

# EMPLOYMENT TRIBUNALS

Claimant Respondent Mr M Wikramabahu Senarath Nigeria High Commission ν Central London Employment Tribunal (BY CVP videolink) Heard at: 7 June 2021 On: Before: **Employment Judge Brown** Appearances: Claimant: Did not attend and was not represented Did not attend and was not represented Respondent:

# JUDGMENT

The Claimant's claim is struck out because the Tribunal has no jurisdiction to consider it, as all his complaints are barred by state immunity.

# REASONS

## Preliminary

- 1. By a claim form presented on 18 October 2019, the Claimant brought complaints of unfair dismissal; failure to pay redundancy pay; and unlawful deductions from wages against the Respondent Embassy, his former employer. The Claimant stated that he was employed as a chauffeur.
- 2. The First Claimant's claim was sent to the FCO for service on the Nigerian Ministry of Foreign Affairs by the FCO Diplomatic Channel on 25 November 2019.
- 3. The Respondent has not presented an ET3 Response.
- 4. This hearing was listed to decide whether to strike out the Claimant's claims because they have no reasonable prospect of success and/or the Tribunal has no jurisdiction to consider them because they are barred by state immunity.
- 5. Neither the Claimant nor the Respondent attended the Hearing today. Joining instructions had been sent to the parties. I was satisfied that the parties were otherwise aware of the hearing today, as it was listed at a Preliminary Hearing on 25 March 2021, when the Claimant had attended. The Preliminary Hearing record had been sent to the parties.

- 6. I proceeded with the hearing in the absence of the parties.
- 7. The hearing today was conducted by CVP videolink. Members of the public were entitled to attend the hearing, and 2 did.

#### Tribunal Required to Give Effect to State Immunity

- 8. Foreign states enjoy a general immunity from the jurisdiction of the courts in the UK, pursuant to the State Immunity Act 1978. By *SIA 1978 s 1(1)*: 'A state is immune from the jurisdiction of the courts of the UK, except as provided in the following provisions of this Part of this Act'.
- 9. Courts and Tribunals are required to give effect to this immunity, even if the Respondent foreign state does not appear in the proceedings. The Tribunal in this case is therefore required to give effect to state immunity, even though the Respondent state has not appeared in these proceedings.
- 10. State immunity does not apply in the case of proceedings relating to a contract of employment between the state and an individual where the contract was made in the UK or the work is to be wholly or partly performed there,  $s \ 4(1) \ SIA$ . On the other hand, s4(1) itself does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Vienna Convention on Diplomatic Relations or the members of a consular post within the meaning of the Vienna Convention on Consular Relations,  $s \ 16(1)(a) \ SIA$ .
- 11. Art 1 VCDR defines: (1) The "members of the mission" as including "members of the staff of the mission": art 1(b); (2) The "members of the staff of the mission" as including "members ... of the administrative and technical staff ... of the mission": art 1(c); and (3) "The "members of the administrative and technical staff of the mission" are the members of the staff of the mission employed in the administrative and technical service of the mission": art 1(f).
- 12. Thus, where the provisions of s 16(1)(a) SIA apply, state immunity can operate to prevent employees from bringing claims relating to their contract of employment. Lord Sumption in Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs; Secretary of State for Foreign and Commonwealth Affairs; Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah Benkharbouche v Republic of Sudan ors [2018] IRLR 123, [2017] ICR 1327 SC, said, at [1]: "the effect of section 16(1)(a) is that a state is immune as respects proceedings concerning the employment of members of a diplomatic mission, including its administrative, technical and domestic staff."
- 13. In Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs; Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah, [2018] IRLR 123, [2017] ICR 1327, the Supreme Court decided that the doctrine of state immunity in international law applied only sovereign acts, not private acts, of the foreign state concerned. Whether there has been such an act will depend on the nature of the relationship between the parties, and this in turn will depend on the functions that the employee was employed to perform. With regard to purely domestic staff employed in a diplomatic mission, their employment is not an inherently governmental act, but is an act of a private law character, and there is no basis in customary international law for the application of state immunity in an employment context to such acts. The wider immunity conferred in such

employment cases by ss 4(2)(b) and 16(1)(a) State Immunity Act 1978 was therefore inconsistent with art 6 of the European Convention on Human Rights, and art 47 of the Charter of Fundamental Rights of the EU.

- 14. Following *Benkharbouche*, Tribunals do have jurisdiction to hear complaints brought by domestic staff against foreign states based on EU law, if the employment relationship is of a purely private law character. Art 47 of the Charter of Fundamental Rights of the EU provides for the right to an effective remedy and a fair trial. The Supreme Court decided that the Charter of Fundamental Rights of the power to disapply the provisions of the SIA 1978 to ensure that the Claimants were able to pursue an effective remedy for the alleged contravention of their EU law rights.
- 15. However, under the *State Immunity Act* 1978, Tribunals still do not have jurisdiction to hear complaints based on national law only.
- 16. While a Declaration of Incompatibility was made in *Benkharbouche*, domestic law claims remain barred by the *SIA* 1978 because the Supreme Court decided that neither s 4(2)(b) nor s 16(1)(a) *SIA* could be read down, pursuant to the *HRA* 1998 s 3(1), in such a way as to make them compatible with the Convention rights.
- 17. The UK Government has not taken any action following the declaration of incompatibility in *Benkharbouche*. The *SIA* has not been amended or repealed in any way. The effect of s16(1)(a) *SIA* is still that a state is immune regarding UK domestic law employment claims brought by members of a diplomatic mission, including its administrative, technical and domestic staff.

### This case

- 18. All the Claimant's claims in this case are claims based on UK law only. On the face of it, all his claims are barred by state immunity. The Claimant did not attend the hearing today to argue otherwise.
- 19. I decided that all the Claimant's complaints are barred by state immunity, so that the Tribunal has no jurisdiction to hear them. The Claimant's claim is therefore struck out.

Dated: 7 June 2021

Employment Judge Brown

SENT TO THE PARTIES ON

07/06/2021.....

FOR THE TRIBUNAL OFFICE