Case No: 2202255/19

EMPLOYMENT TRIBUNALS

Claimant	**and**	**Respondent**
Ms AS Koffi		**Permanent Representation of Cote D'Ivoire to International Commodity Organisations**

HELD AT: London Central (CVP) ON: 28 February 2022

BEFORE: Employment Judge Norris (sitting alone)

Representation:
Claimant In person
Respondent Ms A Mayhew, Counsel

JUDGMENT ON RECONSIDERATION

1. Upon the Respondent's application under Rule 71 (Schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) to reconsider the judgments of 10 March 2020 (default judgment on liability) and 17 October 2020 (reserved remedy judgment), the application succeeds and the judgments are set aside.

2. The claim shall be re-served in accordance with section 12(1) State Immunity Act 1978.

REASONS

Introduction

1. This case has a protracted history. The Claimant submitted her claim on 10 June 2019, complaining of unfair dismissal, discrimination because of religion or belief and/or discrimination because of sex. The Employment Tribunal served the claim on the Respondent by post on 24 September 2019, giving a date for lodging the response of 22 October 2019. No response was received and accordingly on 19 November 2019, the Employment Tribunal wrote to the Respondent seeking confirmation of whether it regarded itself as entitled to state immunity and whether it was intending to enter a defence. The Respondent was given until 3 December 2019 to reply. No response was received by that date or at all.

2. On 11 February 2020, the Tribunal wrote again to the Respondent with a warning that it was intending to enter default judgment as to liability. The Respondent was given until 25 February 2020 to lodge its response. It did not do so, and accordingly

liability judgment was entered in default and the first day of the full merits hearing (10 March 2020) converted to consider remedy. However, neither party attended on that day, and having contacted the Claimant's then representative Mr Rice, I adjourned the hearing until 14 May 2020. In light of COVID restrictions in place on that date and the closure of the Tribunal to in-person hearings, the Remedy Hearing was once again adjourned until 8 July 2020.

3. The Remedy Hearing finally took place on 8 July 2020 (by CVP) and the Claimant gave evidence. The Respondent did not appear and was not represented. An issue arose as to the legality of the Claimant's wages, in that she appeared to have paid no tax or National Insurance throughout her employment with the Respondent. Accordingly, I reserved my decision and gave Mr Rice time to make written submissions on the point. These having been made, the remedy judgement was completed on 17 October 2020 and sent to the parties two days later.

4. Unfortunately, I was not made aware until late 2021 of the correspondence that ensued following promulgation of the remedy judgment, between the Respondent's first solicitors, Riverbrooke, its second solicitors Teacher Stern and the Claimant's solicitor Mr Rice, that correspondence being sent to the Tribunal in November and December 2020 and between February and October 2021. The Claimant found herself unable to enforce the remedy judgment. In summary, the Respondent first contended that it had not been served with the claim and that it intended to apply to set aside the judgments and then that it asserted state immunity and sought reconsideration of both judgments.

5. It was argued on behalf of the Claimant that the reconsideration application was out of time, and this was certainly correct. However, when the correspondence was brought to my attention, it appeared to me that if the Respondent fell within any part of the definition of "the State" pursuant to section 14(1)(a) to (c) State Immunity Act 1978, it appeared to follow that the rules for service contained in section 12(1) (and the extension of time for entering an appearance under section 12(2)) should have been applied and consequently that, in line with section 12(4), no default liability judgment could validly have been entered; consequently the remedy judgment would also have to be set aside. Until the position was clarified, it appeared the parties were at a stalemate because the Claimant would continue to be unable to enforce the remedy judgment if the Respondent was covered by the SIA. Accordingly, I listed the matter for a Reconsideration Hearing under rule 72.

6. That hearing commenced on 7 January 2022 and on that occasion the Respondent was represented by Ms Mayhew of Counsel and the Claimant by Mr Bidnell-Edwards, also of Counsel. It transpired that the parties had not received the directions I had sent out on listing the Reconsideration Hearing and accordingly we adjourned until 28 February 2022 for the parties to consider their arguments in relation to four questions:

    a. Does the Claimant accept that service of the claim form needed to be effected pursuant to section 12 State Immunity Act 1978 (SIA) (and if not, on what basis does she say it did not)?

b. If she does, does she assert nonetheless that the Respondent submitted to the jurisdiction of the Tribunal by submission of a document referred to as a 'draft response' and entitled "*provisional* grounds of resistance" [sic] on 4 December 2020, or that it otherwise falls under the jurisdiction of the Tribunal, and if so, on what basis does she so assert?

c. Does the Claimant accept that default judgment could not have been validly entered in light of section 12(4) SIA (and if not on what basis does she argue the contrary)?

d. If the Claimant maintains that the Respondent is not a state entity, on whom does she say that the burden falls of raising (and showing) that it was, or is it a point that the Tribunal should have addressed without either party having to raise and/or show it?

7. The initial order was for the Claimant to answer these questions and for the Respondent to be given 14 days to confirm its position as regards each of them. The parties were ordered to exchange written skeleton argument by 22 February 2022. Further, the Claimant was ordered to serve on the Respondent by 14 January 2022 a copy of all documents and submissions produced by her in the proceedings until Teacher Stern came on the record.

8. I understand that albeit late in the day and not in accordance with the order, the Claimant's representative did serve the necessary documents, which the Respondent incorporated into its bundle for the reconvened Reconsideration Hearing. However Mr Rice then came off the record and the Claimant was unrepresented on 28 February. She applied for an adjournment of the hearing, which I refused on the basis that it was not in the interests of justice to delay further, since if the Respondent's application succeeded, the claim form originally received in June 2019 would have to be re-served no earlier than March 2022. Further, the Claimant would be given the opportunity to comment on the Respondent's submissions which I ordered to be served on her in advance of the Reconsideration Hearing.

The Reconsideration Hearing

9. At the hearing, we went through Ms Mayhew's detailed submissions step-by-step and clarified with the Claimant her position and response to each of the Respondent's arguments. I gave my decision orally at the time but indicated that I would in any event give full reasons in written form so that the Claimant could discuss with any new solicitor or other relevant person the progress of the matter to date.

The Law

10. The relevant sections of the State Immunity Act 1978 are as follows:

a. ***Section 14 States entitled to immunities and privileges.***

(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—

(a) the sovereign or other head of that State in his public capacity;
(b) the government of that State; and
(c) any department of that government,

but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.

b. ***Section 12 Service of process and judgments in default of appearance.***

(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign, Commonwealth and Development Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

(2) Any time for entering an appearance (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid.

(3) A State which appears in proceedings cannot thereafter object that subsection (1) above has not been complied with in the case of those proceedings.

(4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) above has been complied with and that the time for entering an appearance as extended by subsection (2) above has expired.

(5) A copy of any judgment given against a State in default of appearance shall be transmitted through the Foreign, Commonwealth and Development Office] to the Ministry of Foreign Affairs of that State and any time for applying to have the judgment set aside (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the copy of the judgment is received at the Ministry.

(6) Subsection (1) above does not prevent the service of a writ or other document in any manner to which the State has agreed and subsections (2) and (4) above do not apply where service is effected in any such manner.

Findings and Conclusions

11. The Respondent contends that it is to be regarded as the State under either section 14(1)(b) or (c) SIA. Firstly, it contends that it exercises sovereign authority in the United Kingdom, acting on behalf of Côte d'Ivoire as the interface between Côte d'Ivoire and International Commodities Bodies. It notes that the Respondent is headed by Ambassador Touré who had submitted two witness statements, in one of which he explained that the Respondent is a body representing "the commercial and economic interests of Côte d'Ivoire in the United Kingdom".

12. Further, the Ambassador stated that he attends seminars, meetings and workshops of various commodity bodies and delivers the instructions of the government of Côte d'Ivoire. He claims that the Respondent is a diplomatic mission based in the United Kingdom.

13. At the first part of the reconsideration hearing on 7 January 2022, an Internet search had revealed that the Respondent appears on the London Diplomatic List for 2021 under the heading "Embassy of the Republic of Côte d'Ivoire". Those search results had not been reproduced in the Respondent bundle for the hearing on 28 February, and I asked the Claimant whether she recalled and accepted that it did so appear. Although she accepted that it appears now, she was unsure when it had first appeared.

14. The same search was conducted again and I am satisfied that the Respondent appeared on the London Diplomatic List in 2013, which was before the Claimant started to work there. At that time, Ambassador Touré was named as a Counsellor in the International Organisations Section Commodities, which was based at an address in Regent St, London. The Cavendish Square address to which post was sent by the Tribunal and at which the Claimant, according to her appointment letter, worked from November 2014 until her dismissal, is the one that appears on the current London Diplomatic List for the Commercial & Economic Section (Commodities), with Ambassador Touré named as such for the International Organisations Section Commodities.

15. Further, the Respondent sought to rely on the Claimant's own written submissions as lodged by Mr Rice on her behalf in September 2020, in answer to the question of her tax liability in the UK. It was asserted: "The place of management of [the Claimant's] employment for the [Respondent] was indeed the Ivory Coast (the [Respondent] itself being an interface between the government of Côte d'Ivoire and the International Commodity Bodies (ICBs)) and thus tax is payable in [Côte d'Ivoire]". The submissions went on, "The [Respondent] in its position as a medium between the government of the Côte d'Ivoire and the ICBs is such a political subdivision of the same".

16. Accordingly, I accepted the Respondent's argument, which was not opposed factually by the Claimant, that the Respondent is, for the purposes of section 14 SIA, "the State" under either section 14(b) or (c).

17. In answer to the first question, therefore, the Respondent asserts that section 12(1) must apply to the institution of proceedings against it. It is common ground that transmission through the Foreign, Commonwealth and Development Office to the Ministry of Foreign Affairs of Côte d'Ivoire did not take place as mandated by that section.

18. The Claimant argued that the Ambassador will have received the claim and associated correspondence sent to the postal address of the Respondent and that he has chosen to ignore it until the remedy judgment was reported. That may very well be true. She argued further that he should not be above the law and that she should be entitled to pursue her claim against the Respondent. I note that the Ambassador is not a named Respondent and in any case, as I explained to the Claimant, that where service is required by law to be effected in a certain way, it is not open to the Tribunal to ignore that requirement.

19. At the hearing on 7 January 2022, Mr Bidnell-Edwards had raised the question of whether section 12(6) could have been engaged by the Respondent simply doing nothing and hence whether it could be inferred to have agreed to service other than in accordance with section 12(1). Since he was not present and nor had he, apparently, been instructed to set out and develop any such argument on the point, I raised it in accordance with the overriding objective and specifically on the basis that the Claimant should be put, so far as possible, on an equal footing with the Respondent notwithstanding her lack of legal representation at this hearing.

20. Ms Mayhew however referred me to the Supreme Court authority of *General Dynamics United Kingdom Ltd v State of Libya*[1], in which the legal principles applicable to the service of proceedings were set out. Specifically, the Supreme Court held that the procedure in section 12(1) SIA is intended to be a mandatory and exclusive procedure in the cases to which it applies, subject only to the exception in section 12(6) in the case of service in a manner to which the defendant state has agreed (paragraph 81). It noted at paragraph 76 that (so far as is relevant to this case):

    (1) Section 12 establishes special procedures and procedural privileges in cases where the defendant is a State.

    (2) In cases to which section 12(1) applies, the procedure which it establishes for service on a defendant state through the FCDO is mandatory and exclusive, subject only to the possibility of service in accordance with section 12(6) in a manner agreed by the defendant state.

    (3) A particular purpose of section 12 is to provide a means by which a State can be given notice of proceedings against it and a fair opportunity to respond. … The defendant state must be given notice of the proceedings so that it has adequate time and opportunity to apply to set aside the order for enforcement, inter alia on grounds of state immunity,

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before any further steps are taken to enforce the award. A document giving such notice is a document required to be served for instituting proceedings against a State within section 12(1). …

(4) …

(5) Although there is no rule of customary international law requiring that the service of a document instituting proceedings against a defendant state be served through the diplomatic channel, considerations of international law and comity strongly support a reading of section 12(1) which makes its procedure available and mandatory, subject to section 12(6), in all cases where documents instituting proceedings are to be served on a foreign state.

(6) Although subsections 12(2), (4) and (5) make provision for entering an appearance and judgment in default of appearance, there is no reason to read section 12(1) as limited to service of proceedings which may lead to the entering of an appearance or a default judgment, or to corresponding procedures as provided for in section 22(2). On the contrary, section 12(1) is intended to establish a procedure for service of general application. …

(7) If section 12(1) has no application, there would be no procedure under the SIA by which notice of enforcement proceedings could be given to a defendant state.

(8) …".

21. All of that being so, it seems to me unarguable that the claim form should have been served via the FCDO in this case. If a "mandatory and exclusive" procedure could be subverted simply by the Respondent doing nothing when it had received the claim otherwise than in accordance with section 12(1), I consider that the Act would have specified this. I also accept Ms Mayhew's argument that the State's "agreement" in this context must precede service and not postdate it by implication.

22. Ms Mayhew further argues that given that the claim was not validly served, there were no proceedings on foot and thus the Respondent cannot be said to have submitted to the jurisdiction by providing the various documents including the draft response/provisional grounds of resistance. I make no finding on this point because the question of whether the Respondent can avail itself of the State immunity provisions in the Act are for another day.

23. However, I do accept that the failure of the process under section 12(1) means accordingly that the default liability judgment was entered in contravention of section 12(4). There has been no proof – nor could there be – of compliance with section 12(1) nor indeed of the proper expiry of the extended time for entering an appearance afforded by section 12(2).

24. In light of the above findings, there is no requirement to go on to answer the fourth question of where the burden falls of raising and/or showing that the Respondent is a State entity.

25. Accordingly, the application for reconsideration succeeds and both judgments are set aside. The Tribunal must now re-serve the original claim in accordance with section 12(1). I note that Ms Mayhew asked at the end of the Reconsideration Hearing for the original judgments to be taken down from the online decisions database and I will instruct the administration to do so, although this judgment on reconsideration will appear instead and as Ms Mayhew acknowledged, where the original judgments (and in particular the remedy judgment) have been reported or disseminated online, it is not in the Tribunal's gift to remove such reports.

Remedial Order

26. On 17 January 2022, I caused a letter to be sent to the parties relating to a Parliamentary question of 11 February 2021 and the Hansard records for Parliament on 23 February 2021. This relates back to the Supreme Court's judgement in the case of *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*[2] , in which it was concluded that certain provisions of the SIA are incompatible with Articles 6 and 14 of the European Convention on Human Rights. The answer to the Parliamentary question stated that the government has decided to address the incompatibility by way of Remedial Order which was to be laid in draft before Parliament in due course. I invited the parties' comments as to the future progress of the case, including whether there should be a stay generally pending the coming into force of the Order.

27. Neither Ms Mayhew nor I are aware of the draft Remedial Order even being laid before Parliament (and no representations were received on the point on behalf of the Claimant before her solicitor came off the record). Given the length of time that it is likely to take to effect service on the Respondent through the FCDO, it seems to me that this is an issue that can be revisited if necessary once that has been achieved and if the Respondent asserts state immunity at that point, as it has stated it intends to. Just as I have made no finding as to whether or not the Respondent has submitted to the Tribunal's jurisdiction through its correspondence (and attachments), nor have I made any finding as to whether the incompatibility findings in *Benkharbouche* are relevant to this Claimant, in light of her "role as an adviser working on behalf of a political subdivision of a contracting State" (as it was termed in the submissions made on her behalf in September 2020). It did not seem to me necessary, desirable, or in accordance with the overriding objective, to stay the proceedings at this point.

Employment Judge Norris
Date: 28 February 2022
JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE