EMPLOYMENT TRIBUNALS

Claimant		*Respondent*
Miss ME Iheme	**AND**	**1. Nigeria High Commission** **2. Federal Republic of Nigeria**

OPEN PRELIMINARY HEARING

HELD AT: **London Central (by CVP remote videolink)**

ON: 21 January 2022

BEFORE: Employment Judge Brown

Representation:

For Claimant: In person
For Respondent: Mr Pipi, Counsel

JUDGMENT AT AN OPEN PRELIMINARY HEARING

The judgment of the Tribunal is:

1. The Claimant's employment did not involve inherently sovereign or governmental acts in accordance with the judgment in *Benkharbouche,* but was a purely private act.

2. The Claimant is therefore entitled to judgment against the Respondents in her claims that she was discriminated against because of her sex and religion and was victimised, and is entitled to compensation from the Respondents in the sum of £70,747.06.

REASONS

Background

1. The background to this hearing was that I had made a r21 judgment and a remedy judgment in favour of the Claimant on 30 September 2019. The Respondent appealed that judgment to the Employment Appeal Tribunal. By judgment dated 15 September 2021 the Employment Appeal Tribunal allowed the Respondent's appeal on one ground – that the Employment Tribunal misdirected itself by failing to consider whether or not the Claimant's

employment at the diplomatic mission involved an inherently sovereign or governmental act, or was a purely private act.

2. The EAT remitted the case to the same Employment to consider whether or not the Claimant's employment involved inherently sovereign or governmental acts in accordance with the judgment in *Benkharbouche,* or was a purely private act. The EAT said that, if the former, the Claimant's claims should be dismissed as state immunity applies. If the latter, the Claimant's claims that she was discriminated against because of her sex and religion and was victimised, and was entitled to compensation in the sum of £70,747.06, should be allowed.

This Hearing

3. The issue to be determined is whether the Claimant's employment involved inherently sovereign or governmental acts, or was a purely private act, because she exercised ancillary and supportive technical and administrative functions.

4. I had previously given directions for the preparation of this Hearing, including exchange of documents relevant to the issue of state immunity, preparation of a bundle and exchange of witness statements. The Respondents had prepared a short bundle, but the Bundle did not have any documents from the Claimant's period of employment. It contained a short witness statement from the Claimant.

5. I heard evidence from the Claimant. She was cross examined by Mr Pipi for the Respondents.

Findings of Fact

6. The Claimant was employed by Nigeria High Commission from 7 April 2010 until her dismissal on 6 January 2014. She gave the following evidence about her roles, which I accepted.

7. The Claimant worked as a Schedule Officer for the High Commission from 7 April 2010 - 14 January 2013. This role involved receiving applicants for visas and passports. In order to attend a visa/passport appointment, an applicant is expected to have made a valid appointment, to have made the correct payment online and to bring the proper paperwork. The Claimant's job was to check that the applicant had complied with all these requirements. For example, she would check that the applicant had put their surname and forenames in the correct boxes on the forms. The Claimant would also use the applicant's reference number to check that they had paid their fee and booked an appointment for that day. If the applicant had complied with all the procedural steps, the Claimant would collate the paperwork and pass it to the visa/passport officers, who were usually diplomatic staff. These diplomatic staff would check and approve or decline the applications.

8. The Claimant told me, and I accepted, that she did not have any authority to approve or decline passport and/or visa applications.

9. If an applicant did not have a valid appointment, or had not made the correct payment or did not have the correct paperwork, the Claimant would not collate their paperwork, but would refer them to requirements published on the High Commission's website.

10. Occasionally, applicants would attend asking for an emergency appointment. The Claimant would refer these requests to immigration officers, who would decide whether to allow an emergency appointment for the passport or visa application.

11. The Claimant also worked as a receptionist for the High Commission from 14 January 2013 - 5 January 2014. This job involved receiving visitors to the High Commission. The Claimant said that she usually sat at a counter in the reception hall of the High Commission; when the doorbell rang, the Claimant would buzz the door to let the visitor in. The Claimant would ask for the visitor's name and the name of the staff member they wished to see. The Claimant would check the visitor's name against a list given that morning by staff members expecting visitors. If the name was on the list, the Claimant would notify the staff member by telephone that the visitor had arrived, ask the visitor to fill in the visitors' register, issue a visitor's tag and give verbal directions to the staff member's office.

12. If the visitor did not have an appointment, the Claimant would contact the staff member they wished to see. If the staff member did not wish to see the visitor, the Claimant would advise the visitor to telephone the High Commission to book an appointment.

13. When a visitor left, the Claimant would collect the visitor's tag and ask them to sign out in the visitors' register.

14. The Claimant was asked in cross examination about paragraph 17 of her Particulars of Claim. She explained that problems could arise when she had not been told that new diplomats had been appointed, so that she could not allow them admission to the Mission. Problems also arose when visitors from other Embassies attended and the Claimant had not been given their names.

15. At various times during the Claimant's employment, the High Commission would host events and parties at the High Commission's reception hall or the High Commissioner's residence or a hotel. These events included parties for the celebration of Nigeria's Independence day, cultural events and receptions for Nigerians coming to the UK. The Claimant would be asked to work as an usher at these functions, which involved welcoming guests and leading them to their seats, ensuring that they were comfortable, helping to serve food and drinks and giving directions to the toilets or cloakrooms.

16. The Claimant told me and I accepted that she did not have any access to confidential governmental information in any of her roles. She said that all confidential governmental information and processes were tightly guarded and restricted to the diplomatic staff.

Relevant Law: State Immunity Law and EU Law

17. 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'.

State Immunity: Contracts of Employment

18. 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. On the other hand, s4(1) SIA itself 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 UK nor habitually resident there; or (c) the parties to the contract have otherwise agreed in writing, s 4(2) SIA.

19. S 4(1) SIA also 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 ("VCDR"), s 16(1)(a) SIA.

20. 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).

21. Thus, where the provisions of s 4(2) or s 16(1)(a) apply, state immunity can operate to prevent employees from bringing claims relating to their contract of employment.

22. However, Art 6.1 European Convention on Human Rights ("ECHR") provides: "In the determination of his civil rights and obligations…., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

23. Art 47 Charter of Fundamental Rights of the EU provides: "47 Right to an effective remedy and to a fair trial Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article."

24. 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. "The rule of customary international law is that a state is entitled to immunity only in respect of acts done in the exercise of sovereign authority" [37].

25. 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 [54].

26. At [55] Lord Sumption distinguished between the three categories of embassy staff as follows: "The Vienna Convention on Diplomatic Relations divides the staff of a diplomatic mission into three broad categories: (i) diplomatic agents, ie 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: see Governor of Pitcairn and Associated Islands v Sutton (1994) 104 ILR 508 (New Zealand Court of Appeal). However, I find it difficult to conceive of cases where the employment of purely domestic staff of a diplomatic mission could be anything other than an act jure gestionis. The employment of such staff is not inherently governmental. It is an act of a private law character such as anyone with the necessary resources might do."

27. At [56] he said that the approach he set out was supported by the case law of the European Court of Human Rights,

"[56] This approach is supported by the case law of the European Court of Human Rights, which I have already summarised. 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 66 EHRR 19, 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."

28. Lord Sumption had already cited at length from Cudak v Lithuania (2010) 51 E.H.R.R. 15. He cited paragraphs [64] – [67] and [70] – [71] of that judgment.

29. In Cudak the applicant had been hired as a secretary and switchboard operator by the Embassy of Poland in Vilnius. Her duties were stipulated in her contract and were those normally expected of such a post. In 1999, the applicant complained to the relevant Ombudsman in Lithuania that she was being sexually harassed by one of her male colleagues as a result of which she had fallen ill. She brought an action for unfair dismissal before the civil courts. The courts declined jurisdiction on the basis of state immunity, which had been invoked by the Polish Ministry of Foreign Affairs. The Lithuanian Supreme Court held that the applicant had exercised a public service function during her employment with the Embassy, and that, merely on the basis of the title of her position, her duties facilitated the exercise by Poland of its sovereign functions such that the doctrine of State immunity was applicable. Relying on art.6(1), the applicant complained to the European Court of Human Rights that the dismissal of her claim by the domestic courts violated her right of access to a court. The ECHR decided that the applicant's art 6 right had been breached. At paragraphs [64] and [70] the ECHR said

"[64] In this connection, the Court notes that the application of absolute state immunity has, for many years, clearly been eroded. In 1979 the International Law Commission was given the task of codifying and gradually developing international law in the area of jurisdictional immunities of states and their property. It produced a number of drafts that were submitted to states for comment. The draft articles it adopted in 1991 included one—art.11—on contracts of employment. In 2004 the United Nations General Assembly adopted the Convention on Jurisdictional Immunities of States and their Property."..

[69] … the applicant was not covered by any of the exceptions enumerated in art.11 of the International Law Commission's Draft Articles: she did not perform any particular functions closely related to the exercise of governmental authority. In addition, she was not a diplomatic agent or consular officer, nor was she a national of the employer state. …" .

[70] The Court observes in particular that the applicant was a switchboard operator at the Polish Embassy whose main duties were: recording international conversations, typing, sending and receiving faxes, photocopying documents, providing information and assisting with the organisation of certain events. Neither the Lithuanian Supreme Court nor the respondent Government have shown how these duties could objectively have been related to the sovereign interests of the Polish Government. Whilst the schedule to the employment contract stated that the applicant could have been called upon to do other work at the request of the head of mission, it does not appear from the case file—nor has the Government provided any details in this connection—that she actually performed any functions related to the exercise of sovereignty by the Polish State."

30. It is notable that Lord Sumption said, at [26] and [29] Benkharbouche, regarding the judgment of the ECHR in Cudak,

"[26] The court was therefore right to regard these provisions of draft article 11 as applying the restrictive doctrine of state immunity to contracts of employment, and as foreshadowing, in that respect, the terms of the Convention." …

"[29] …Article 11 codifies customary international law so far as it applies the restrictive doctrine to contracts of employment. That would have been enough for Ms Cudak's .. purposes. So far as article 11 goes beyond the application of the restrictive doctrine, its status is uncertain… It would perhaps have been better if the Strasbourg court had simply said that employment disputes should be dealt with in accordance with the restrictive doctrine ..".

31. The "restrictive doctrine" in this context recognises state immunity only in respect of acts done by a state in the exercise of sovereign authority (jure imperii), as opposed to acts of a private law nature (jure gestionis).

32. In Governor of Pitcairn and Associated Islands v Sutton (1994) 104 ILR 508 New Zealand Court of Appeal, the parties had agreed the following facts in relation to the employee's role: " THE applicant, Mrs Sutton, was employed by His Excellency the Governor at the Office at [sic] the Governor of Pitcairn in Auckland. The applicant was employed in the position of typist/clerk. The applicant's duties comprised the provision of all typing and secretarial services necessary to operate the Office of the Governor, including typing all communications between the Governor, the Commissioner and Pitcairn, including the Governor's official instructions, and registering all mail going into and out of the Office of the Governor. Essentially Mrs Sutton was employed by the Governor in order to assist in the carrying out of the Governor's administrative functions as the Governor of Pitcairn."

33. Article 3 of the Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965); Cmnd 2565 provides:

1.The functions of a diplomatic mission consist, inter alia, in:
(a) Representing the sending State in the receiving State;
(b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
(c) Negotiating with the Government of the receiving State;
(d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

34. The SC in Benkharbouche decided that, 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 European Convention on Human Rights, and art 47 Charter of Fundamental Rights of the EU.

35. 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. Tribunals also have jurisdiction to hear complaints brought by administrative staff, if the employment relationship was of a purely 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 the provisions of the SIA 1978 entirely to ensure that the Claimants were able to pursue an effective remedy for the alleged contravention of their EU law rights.

36. For employment claims before IP completion day (31 December 2020), the general principles in the Charter continue to apply and Claimants can rely on the Charter, as described in Benkharbouche, to disapply the SIA where it is incompatible with those general principles (Withdrawal Act 2018 Sch 8 para 39(3)).

Sovereign Acts in Private Law Employment

37. At [57] - [58] Benkharbouche, Lord Sumption cautioned against the suggestion that, because the employment of an employee is of a private law character, state immunity does not attach to any act of the state in relation to that employment. He gave examples of where state immunity could attach to particular acts of a state in relation to an employee. He said,

"[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…

[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 state's recruitment policy. These particular examples are all reflected in the United Nations Convention and were extensively discussed in the preparatory sessions of the Inter-national Law Commission. They are certainly not exhaustive. United States v Public Service Alliance of Canada, Re Canada Labour Code [1993] 2 LRC 78, [1992] 2 SCR 50 concerned the employment of civilian tradesmen at a US military base in Canada. The Supreme Court of Canada held that while a contract of

employment for work not involving participation in the sovereign functions of the state was in principle a contract of a private law nature, particular aspects of the employment relationship might be immune as arising from inherently governmental considerations, for example the introduction of a no-strike clause deemed to be essential to the military efficiency of the base. In these cases, it can be difficult to distinguish between the purpose and the legal character of the relevant acts of the foreign state. But as La Forest J pointed out ([1993] 2 LRC 78 at 89, [1992] 2 SCR 50 at 70), in this context the state's purpose in doing the act may be relevant, not in itself, but as an indication of the act's juridical character."

Discussion and Decision

Private Law Employment – Jurisdiction to Hear EU Law Complaints

38. I considered whether the Respondent's employment of the Claimant was an exercise of sovereign authority. If it was not, the Tribunal has jurisdiction to hear her complaints against the Respondent based on EU law.

39. The Respondent contended that the functions performed by the Claimant in her role as a Schedule Officer, in particular, fell within the sphere of governmental or sovereign activity, because issuing passports and visas was a core sovereign function of the Mission.

40. On my findings of fact, while the functions of the Respondent itself may have been inherently governmental, I considered that all the Claimant's duties were truly ancillary and supportive to this, as described by Lord Sumption in Benkharbouche, at [55].

41. The Claimant's Schedule Officer role, 7 April 2010 - 14 January 2013, involved checking whether applications for passports and visas had complied with the published administrative requirements – booking an appointment, filling in the appropriate form and paying the requisite fee. Her duties were functional, clerical duties in the passport/visa section of the Mission. The Claimant did not have any decision-making functions on the substance of visa/passport application, but referred all completed applications to decision-making officers.

42. On my findings of fact, the Claimant functions were indeed "essentially ancillary and supportive" to the functions of the Respondent. Her role was not close to such governmental functions – it was a low-level clerical task checking that published and straightforward procedural steps had been complied with. Her role did not involve the exercise of any discretion in relation to passport or visa applications.

43. Her receptionist role from 14 January 2013 - 5 January 2014 involved greeting and registering visitors and passing them to the member of staff they were visiting – or advising them to book an appointment.

44. This was a simple task and did not involve any official communications, unlike in *Governor of Pitcairn and Associated Islands v Sutton*. This role had little connection with any governmental function of the mission.

45. Equally, her usher duties from time to time required the Claimant to carry out practical greeting and serving functions. These functions were not far removed from those of domestic staff, serving food and showing guests where to sit and where to find restrooms.

46. I did not agree with the Respondent's submission that, because the Claimant's Schedule Officer role assisted the Respondent to carry out its governmental functions as described in Article 3 of the Convention on Diplomatic Relations, her employment was an exercise of sovereign authority.

47. Such a submission appeared to be inconsistent with the dictum of Lord Sumption in *Benkharbouche*, at [55] and the approach of the ECHR *in Cudak v Lithuania*. Lord Sumption's words suggest that technical and administrative staff, in general, exercise ancillary and supportive functions. He does not suggest that their employment is an exercise of sovereign authority simply because they support or assist the governmental functions of the mission. Rather, he says 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 (emphasis added).

48. Lord Sumption's examples of such administrative staff, whose functions might be sufficiently close to the governmental functions of the mission, were Cypher clerks and confidential secretarial staff. Such employees are necessarily privy to highly confidential governmental communications. On the agreed facts in *Governor of Pitcairn and Associated Islands v Sutton*, the secretary typed "all communications between the Governor, the Commissioner and Pitcairn, including the Governor's official instructions". Her role therefore encompassed typing governmental-level communications.

49. In *Cudak v Lithuania*, the applicant was employed at the Polish Embassy in Vilnius. The functions of an Embassy are defined in Art 3 VCDR. The functions of administrative staff at Embassies are inherently likely to be supportive of the activities set out in Art 3. However, the ECHR did not suggest that, because the applicant was employed in the Embassy, and carried out administrative functions there, that her employment should be considered to be an act of sovereign authority.

50. On the contrary, the ECHR in *Cudak* said that it had not been demonstrated how the administrative functions of the applicant in "recording international conversations, typing, sending and receiving faxes, photocopying documents, providing information and assisting with the organisation of certain events" could objectively have been related to the sovereign interests of the Polish Government.

51. The Claimant's functions throughout her employment were at a lower administrative level to those of the applicant in *Cudak*. I did not consider that,

because the Claimant's functions were broadly supportive of the Respondent's passport and visa functions, that meant that her employment was an act of sovereign authority.

52. On the facts, in all of her roles, the Claimant's functions were not "close" to the governmental functions of the mission; they were relatively low-level ancillary clerical and supportive functions. They did not involve substantive decision making, or knowledge of any confidential governmental information. The Respondents do not have state immunity in respect of her claims.

53. Following the EAT judgment in this case, the Tribunal's original judgment stands - the Claimant's claim against the Respondent/s, that she was discriminated against because of her sex and religion and was victimised, succeed, and she is entitled to compensation in the sum of £70,747.06.

_____
Employment Judge Brown

Dated: …21 January 2022……..……..

Sent to the parties on:

21/01/2022.
For the Tribunal Office