dignity***

Dignity is a notoriously slippery concept. Gearty describes it as 'a core sentiment that lies behind and explains much of the language actually deployed in the Convention' and as "the notion that each person matters in view of his or her humanity".<sup>42</sup> Dignity, as a quality innate to all humans, is a term also discussed in labour law scholarship.<sup>43</sup> Regardless of the term's precise definition, it is clearly considered relevant in both legal areas.

---

<sup>40</sup> Hugh Collins, *Nine Proposals for the Reform of the Law on Unfair Dismissal* (Institute of Employment Rights 2004), 42.

<sup>41</sup> [1987] UKHL 8, [1988] ICR 142.

<sup>42</sup> Gearty, *Principles* (n 11) 84.

<sup>43</sup> Collins, *Justice in Dismissal* (n 5); B Hepple, 'Human Rights and Employment Law' (1998) 8 *Amicus Curiae* 19; Simon Deakin, 'The Utility of "Rights Talk": Employees' Personal Rights' in Conor Gearty and Adam Tomkins (eds), *Understanding Human Rights* (Pinter 1999) 357; Freedland and Kountouris (n 7); cf Christopher McCrudden, 'Labour Law as Human Rights Law: A Critique of the Use of "Dignity"' by Freedland and Kountouris' in Alan Bogg, Cathryn Costello, and ACL Davies (eds), *The Autonomy Of Labour Law* (Hart Publishing 2015).

In unfair dismissal, dignity is most engaged in cases concerning the right to privacy. Many of these cases involve elements of control or domination, with the employer seeking to control an employee's conduct outside of work, which fails to treat employees as autonomous individuals deserving of being treated with dignity.<sup>44</sup> On a more basic level, the idea that 'labour is not a commodity' underlies much of the rationale behind controls on dismissal.<sup>45</sup> In that sense, and according to Collins, all regulation of dismissal is justified by dignity and autonomy.<sup>46</sup> Interestingly, it may be argued that the current regime already acknowledges the role that dignity plays in cases of unfair dismissals. An entitlement of an employee to a written statement of reasons for their dismissal, thereby acknowledging the employee's agency, acts as evidence for this.<sup>47</sup> Consequently, especially in cases engaging Convention rights, there is a strong case to be made that the stakes for dignity may be as high in dismissal as they are in public law. Similar levels of review, therefore, should be conducted in both circumstances.

### *Civil Liberties*

Basing his definition on the work of Feldman, Gearty states that 'The subject of civil liberties is best viewed as being concerned with those freedoms which are essential to the maintenance and fostering of our representative system of government'.<sup>48</sup>

In unfair dismissal, civil liberties are most engaged in dismissals touching upon Articles 10 and 11 ECHR, where an employee is dismissed pursuant to their political affiliation, speech, or membership of a trade union.<sup>49</sup> Dismissals in these circumstances have a clear chilling effect on civil liberties and detract from the quality of the UK's democracy. The fear of losing one's livelihood is a strong disincentive to engaging in political speech and association. It is clear to see how such dismissals engage the principle of respect for civil liberties. As with dignity, therefore, similar levels of review should be conducted in dismissal

---

<sup>44</sup> Mantouvalou, 'Human Rights and unfair dismissal' (n 17).

<sup>45</sup> Declaration concerning the Aims and Purposes of the International Labour Organisation, adopted at the 26th session of the ILO, Philadelphia, 10 May 1944.

<sup>46</sup> Collins, *Justice in Dismissal* (n 5).

<sup>47</sup> ERA 1996, s 92.

<sup>48</sup> Gearty, *Principles* (n 11) 34; David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, OUP 2001).

<sup>49</sup> *Vogt* (n 31); *Aslef* (n 31); *Redfearn v UK* (n 31); *Young* (n 33).

cases impacting upon political activity covered by the HRA as in equivalent public law cases.

The challenge from analogy has sought to show that the principles that lead judges to intervene more robustly in public law cases under the HRA, rather than exercise restraint or deference, are also engaged where a dismissal involves Convention rights. In doing so, given the lack of constitutional constraints on judges in dismissals, the claim is made that judges should abandon their deference to managerial prerogative in Convention rights sensitive dismissals<sup>50</sup> and instead adopt a HRA based approach – the value of which is assessed in Part II.

## II. APPLYING THE HRA TO UNFAIR DISMISSALS

### Personal Scope

Universality is a key tenet of human rights law, reflected at Article 1 ECHR and in the HRA by virtue of the s 3 interpretative obligation and duty under s 6. Therefore, the first problematic aspect of the unfair dismissal regime from a human rights perspective is its lack of universality. There are two principal ways in which access to a claim for unfair dismissal is restricted: first, the inability of ‘workers’ to claim unfair dismissal;<sup>51</sup> and, second, the qualifying period requiring two years’ continuous service before an employee is eligible to claim.<sup>52</sup>

#### *Workers*

Access to the right to claim unfair dismissal is limited to ‘employees’ – meaning those engaged under a contract of employment.<sup>53</sup> Collins has described this state of affairs as “as unjustifiable as it is inexplicable” and the extension of protection from unfair dismissal to workers is one of his nine proposed reforms to the law on unfair dismissal.<sup>54</sup> Davies characterises this as a ‘radical’ position.<sup>55</sup>

---

<sup>50</sup> Davies, *Judicial Self-Restraint* (n 9).

<sup>51</sup> ERA 1996, s 94.

<sup>52</sup> ERA 1996, s 108

<sup>53</sup> ERA 1996, s 230(1).

<sup>54</sup> Collins, *Nine Proposals* (n 40) 9.

<sup>55</sup> ACL Davies, *Perspectives on Labour Law* (2nd edn, CUP 2009) 83.

However the present case is that workers should enjoy protection from unfair dismissal where their Convention rights are engaged. Thus, the position is consonant with Davies' view that protection of *fundamental rights* should be extended to all workers.<sup>56</sup>

The inadequacy of the distinction is exemplified by *O'Kelly v Trusthouse Forte Plc.*<sup>57</sup> In this case, casual wine waiters were for all intents and purposes dismissed pursuant to their attempts to organise with the help of a union. Their claim for unfair dismissal, however, failed without any consideration of the employer's motives due to their status as workers. *O'Kelly* is an extreme example but demonstrates how the distinction fails to adequately protect Convention rights in relevant cases.

Applying a HRA based approach to unfair dismissal law would alleviate this issue significantly. Section 3 HRA might be used so as to read and give effect to the following reading of s 94 ERA as follows: 'An employee, and a worker where their Convention rights are engaged, has the right not to be unfairly dismissed by his employer.' Such a reading would not go against the overriding statutory regime.<sup>58</sup> Moreover, the fact that workers enjoy the protection of many other employment rights, such as discrimination, allows the courts to infer Parliamentary intent on this matter thereby avoiding any Parliamentary sovereignty criticisms.

### *The Qualifying Period*

The qualifying period, at s 108 ERA, denies access to a claim for unfair dismissal to employees who do not possess two years of continuous service. Generally, the existence of a qualifying period is within a state's margin of appreciation.<sup>59</sup> However, in *Redfearn*, it was ruled that the satisfaction of a qualifying period in cases where a dismissal may be in breach of Convention rights constitutes a disproportionate exclusion.<sup>60</sup> Therefore, for the dismissals with which this paper is concerned, the dilemma of the qualifying period has already been largely solved.

The dilemma does, however, remain for dismissed individuals who are unable to hang their claim on a 'human rights hook'. This, *inter alia*, has

---

<sup>56</sup> *Ibid.*

<sup>57</sup> [1984] QB 90 (CA).

<sup>58</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

<sup>59</sup> *Stedman v United Kingdom* (1997) 23 EHRR CD 168.

<sup>60</sup> *Redfearn* (n 31).

precipitated calls for an ‘integrated approach’ to labour rights in interpreting the ECHR.<sup>61</sup> Failing this, there may also be a case to be made that an ‘integrated approach’ to labour rights is possible under the HRA. Indeed, the case may be stronger as the margin of appreciation, which currently protects the general qualifying period, is afforded to states, not to governments, and therefore as a branch of the state the judiciary is not limited by it. It is now acknowledged that the HRA creates domestic rights and the judiciary are currently riding on a wave of support for common law constitutional rights.<sup>62</sup> Therefore, although unlikely, there is nothing in principle precluding the judiciary from integrating the right to unfair dismissal, so labelled at s 94 ERA, in the HRA. In that sense, the HRA may be partially informed by the ERA in a similar way to how the ESC helps give content to the rights in the ECHR.

In any event, for present purposes, what is of note is that the qualifying period is no longer an issue for dismissals engaging an individual’s Convention rights. Indeed, ensuring robust scrutiny of dismissals in such circumstances is a prudent step to be taken before seeking to extend that scrutiny in all cases.

Therefore, it may be seen that a HRA based approach to relevant dismissals either has the capacity to grant greater protection to Convention rights, or has already managed to do so, following Strasbourg case law, without need for legislative modification of the statutory qualifying period.

## **Reasons For Dismissal**

There are three categories of reasons for dismissal: automatically fair,<sup>63</sup> automatically unfair,<sup>64</sup> and potentially fair.<sup>65</sup> The latter two are most relevant to the present enquiry.

### *Automatically Unfair Reasons*

---

<sup>61</sup> V. Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13(3) Human Rights Law Review 529.

<sup>62</sup> E.g. *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455.

<sup>63</sup> ERA 1996, s 10(4); Trade Union and Labour Relations (Consolidation) Act 1992, s 237.

<sup>64</sup> ERA 1996, ss 99 - 105.

<sup>65</sup> ERA 1996, ss 98(1)(b) and 98(2).

In the interests of space, the list of automatically unfair reasons will not be given here. Collins lists three types of reason for dismissal that are treated as automatically unfair: protection of social rights, protection of worker representatives in performing their functions, and victimisation for asserting a statutory right enforceable in an employment tribunal.<sup>66</sup> Dismissals for these reasons will result in an automatic finding of unfair dismissal and entitle the individual to a remedy.

As a product of legislation, the contents of the list of automatically unfair reasons are a political choice. There are some omissions which commentators have been critical of such as dismissals relating to political expression or religion.<sup>67</sup> Collins has called for the rights in the Charter of Fundamental Rights of the European Union to be included in the list.<sup>68</sup>

A HRA based approach to dismissals will not give rise to these developments. That is not, however, a shortcoming of the approach. Automatic unfair dismissals allow no room for justification – therefore, it is difficult to see why qualified rights should enjoy absolute protection upon engagement. A more balanced approach, which the HRA allows for, would necessitate a discussion as to the proportionality of the dismissal, including whether the dismissal pursued a legitimate aim. It is the failure at present of the courts to apply a true proportionality analysis in these cases, which has in part induced calls for a wider category of automatically unfair reasons. A true proportionality analysis would swiftly consider unmeritorious reasons unfair.

Therefore, although a HRA based approach to dismissals engaging Convention rights would be unable to widen the list of automatically unfair reasons for dismissal, this is no great disadvantage.

### *Potentially Fair Reasons*

Two elements make up a potentially fair dismissal: firstly, the actual reason relied upon;<sup>69</sup> secondly, the reasonableness of the employer's action in dismissing the employee for that reason.<sup>70</sup>

---

<sup>66</sup> Collins, *Nine Proposals* (n 40) 75.

<sup>67</sup> Deakin, *The Utility of Rights Talk* (n 43) 366.

<sup>68</sup> Collins, *Nine Proposals* (n 40) 78.

<sup>69</sup> ERA 1996, ss 98(1)(b) and 98 (2).

<sup>70</sup> ERA 1996, s 98(4).

The first step is to identify which of the four potentially fair reasons the employer had for the dismissal. They are conduct, capability, redundancy, and ‘some other substantial reason’.<sup>71</sup> These reasons are largely in line with international standards and reflect Article 4 ILO Convention 158, Termination of Employment, 1982 – a treaty not ratified by the UK. Despite this fact, the reasons are not without controversy, and Deakin has labelled their width as one of the problems with unfair dismissal from a rights-based perspective.<sup>72</sup> For example, the category of ‘some other substantial reason’ has been found to include dismissals as a result of an employee’s difficult personality, and dismissals arising from pressures to dismiss.<sup>73</sup>

These flaws are, however, endemic of the unfair dismissal regime generally. It is the reasonableness element that is more relevant to the enquiry of what a HRA based approach to unfair dismissal can add to dismissals engaging an individual’s Convention rights. It is the reasonableness element also which has most robustly repelled a genuine HRA interpretation to such dismissals. Moreover, remedying the deficiency of the reasonableness element, by applying a proportionality analysis in cases engaging Convention rights, would alleviate the worst symptoms of the breadth of the potentially fair reasons in the statute.

## **Reasonableness**

### *‘The Band of Reasonable Responses’*

In order to assess whether an employer acted ‘reasonably’ in the circumstances by dismissing the employee, the courts have adopted the notorious ‘band of reasonable responses’ test (BORR) set out in *Iceland Frozen Foods v Jones*:<sup>74</sup>

[T]he function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstance of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.<sup>75</sup>

---

<sup>71</sup> ERA 1996, ss 98(1)(b) and 98(2).

<sup>72</sup> Deakin, *The Utility of Rights Talk* (n 43) 364.

<sup>73</sup> *Perkin v St. George’s Healthcare NHS Trust* [2005] EWCA 1174, [2006] ICR 617; *Dobie v Burns International Security Services (UK) Ltd* [1983] IRLR 278 (CA).

<sup>74</sup> *Iceland* (n 2).

<sup>75</sup> *ibid.*

This test, after some judicial criticism,<sup>76</sup> has been reaffirmed and remains law.<sup>77</sup> The test instructs tribunals to assess the reasonableness of the decision to dismiss from the perspective of the hypothetical reasonable employer – it must not substitute its own view as to the reasonableness of the decision. The breadth of the BORR, and the weight given to managerial prerogative under the test, is exhibited by Ackner LJ in *British Leyland UK Ltd v Swift*:

As has been frequently said in these cases, there may well be circumstances in which reasonable employers might react differently. An employer might reasonably take the view, if the circumstances so justified, that his attitude must be a firm and definite one and must involve dismissal in order to deter other employees from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as a special case.<sup>78</sup>

Under this test it is clear that, as Collins puts it, ‘considerations of respect for the civil liberties [and human rights] of employees rarely surface in the reasoning of the courts and tribunals’.<sup>79</sup> Consequently, the test has been heavily criticised in a vast academic literature – it has been likened to a perversity test and the *Wednesbury* test in administrative law,<sup>80</sup> described as an ‘unwarranted gloss on the statute’,<sup>81</sup> and as switching the emphasis from requiring an employer to act reasonably to requiring that an employer does not act unreasonably.<sup>82</sup>

---

<sup>76</sup> *Haddon v Van den Bergh Foods* [1999] ICR 1150 (EAT).

<sup>77</sup> *Post Office v Foley; Midland Bank plc v Madden* [2000] IRLR 827 (CA); *Sainsbury’s Supermarkets Ltd v Hitt* [2002] EWCA Civ 1588, [2003] ICR 111; *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, [2009] IRLR 563; *Orr v Milton Keynes Council* [2011] EWCA Civ 62, [2011] 4 All ER 1256; *Turner* (n 2).

<sup>78</sup> *British Leyland UK Ltd v Swift* [1981] IRLR 91 (CA).

<sup>79</sup> Collins, *Justice in Dismissal* (n 5) 185-86.

<sup>80</sup> *Associated Provincial Picture House v Wednesbury Corporation* [1947] EWCA Civ 1, [1948] 1 KB 223; Davies, *Judicial Self-Restraint* (n 9) 293; PL Davies and MR Freedland, ‘The Impact of Public Law on Labour Law, 1972-1997’ (1997) 26 ILJ 311; Collins, *Nine Proposals* (n 40) 35; Heather Williams QC ‘Dismissal and the Band of Reasonable Responses; an Unconventional Approach to Convention Rights?’ (Oxford Human Rights Hub, 4 December 2012) <<http://ohrh.law.ox.ac.uk/dismissal-and-the-band-of-reasonable-responses-an-unconventional-approach-to-convention-rights/>> accessed 27 April 2016.

<sup>81</sup> Collins, *Nine Proposals* (n 40) 36.

<sup>82</sup> Collins, *Justice in Dismissal* (n 5) 39; cf D Cabrelli, ‘The Hierarchy of Differing Behavioural Standards of Review in Labour Law’ (2011) 40 *Industrial Law Journal* 146.



The UK courts have stated that the BORR is *not* a perversity or *Wednesbury* test – most recently by Elias LJ in *Turner*.<sup>83</sup> This is unconvincing – given the breadth of the test, it is difficult to envisage an instance in which an employer’s decision falls outside the BORR and cannot be characterised as perverse.

Given that *Wednesbury* and its variants have been explicitly rejected by Strasbourgh, it is of concern that the BORR remains the standard of review in dismissal cases engaging Convention rights.<sup>84</sup> What a HRA based approach, built out of the challenge from analogy, has the capacity to contribute to this area of dismissal is the imposition of proportionality to the reasonableness element of potentially fair dismissals.<sup>85</sup>

There has been, however, a spate of domestic decisions paying lip service to protecting Convention rights and intensifying the standard of review whilst failing to apply a genuine proportionality analysis.<sup>86</sup> This line of authority has culminated in the ruling in *Turner* that the BORR is compatible as a justificatory test under the Convention – a decision that requires refuting in order to make the claim that a HRA based approach can inject proportionality into the reasonableness test.

#### *Turner v East Midlands Trains Ltd*

In *Turner*, the claimant employee was dismissed from her job as a senior train conductor due to allegations of misconduct. The employer alleged that the employee had deliberately manipulated the ticket machine so as to sell fraudulent tickets and retain the proceeds. There was no direct evidence and the employee denied the allegations. The employer based their case on statistics and inferences which could be drawn from the data – an approach that the employee accepted as adequate by the standards of domestic unfair dismissal law. However, most importantly for present purposes, the employee alleged that the dismissal engaged her Article 8 rights due to the damage to her reputation flowing from the dismissal. In these circumstances, the employee alleged that the domestic BORR did not meet the requirements of Article 8, necessitating the application of a proportionality analysis.

---

<sup>83</sup> *Turner* (n 2) [18].

<sup>84</sup> *Smith* (n 26).

<sup>85</sup> L. Vickers, ‘Unfair Dismissal and Human Rights’ (2004) 33 *Industrial Law Journal* 52.

<sup>86</sup> *McGowan v Scottish Water* [2005] IRLR 167 (EAT); *X* (n 15); *Pay* (n 29); *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932, [2005] IRLR 81.

Rejecting the claimant employee's submissions, Elias LJ held that the BORR applies to all aspects of the dismissal process, including whether adequate procedures were adopted,<sup>87</sup> and that the test provided a sufficiently robust analysis of the decision to ensure compliance with Article 8. Moreover, Elias LJ stated that the domestic test may protect human rights more effectively than the Strasbourg proportionality test.<sup>88</sup>

*Turner* is an unfortunate judgment. Elias LJ's analysis is incoherent in respect of both its finding of equivalence between the BORR and proportionality, and its characterisation of Strasbourg authority.

### Proportionality and the 'band of reasonable responses' test – structural differences

Conventional wisdom under the HRA and in Strasbourg case law necessitates that infringements on Convention rights are assessed by proportionality – *Wednesbury* and its variants are incompatible.<sup>89</sup> This is relevant, as Elias LJ's defence of the variable nature of the BORR, when Convention rights are engaged, appears very similar to the rejected super-*Wednesbury* test.<sup>90</sup>

Lord Reed in *Bank Mellat* provides the most recent and authoritative formulation of the proportionality test under the HRA.<sup>91</sup> Paraphrasing, there are four limbs:

1. the limitation on the right must pursue a legitimate aim;
2. the measure taken must be rationally connected to that legitimate aim;
3. there must be no less restrictive measure available; and
4. on balance, is the impact of the rights infringement disproportionate to the likely benefit of the impugned measure.

The BORR falls well below this standard. By virtue of the very fact that it allows for a 'band' or 'range' of responses, it is clear that it permits for dismissals which may not necessarily be the least restrictive measure to achieve the employer's legitimate aim. Moreover, proportionality by its nature requires the

---

<sup>87</sup> *Whitbread plc v Hall* [2001] IRLR 275 (CA); *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23 (CA).

<sup>88</sup> *Turner* (n 2) [56].

<sup>89</sup> *Smith* (n 26).

<sup>90</sup> *Turner* (n 2) [52]; *A v B* [2003] IRLR 405 (EAT); *Salford Royal NHS Foundation Trust v Roldan* [2010] EWCA Civ 522, [2010] ICR 1457.

<sup>91</sup> *Bank Mellat v HM Treasury* [2013] UKSC 39, [2014] A.C. 700 [74].

court/tribunal to make its own independent assessment as to whether there has been a violation of a Convention right.<sup>92</sup> Contrastingly, the BORR, as seen above, actively deters tribunals from forming their own view of the reasonableness of the employer's decision to dismiss. The assertion by Elias LJ that the BORR may more effectively protect Convention rights is highly flawed. This is especially the case in the context of domestic dismissal cases where courts and tribunals need not consider the 'Margin of Appreciation' or the aspiration of institutional preservation that drives some of the Strasbourg jurisprudence.

### Incoherent and partial view of authority

In seeking to establish the BORR as Article 8 compliant, Elias LJ offered an incoherent and partial view of Strasbourg authority.

Due to the employee's case centring on the incompatibility of the procedure adopted, Elias LJ was required first to jump the preliminary hurdle of demonstrating that Article 8 does not require a proportionality analysis in respect of procedural fairness. In jumping this hurdle, Elias LJ cited a number of Strasbourg authorities.<sup>93</sup> However, it is difficult to conclude from the passages cited that the authorities disavow a proportionality analysis. In *McMichael*, the required standard of procedure was 'to a degree sufficient to provide... the requisite protection of... interests'.<sup>94</sup> This begs the question of what is 'sufficient' and 'requisite' – usually answered through an assessment of proportionality. Similarly, in *Buckley*, it is stated that interfering measures must be 'fair' and afford 'due respect' to Article 8 interests.<sup>95</sup> What is 'fair' and affords 'due respect' is typically determined by proportionality. Finally, in *Turek*, the standard of procedural protection is said to be one which offers 'practical' and 'effective' protection of Article 8 rights – two metrics usually distilled, again, through proportionality. In this context, it is difficult to see how the weight of findings of fair dismissal, pursuant to the BORR, may be claimed to amount to 'effective' protection. Indeed, conventional Strasbourg wisdom dictates that insufficient procedural safeguards may result in a violation of Article 8.<sup>96</sup> Therefore, the conclusion Elias LJ draws from these cases, which fall short of

---

<sup>92</sup> *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104.

<sup>93</sup> *McMichael v UK* (1995) 20 EHRR 205 [102]; *Buckley v UK* (1997) 23 EHRR 101 [76]; *Turek v Slovakia* (2007) 44 EHRR 43 [113].

<sup>94</sup> *McMichael* (n 93).

<sup>95</sup> *Buckley* (n 93).

<sup>96</sup> *Connors* (n 25).

an explicit rejection of proportionality, represent a partial and incoherent view of authority.

A further, more egregious example of Elias LJ's partial presentation of the Strasbourg case law is found in his reliance on *Palomo Sanchez*.<sup>97</sup> Elias LJ cites *Palomo Sanchez* as authority for the position that, due to the leeway afforded to employers in dismissal cases, the BORR is Article 8 compliant.<sup>98</sup> Implicit in that position is the finding that no proportionality analysis is required. However, at paragraph 30, it is stated that 'the proportionality of a measure of dismissal in relation to the conduct of the employee concerned underlies all the legislation analysed.' Indeed, an explicit proportionality analysis, within which account is taken of the employer's discretion, is conducted at paragraphs 69 – 77 of *Palomo Sanchez*.

A final note on the incoherence and partiality of Elias LJ's analysis of the authorities concerns those relevant cases which were omitted. The judgment makes no references to the cases of *Pay v UK*, *Vogt v Germany* or *Obst v Germany* – all of which address infringements with Article 8 rights in employment contexts through the lens of proportionality.<sup>99</sup> Particularly in *Pay*, the Strasbourg court 'did not ask whether the employer acted "reasonably" or "within a range of reasonable responses"', and therefore it would appear that 'the test of justification under Article 8(2) differs from the normal test of reasonableness for unfair dismissal'.<sup>100</sup> Moreover, the Strasbourg court continues to assess such infringements on a proportionality basis.<sup>101</sup> Such cases, therefore, point strongly in the direction that Article 8 requires that any infringements be assessed as a matter of proportionality, contrary to the decision in *Turner*.

### Turner – conclusions

In light of the above, there is a strong case to be made that the judgment in *Turner v East Midlands Trains* requires revisiting, and that the BORR does not satisfy the requirements of Article 8. Ultimately, *Turner* is a judgment symptomatic of the judicial view challenged in Part I. Therefore, suspending

---

<sup>97</sup> *Palomo Sanchez v Spain* (2012) 54 EHRR 24.

<sup>98</sup> *Turner* (n 2) [53].

<sup>99</sup> *Pay v United Kingdom* (2009) 48 EHRR SE2; *Vogt* (n 31); *Obst v Germany* App no 425/03 (ECtHR, September 23, 2010); *Schuth v Germany* (2011) 52 EHRR 32.

<sup>100</sup> V. Mantouvalou and H. Collins, 'Private life and dismissal: Pay v UK' (2009) 38(1) *Industrial Law Journal* 133.

<sup>101</sup> *Fernandez-Martinez v Spain* (2015) 60 EHRR 3.

disbelief and assuming that the judiciary take a more reflective institutional view of self as suggested, there is a strong case that a HRA based approach to relevant dismissals would yield a different result.

Indeed, a HRA based approach coupled with a shift in judicial attitudes, is capable of offering a proportionality analysis in dismissals engaging Convention rights. This would bring unfair dismissal in line with HRA analyses in other areas and with the direction of travel in Strasbourg.<sup>102</sup>

## Remedies

There are three possible remedies for unfair dismissal: reinstatement, reengagement, and compensation.<sup>103</sup> The compensatory award has two elements: a basic award and a compensatory award. The basic award is calculated by statutory formula. The compensatory award is calculated by what the tribunal considers just and equitable.<sup>104</sup>

The practice of this remedial scheme has a number of deficiencies: firstly, a negligible number of unfair dismissals result in orders of reinstatement or reengagement. Only 5 of 5,100 upheld cases in 2011-2012 made such orders.<sup>105</sup> Secondly, the damages awarded in unfair dismissal cases are low – the median award in 2011-2012 being £4,560.<sup>106</sup> Thirdly, there is a statutory cap on the amount of damages available for an unfair dismissal which is currently set at £72,300.<sup>107</sup> Fourthly, in a finding of unfair dismissal for a failure to follow correct procedures, an award of damages may be reduced by up to 50% if the employer shows that the employee would have been dismissed in any event - the *Polkey* deduction<sup>108</sup>. Fifthly, awards may be reduced for contributory negligence or subsequent proof of good cause for summary dismissal to zero.<sup>109</sup> Sixthly,

---

<sup>102</sup> H Collins and V Mantouvalou, 'Human Rights and the Contract of Employment' in M Freedland and others (eds), *The Contract of Employment* (OUP 2016), 205.

<sup>103</sup> ERA 1996, ss 112-127B.

<sup>104</sup> ERA 1996, s 123.

<sup>105</sup> Ministry of Justice, Employment Tribunals and EAT Statistics 2011-2012, <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/218497/employment-trib-stats-april-march-2011-12.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218497/employment-trib-stats-april-march-2011-12.pdf)> accessed 2 May 2016, table 3.

<sup>106</sup> *ibid* table 5.

<sup>107</sup> ERA 1996, s 124.

<sup>108</sup> *Polkey* (n 41).

<sup>109</sup> ERA 1996, s 123(6); *W Devis & Sons v Atkins* [1977] ICR 662 (HL); *Nelson v BBC* (No 2) [1980] ICR 110 (CA).

and problematically from a rights perspective, no damages may be awarded for non-pecuniary loss.<sup>110</sup>

At present, it would appear that a HRA based approach to dismissals engaging Convention rights would be of limited use in bolstering the remedial regime.<sup>111</sup> The reason for this is that damages under the HRA have thus far been subject to Lord Bingham's 'mirror' principle.<sup>112</sup> The 'mirror' principle holds that courts and tribunals must look exclusively to Strasbourg jurisprudence for guidance on the award of damages and as to quantum. This is problematic for unfair dismissal as Strasbourg, under Article 41, recognises only 'just satisfaction'.<sup>113</sup> The effect has been to preclude, *inter alia*, awards of punitive damages under the HRA – a key recommendation of Collins, alongside injunctions, for the reform of unfair dismissal.<sup>114</sup> Moreover, remedies for breaches of human rights may also be purely declaratory. Space precludes a full discussion of the flaws of this approach, but there have been calls for a tort-based approach to HRA damages.<sup>115</sup>

It is worth noting that there since the development of the principle of judicial 'dialogue' there may be some light on the horizon for damages under the HRA.<sup>116</sup> However, at present, a HRA based approach to dismissals engaging Convention rights would be of limited efficacy in respect of improving the remedial regime for unfair dismissal.

## CONCLUSION

The purpose of this paper has been to make the case for a HRA based approach to dismissals engaging Convention rights.

In making the case, two interconnected exercises have been conducted. Firstly, it was necessary to pave the way for a HRA based approach to

---

<sup>110</sup> *Addis v Gramophone Co Ltd* [1909] AC 488 (HL); *Dunnachie v Kingston-upon-Hull City Council* [2004] UKHL 36, [2005] 1 AC 226.

<sup>111</sup> Oliver (n 13) 358-9.

<sup>112</sup> HRA 1998, s 8; R (*Ullah*) v *Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20]; R (*Greenfield*) v *Secretary of State for the Home Department* [2005] 1 WLR 673 [18-19].

<sup>113</sup> ECHR Art. 41.

<sup>114</sup> *Selçuk v. Turkey* (1998) 26 EHRR 477; *Mentes v Turkey* (1998) 26 EHRR CD 1; *BB v United Kingdom* (2004) 39 EHRR 30; Collins, *Nine Proposals* (n 40) 76.

<sup>115</sup> Jason N.E. Varuhas, 'Damages' in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011).

<sup>116</sup> *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373.

dismissals. This was done through demonstrating horizontality and, more importantly, introducing the ‘challenge from analogy’ to the judicial institutional view of self in dismissal cases. Secondly, the potential of such an approach was assessed. It is clear from the preceding analysis that a HRA based approach has the potential to vastly improve the protection of Convention rights in dismissal by widening the personal scope of the action, and by injecting a proportionality analysis into the assessment of the reasonableness of decisions to dismiss.

There are, however, limitations to a HRA based approach: firstly, in order to benefit from the increased protection, an individual must be able to hang their claim on a ‘human rights hook’; secondly, it is unlikely to positively affect remedies for unfair dismissal; and, thirdly, to be applied at its height it requires that the ‘challenge from analogy’ to judicial attitudes be accepted. On this last point, however, the contemporary judicial willingness to engage with matters previously thought beyond their competence, such as the bedroom tax litigation, may indicate a climate of judicial intervention in which the ‘challenge from analogy’ may be more readily accepted.<sup>117</sup>

Space has precluded a full analysis of the literature on the underlying theory of dismissal law.<sup>118</sup> Considering what Collins would add to a second edition of *Justice in Dismissal* would be a fruitful area of further research. Since his monograph, the HRA has been passed and the UK courts have developed a healthy rights jurisprudence. Better distilling the underlying theoretical importance of protection from dismissal, in this context, could offer an intellectual architecture from which the courts, accepting the ‘challenge from analogy’, could build a stronger unfair dismissal regime for all workers.

A necessary first step, however, is ensuring that sufficient protection is offered in instances of dismissal engaging rights which the law *already* recognises as important – Convention rights. This paper hopes to contribute towards taking that first step.

---

<sup>117</sup> R (*Rutherford*) v *Secretary of State for Work and Pensions* [2016] EWCA Civ 29, [2016] HLR 8.

<sup>118</sup> Collins, *Justice in Dismissal* (n 5); Gwyneth Pitt, ‘Justice in dismissal: A reply to Hugh Collins’ (1993) 22(4) *Industrial Law Journal* 251.