EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
MISS L LORENZO JULIAN		**THE KINGDOM OF SPAIN**

Heard at: London Central, by CVP

On: 20 April, 2021

Before: Employment Judge O Segal QC

Representations
For the Claimant: In person
For the Respondent: Mr J Davies, counsel

JUDGMENT

The judgment of the Tribunal is that:-

(1) The claims under the Employment Rights Act 1996 and Employment Act 2002 are dismissed.

(2) The claims under the Equality Act 2010 will proceed – the Respondent is not able to assert either diplomatic or state immunity in respect of these claims.

(3) The correct Respondent in respect of those latter claims is 'The Kingdom of Spain'.

REASONS

Introduction – The issues

1. By a claim form presented on 24 December 2015, the Claimant brought complaints of (constructive) unfair dismissal contrary to s94 Employment Rights Act 1996; failure to provide a written statement of terms and conditions pursuant to s1 Employment Rights Act 1996 & s38 Employment Act 2002; direct race discrimination (because of her British nationality) contrary to ss13 and 39 Equality Act 2010; and harassment related to race (British nationality) under ss26 and 39 Equality Act 2010 against the Respondent Embassy.

2. At a hearing in 2018, EJ Wade ruled that the Respondent had not submitted to the jurisdiction of the Courts of the United Kingdom by waiving any immunity on which it was entitled to rely in defence of these claims.

3. This open Preliminary Hearing was listed by EJ Brown on 4 December 2000, to determine all issues relating to state and diplomatic immunity in this case. I take the following paragraphs, setting out the issues in that regard, largely from the helpful Case Management Summary following that hearing,

4. Foreign states enjoy a general immunity from the jurisdiction of the courts in the UK, pursuant to the State Immunity Act 1978 ("SIA"). By SIA 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"*. However, 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.

5. On the other hand, s 4(1) SIA itself does not apply:-

5.1. Where at the time proceedings are brought the individual is a national of the State concerned: s 4(2)(a); or

5.2. 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.

6. Thus, where the provisions of s 4(2)(a) or s 16(1)(a) apply, state immunity will, as a matter of domestic law, operate to prevent employees from bringing claims relating to their contract of employment.

Claims based on EU legal rights

7. Nevertheless, in Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs; Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah [2017] ICR 1327, the Supreme Court decided that the doctrine of state immunity in international law applied in general only to 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 domestic staff employed in a diplomatic mission, such as the claimants in that case, their employment and functions are 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) and 16(1)(a) SIA 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.

8. Following Benkharbouche, therefore, tribunals do have jurisdiction to hear complaints brought by domestic staff against foreign states **based on EU law**, where the employment relationship is of a private law character. Art 47 of the Charter provides for the right to an effective remedy and a fair trial. The Supreme Court decided that the Charter therefore provided the power to disapply those provisions of SIA, to ensure that the Claimants were able to pursue an effective remedy for the alleged contravention of their EU law rights.

9. In this case, the Respondent contends that the Claimant was not a member of the Respondent's domestic staff, but was a member of its Administrative/Technical staff. The Respondent says that her functions were sufficiently close to the governmental functions of the mission that her employment involved the exercise of an inherently sovereign or governmental act, so that her all claims are barred by state immunity.

Claims based on solely domestic legal rights

10. By reason of those same provisions of SIA, ss 4(2) and 16(1)(a), tribunals do **not** have jurisdiction to hear claims brought by the same sort of claimants as in Benkharbouche **based on national law** only. While a declaration of incompatibility was made in Benkharbouche, domestic law claims remain barred by SIA 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 Convention rights.

11. In addition, the Respondent relies on diplomatic immunity to defeat the Claimant's claims. It says that the Kingdom of Spain can only be liable to the Claimant for breaches of the Equality Act 2010 ('EqA') through the actions of the persons against whom the Claimant makes her allegations. The Respondent says that those persons are members of the staff of the Diplomatic mission to whom diplomatic immunity applies in varying degree, depending on their status in the mission and the nature of the activity carried out. Most of the allegations are made against Sr. Gonzales, who held the position of '*Canciller'*. It says that the Claimant's contract of employment is expressed to be between the Claimant and the Ambassador. The Ambassador is a diplomatic agent within the meaning of the Vienna Convention and enjoys almost total immunity from suit. The Respondent also says that Sr González is either also such a diplomatic agent with the meaning of the Vienna Convention, or a member of the administrative and technical staff who enjoys that immunity in so far as his acts are performed within the course of his duties pursuant to Article 37 Vienna Convention on diplomatic immunity. In either category, he enjoys the bundle of rights which constitute diplomatic immunity. One of those rights is immunity from the civil jurisdiction of the host country under Art 31 of the Vienna Convention (para 8 of judgment of Lord Sumption in Reyes v Al-Maliki [2018] IRLR 267). He also cannot be compelled to give evidence before the Employment Tribunal: Article 31(2) Vienna Convention.

Evidence

12. I had a bundle prepared pursuant to the directions of the tribunal by the Respondent.

13. I had witness statements and heard live oral evidence from:

13.1. the Claimant; and

13.2. Ms Beatriz Aparacio Campillo, current *Canciller* at the Spanish Embassy in London.

Facts

14. The facts were largely agreed and/or matters of documentary record. I record only those facts which are material to my decision.

15. The Claimant was recruited to work in the Spanish Embassy in about January 2008 whilst she was living in London. She had at that time dual nationality (UK and Spain) and a Spanish passport.

16. The Claimant initially worked as the Ambassador's Social Secretary, in which capacity she worked mainly from his official residence (next door to the Embassy) and sometimes saw confidential documents for the purposes of copying them, etc. After what was described to me as a career break, the Claimant returned to work in 2013 in a more junior capacity, Administrative Assistant, as one of a staff of about 42 working in the Embassy. In the latter capacity, she rarely had sight of confidential documents; and in particular in so far as she placed or listed documents in the 'diplomatic bag' they were almost always in sealed envelopes. At some point towards the end of her employment with the Respondent, the Claimant acted up in the capacity of Protocol Officer, which was described to me as a quasi-civil servant role, liaising with the FCO about arrivals and departures of staff and issues of duty-free goods, diplomatic cars, etc, in that context.

17. The Claimant's contract of employment, dated January 2008, is made, on its face, between herself and the then Ambassador, Mr Carlos Miranda Elio. Mr Miranda left the London Embassy later in 2008 and apparently retired in 2013. Ms Aparicio told me that it was predictable that no new contract would be issued to the Claimant when Mr Miranda left, nor even when the Claimant returned from a period of unpaid absence in 2013, because Embassy staff employment contracts are made with the Spanish Ministry of Foreign Affairs, on whose behalf the current Ambassador acts when he executes those contracts.

18. The contract records that the Claimant has Spanish nationality and a Spanish passport and is resident in Notting Hill, London. At clauses 4 and 5, the Claimant is subject to Spanish social security law and is responsible for her own taxes. The Claimant told me (and there was no dispute raised by the Respondent) that these terms were offered to all staff, regardless of whether they had Spanish nationality.

19. The presence of the Claimant was not notified to the FCO because, as a locally employed member of staff, such notification was only required (or at least only made in practice) where the staff member enjoyed diplomatic 'privileges', such as exemption from local taxes, diplomatic immunity, etc. That contrasts with the position of Mr Gonzales, whose presence in the UK was notified to the FCO on the basis that he enjoyed those 'privileges' in the capacity of 'Attache (Administrative Affairs) – Diplomatic Staff'.

The Law

20. I have referred to the key provisions of SIA above and will cite them in full where appropriate in the Discussion part of these Reasons.

21. Benkharbouche has also been referred to above. Rather than set out the various relevant parts of Lord Sumption's judgment here, I shall cite them where appropriate in the Discussion part of these Reasons.

22. The Reyes case concerned the scope of diplomatic immunity of a Saudi Arabian diplomat who had worked in London at the material time and since left London, pursuant to the Vienna Convention. The critical issue was whether the employment and treatment by him and his wife of the claimant, employed as a domestic servant, were *"acts performed … in the exercise of his functions as a member of the mission"*. The Supreme Court held that they were not.

23. Section 109 EqA provides:

Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

...

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.

24. Section 110 provides:

Liability of employees and agents

(1) A person (A) contravenes this section if—

(a) A is an employee ...,

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer ... , and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

(2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).

Discussion

52. Both the Claimant and Mr Davies provided written submissions and supplemented those orally. I am grateful to them both, and in particular for Mr Davies' written submissions provided in advance of the hearing, which enabled me to identify and understand the material issues with much greater ease than would otherwise have been the case.

Diplomatic immunity

53. The key issue under this heading is whether diplomatic immunity is engaged where the Respondent is the Kingdom of Spain (only) and not any individual diplomat, such

as Mr Miranda or Mr Gonzales (both of whom for the purposes of this part of the Reasons I am prepared to assume would be covered by diplomatic immunity; as seems to me likely in the latter case and obvious in the former case).

54. The Respondent puts its argument in this way: *"The Kingdom of Spain, as ultimate employer of its diplomatic agents, must be entitled to rely on the immunity which attaches to the persons in respect of whom it could be said to be vicariously liable"*. In that regard, it relies, by analogy, on remarks of Laws J in Propend Finance v Sing (unreported), quoted in Re P [1998] 1 FLR 624, at 627, to the effect that a diplomat's immunity exists only *"in right of his sending State"*; thus only the State, and not the diplomat herself/himself can waive that immunity.

55. I disagree.

56. Regardless of the derivation of the immunity and by whom it can lawfully be waived, the immunity is that of the individual diplomat from criminal prosecution or civil suit. It is, as Mr Davies acknowledged, a 'novel' argument by which the Respondent seeks to extend diplomatic immunity to prevent suits against the State of the diplomat.

57. Further, as Mr Davies also acknowledged, it would mean that the very types of case considered in Benkharbouche could never be brought (at least until the diplomat(s) concerned had returned home) – a potential result which it is unlikely the respondents in Benkharbouche and the various courts seized of the case would have missed, even had it not been originally pleaded.

58. The position is particularly clear in this context, it seems to me, as regards claims under the EqA. Section 109 makes an employer liable, essentially, for not taking all reasonable steps to prevent its employees discriminating against or harassing another of its employees. It is a complete defence under s. 109(4) for the employer to demonstrate it took those steps. The potential liability of the individual person discriminating/harassing a claimant is dealt with under s. 110, under which that liability is separate from and regardless of that of the employer. I see no reason in these circumstances why a claim under the EqA against a State should be precluded on the basis that the person who is alleged to have discriminated against/harassed the claimant was a diplomat.

59. In the circumstances, I do not need to determine the other issues raised in the Respondent's submissions under this heading (which seem to me, on a preliminary view, to be well made).

State immunity

The Claimant is a Spanish national

60. Section 4 SIA provides, materially:

> *4(1) A state is not immune as respects proceedings relating to a contract of employment between the state and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.*
>
> *(2) Subject to subsections (3) and (4) below, this section does not apply if*
>
> > *(a) at the time when the proceedings are brought the individual is a national of the state concerned; or*
> >
> > *(b) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; …*

61. Thus, as a matter of domestic law, pursuant to s 4(2)(a) the Respondent has immunity in respect of claims brought by the Claimant because she was, in 2015, a national of Spain (as well as of the UK).

62. The question is therefore whether, applying the principles established in Benkharbouche, article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and/or article 47 of the Charter of Fundamental Rights of the European Union (the Charter), mean that s 4(2)(a) should be disapplied in respect of the claims under the EqA in this case.

63. I set out the relevant parts of Lord Sumption's judgment in this context (emphasis added):

> 53 As a matter of customary international law, **if an employment claim arises out of an inherently sovereign or governmental act of the foreign state, the latter is immune**. It is not always easy to determine which aspects of the facts

giving rise to the claim are decisive of its correct categorisation, and the courts have understandably avoided over-precise prescription. The most satisfactory general statement is that of Lord Wilberforce in The I Congreso, at p 267:

> "The conclusion which emerges is that in considering, under the 'restrictive' theory whether state immunity should be granted or not, **the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity … of a private law character**, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and **within the sphere of governmental or sovereign activity**."

54 In the great majority of cases arising from contract, including employment cases, the categorisation will depend on the nature of the relationship between the parties to which the contract gives rise. **This will in turn depend on the functions which the employee is employed to perform**.

55 The Vienna Convention on Diplomatic Relations divides the staff of a diplomatic mission into three broad categories: (i) diplomatic agents, i e the head of mission and the diplomatic staff; (**ii) administrative and technical staff**; and (iii) staff in the domestic service of the mission. Diplomatic agents participate in the functions of a diplomatic mission defined in article 3, principally representing the sending state, protecting the interests of the sending state and its nationals, negotiating with the government of the receiving state, ascertaining and reporting on developments in the receiving state and promoting friendly relations with the receiving state. These functions are inherently governmental. They are exercises of sovereign authority. Every aspect of the employment of a diplomatic agent is therefore likely to be an exercise of sovereign authority. **The role of technical and administrative staff is by comparison essentially ancillary and supportive**. **It may well be that the employment of some of them might also be exercises of sovereign authority if their functions are sufficiently close to the governmental functions of the mission. Cypher clerks might arguably be an example. Certain confidential secretarial staff might be another:** … … In

Cudak v Lithuania 51 EHRR 15, Sabeh El Leil v France 54 EHRR 14, Wallishauser v Austria CE:ECHR:2012:0717JUD000015604 and Radunovic v Montenegro CE:ECHR:2016:1025JUD004519713, all cases concerning the administrative and technical staff of diplomatic missions, **the test applied by the Strasbourg court was whether the functions for which the applicant was employed called for a personal involvement in the diplomatic or political operations of the mission, or only in such activities as might be carried on by private persons**. In Mahamdia v People's Democratic Republic of Algeria (Case C-154/11) [2013] ICR 1, paras 55—57 **the Court of Justice of the European Union applied the same test, holding that the state is not immune "where the functions carried out by the employee do not fall within the exercise of public powers"**. The United States decisions are particularly instructive, because the Foreign State Immunity Act of the United States has no special provisions for contracts of employment. They therefore fall to be dealt with under the general provisions relating to commercial transactions, which have been interpreted as confining state immunity to exercises of sovereign authority: see Saudi Arabia v Nelson (1993) 507 US 349, 360. The principle now applied in all circuits that have addressed the question is that **a state is immune as regards proceedings relating to a contract of employment only if the act of employing the plaintiff is to be regarded as an exercise of sovereign authority having regard to his or her participation in the diplomatic functions of the mission**: see Segni v Commercial Office of Spain (1987) 835 F 2d 160, 165 and Holden v Canadian Consulate (1996) 92 F 3d 918. Although a foreign state may in practice be more likely to employ its nationals in those functions, **nationality is in itself irrelevant to the characterisation**: see El-Hadad v Embassy of the United Arab Emirates (2000) 216 F 3d 29, paras 4, 5. …

57 I would, however, wish to **guard against the suggestion that the character of the employment is always and necessarily decisive**. Two points should be made, albeit briefly since neither is critical to this appeal.

58 The first is that **a state's immunity under the restrictive doctrine may extend to some aspects of its treatment of its employees or potential employees which engage the state's sovereign interests**, even if the contract of

employment itself was not entered into in the exercise of sovereign authority. Examples include claims arising out of an employee's dismissal for reasons of state security. They may also include claims arising out of a state's recruitment policy for civil servants or diplomatic or military employees, or claims for specific reinstatement after a dismissal, which in the nature of things impinge on the states recruitment policy. …

59 The second point to be made is that **the territorial connections between the claimant on the one hand and the foreign or forum state on the other can never be entirely irrelevant, even though they have no bearing on the classic distinction between acts done jure imperii and jure gestionis**. This is because the core principle of international law is that sovereignty is territorial and state immunity is an exception to that principle. As the International Court of Justice observed in Jurisdictional Immunities of the State [2012] ICJ Rep 99, para 57, the principle of state immunity:

> "has to be viewed together with the principle that each state possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the state over events and persons within that territory. Exceptions to the immunity of the state represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it".

The whole subject of the territorial connections of a non-state contracting party with the foreign or the forum state raises questions of exceptional sensitivity in the context of employment disputes. **There is a substantial body of international opinion to the effect that the immunity should extend to a state's contracts with its own nationals irrespective of their status or functions even if the work falls to be performed in the forum state; and correspondingly that it should not extend to staff recruited from the local labour force in whose protection the forum state has a governmental interest of its own.** Both propositions received substantial support in the preparatory sessions leading to the United Nations Convention and were reflected in the final text of article 11. **Both receive a measure of recognition in the Vienna**

> **Convention on Diplomatic Relations which carefully distinguishes between the measure of immunity accorded to the staff of a diplomatic mission according to whether they are nationals of the foreign state or nationals or permanent residents of the forum state: see articles 33(2), 37, 38, 39(4) and 44**. **In a practical sense, it might be thought reasonable that a contract between a state and one of its own nationals should have to be litigated in the courts of that state under its laws, but unreasonable that the same should apply to locally recruited staff.** There is, however, only limited international consensus on where the boundaries lie between the respective territorial responsibilities of the foreign and the forum state, and on how far the territorial principle can displace the rule which confers immunity on acts jure imperii but not on acts jure gestionis.

64. I note, by reference to the citations in that last paragraph from the Vienna Convention, that all of the Articles referred to make the key distinction, whether or not the persons concerned are *"nationals of or permanently resident in the receiving State"*; if they are, then the immunities granted by those various Articles do not apply.

65. On the question of primary principle, whether the interactions complained of between the Claimant and Mr Gonzales *"arise out of an inherently sovereign or governmental act of"* the State of Spain, I hold that they did not. Focussing in particular on the *"functions which the employee [the Claimant] is employed to perform"*, it seems to me they were not comparable to the functions of the cipher clerk or confidential secretary. They were not *"the functions [which] called for a personal involvement in the diplomatic or political operations of the mission"* but were rather *"such activities as might be carried on by private persons"*. The acts complained of did not *"engage the state's sovereign interests"*.

66. In that regard, the Respondent's reliance on the earlier case of Sengupta v Republic of India [1983] ICR 221, where the EAT found that the acts of a person at 'the lowest clerical level' fell into the category of sovereign acts, is misplaced. As Lord Sumption commented at para [73] of Benkharbouche:

> "Sengupta v Republic of India was decided at an early stage of the development of the law in this area and, in my opinion, the test applied by the Employment Appeal Tribunal was far too wide. I agree with the criticism of the decision in Fox, The Law of State Immunity, p 199n, that the reasoning had more regard to the purpose than to the juridical character of the claimant's employment."

67. Against that important background, I turn to the narrow question of whether I should disapply s 4(2)(a) SIA by reference to article 47 of the Charter. There is a tension, in this case, between two competing principles: (1) that immunity should apply between a state and nationals of that state; and (2) immunity should not apply in respect of locally recruited staff who are nationals of and permanently resident in the forum state. From the Vienna Convention, it would seem that the latter is the dominant consideration.

68. In this case, the Claimant, although in both categories, is in any event, on the material facts, much more in the second. It is almost, although not quite, a coincidence that the Claimant had Spanish nationality (though it was essential that she was bilingual). She was, effectively, a member of locally recruited staff who spoke Spanish and happened to have dual Spanish nationality.

69. I therefore hold that, for the same reasons of principle as s 4(2)(b) was disapplied in Benkharbouche, s 4(2)(a) should be disapplied in respect of the Claimant's EqA claims in this case.

The Claimant being a member of the staff of the Mission

70. Section 16(1) SIA provides:

> "This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968; and – (a) section 4 above does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Convention scheduled to the said Act of 1964 or of the members of a consular post within the meaning of the Convention scheduled to the said Act of 1968"

71. The Supreme Court in Benkharbouche decided that s 16(1), which extends immunity to the claims of any employee of the diplomatic mission, irrespective of whether the relevant act was in exercise of sovereign authority, could not be justified by reference to any rule of customary international law; and therefore disapplied in in respect of EU-law derived claims.

72. For the same reasons, I hold that the Respondent cannot rely on an immunity pursuant to s. 16(1) on the facts of this case in respect of the Claimant's EqA claims.

Does article 47 of the Charter apply to these claims?

73. This point is a short one. The Respondent initially argued that s 5(4) of the European Union (Withdrawal Agreement) Act 2018 meant that the Charter did not apply after January 2020. However, Mr Davies acknowledged during the hearing that this was subject to Schedule 8, para 39, of that Act, which provides that the Charter continues to apply in respect of proceedings brought before the UK left the EU.

Can the Claimant's domestic law claims survive?

74. Once it had been held by this tribunal (see above) that the Respondent had not waived immunity by submitting to the jurisdiction of the tribunal, ss 4(2)(a) and 16(1) SIA have the prima facie effect that the Claimant cannot pursue purely domestic claims against the Respondent.

75. It is, as the Supreme Court held in Benkharbouche, not possible to 'read down' s 16(1) SIA to make it compliant with Article 6 of the ECHR. In the circumstances, whilst I incline to the view that it would be possible to 'read down' s 4(2)(a) to be compliant (cf s 4(2)(b), which Benkharbouche held cannot be so 'read down'), the Claimant cannot pursue her claims under the Employment Rights Act 1996 and Employment Act 2002 by reason of the Respondent's state immunity.

76. At the hearing, the Claimant attempted to resuscitate some of the arguments relating to whether the Respondent had submitted to the tribunal's jurisdiction; but accepted that that issue had been determined (apparently the Claimant had tried to appeal that decision, but without success).

Conclusion

77. Only the Claimant's claims under the EqA will proceed.

78. If, as I understand to be the case, directions will need to be given and a hearing listed to determine those claims, the parties should attempt to agree and write in to the tribunal with proposed directions and seeking a listing with a suggested number of days needed for that hearing.

Oliver Segal QC

Employment Judge

20 April, 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

16th June 2021.