Case Number 2207746/2016

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr F Estrela	**v**	**Consulate General of Angola**

TELEPHONE PRELIMINARY HEARING

Heard at: **Central London Employment Tribunal** **On: 6 July 2022**

Before: **Employment Judge Brown**

Appearances

For the Claimants: **Ms K Liebert, Solicitor**
For the Respondent: **Did not attend and was not represented**

JUDGMENT

The judgment of the Tribunal is:

1. **The Respondent submitted to the jurisdiction of the Tribunal and the Tribunal has jurisdiction to consider all the Claimant's complaints.**

2. **Neither the employment of the Claimant nor his dismissal was an exercise of sovereign authority or engaged a sovereign interest.**

REASONS

This Hearing

1. This Open Preliminary Hearing was listed to determine:

   1.1. Whether the Respondent has submitted to the jurisdiction of the Tribunal pursuant to s2(3)(b) State Immunity Act 1978;
   1.2. If the Respondent has not, whether the employment of the Claimant was an exercise of sovereign authority;
   1.3. If not, whether the Claimant's dismissal engaged a sovereign interest and/or was it an exercise of sovereign authority.

Background

2. By a claim form presented on 24 August 2016, the Claimant brought complaints of unfair dismissal, race discrimination, wrongful dismissal (failure to pay notice pay), unlawful deductions from wages and failure to pay accrued but untaken holiday pay on the termination of employment, against the Respondent Consulate, his former employer.

3. The claim was served on the Ministry of Foreign Affairs of the Government of Angola by the FCO Diplomatic Channel on 30 November 2016.

4. The Respondent presented an ET3 Response on 4 September 2018. It did not mention state immunity.

5. At a Preliminary Hearing on 7 February 2022 I told the parties that I would check the Tribunal file to ascertain how the ET3 had been filed. Having checked the file, there was no covering letter. I noted that there appeared to have been no correspondence from solicitors acting for the Respondent at the time and that, therefore, the ET3 had been sent directly from the Respondent to the Tribunal.

6. The claim had been presented before the decision of the Supreme Court 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.

7. After the decision in Benkharbouche, the Tribunal wrote to the parties again on 15 February 2018 saying that some state immunity cases would now be listed for preliminary hearings. On 6 August 2018 the Tribunal wrote again, saying that claims based on EU law could proceed following Benkharbouche and encouraging the Respondent to present an ET3 Response.

8. As stated above, the Respondent presented an ET3 Response on 4 September 2018.

9. On 17 October 2018 the Tribunal informed the Claimant that the Response had been accepted and sent a copy of the Response to the Claimant.

10. In preparation for the OPH, I ordered the Claimant to write to the Tribunal and the Respondent, by 21 February 2022, saying into which category of employee of the Consulate he fell and why. On 21 February 2022 the Claimant wrote to the Tribunal saying that his role was ancillary and technical in nature in that his role was to check that documents submitted with visa applications met with requirements.

11. On14 March 2022 the Respondent wrote to the tribunal saying:

    "A The Claimant was a member of the administrative and technical staff of the Consulate of Angola at 46 Bedford Square London WC1B 3DP;

    B. The Claimant was a member of the consular staff performing a consular function under Article 5 of the Vienna Convention on Consular Relations (as implemented by the Consular Relations Act 1968). Furthermore, both the Claimant's employment and the claims that he makes, arise out of an inherently

sovereign or governmental act of the Republic of Angola. Neither fall with an area of activity of a private law character;

C. Consular and/or State and/or Diplomatic immunity is claimed as appropriate. The relevant immunity depends upon the nature of the claim and the identity of the Respondent;

D. The Consulate of Angola does not accept that either the Consulate, or the Consul General (whether the acting Consul or the previous Consul), have submitted to the jurisdiction. The ET3 was filed by a member of the Consulate's administrative HR staff who did not have authority to waive the immunity of either the Consulate or of any consular officer or member of staff. Neither the Consulate, the Consul General (acting or otherwise) nor the Republic of Angola have expressly waived immunity in writing, or in any other way;

E. Neither the Consulate of Angola nor the acting Head of Mission consent to the name of the Respondent being changed to the State of Angola. We note that the change of name has significant consequences and is not simply a renaming exercise."

12. In preparation for this Open Preliminary Hearing, solicitors instructed by the Respondent sent the Tribunal a three part Bundle of documents, with an index, and a skeleton argument prepared by Counsel, Mr S Keen, accompanied by a bundle of authorities.

13. The Respondent also sent a witness statements from Mr Joao Manuel. There was also a witness statement from the Claimant.

14. On 5 July 2022 at 10.37 the Respondent's solicitors informed the Tribunal that they were no longer instructed. They provided 2 alternative email addresses to which correspondence should thenceforth be sent.

15. The Tribunal had not processed that email by the time CVP joining instructions were sent to the parties on 5 July 2022. On the morning of 6 July 2022 at 08.52 the Tribunal sent the CVP joining instructions to the 2 email addresses provided for the Respondent by the Respondent's former solicitors.

16. The Tribunal also contacted Mr S Keen, who confirmed that he would not be attending for the Respondent because he was no longer instructed.

17. The Respondent did not attend the CVP hearing at 10.00. At 10.55 the Tribunal sent the joining instructions to the 2 email addresses again and asked whether the Respondent would be attending the hearing, which would now start at 11.00.

18. No reply was received from the Respondent. The Respondent did not attend the hearing at any point. Mr Manuel did not attend the hearing. He did not present himself for cross examination and was not able to answer any questions from the Tribunal.

19. I decided to proceed with the hearing in the absence of the Respondent. It had been given notice of the hearing and I was satisfied that it had had the opportunity to attend. Seeing that the Tribunal is required to give effect to state immunity, I decided to read the witness statement of Mr Joao Manuel and to take it into

account, along with the skeleton argument presented for the Respondent by Mr Keen when he was still instructed, so that I could give full consideration to any argument on state immunity which might be made on behalf of the Respondent, even though it had not attended the hearing.

Findings of Fact – Submission to Jurisdiction

20. On 4 September 2018 the Respondent presented an ET3 Response to the Claimant's claim. At box 2.1 the Respondent's details were given as "Consulate General of the Republic of Angola". The name of the contact was given as "Celestina Sil". The Respondent indicated that it wished to be contacted by post. At box 3, the ET3 said that the ACAS Early Conciliation details were not correct, "Because we did not have any discussions with ACAS." At box 4 "Employment Details", the ET3 said that the dates given by the Claimant for his employment were incorrect. The ET3 said, "Because the Claimant only started when the Consulate of Angola opened in September 2015. Even if it is considered that he was transferred under TUPE, the Claimant did not start employment with the Angolan Embassy in 1999."

21. At Box 6.1, the ET3 confirmed that the Respondent wished to defend the claim. The ET3 then said this (reproduced in full)

    "Apart from those accepted here, the Respondent denies all claims made by the Claimant.

    The Claimant deliberately and with no permission, created a new email address under the of [sic] Consulate of Angola

    This email was used for the public and customers to make direct contact with the Claimant without permission of his superiors. The Claimant was reprimanded and he promised not to carry out any act without permission.

    After the above, the Claimant went on and created a new website for the Consulate of Angola again without permission of his superiors. Given the severity of his actions, the Claimant was dismissed without notice.

    The Respondent is a Consulate mission and has strict rules on confidentiality and actions that can be carried out by its employees."

22. The ET3 did not mention state immunity. State immunity was first asserted by the Respondent at the preliminary hearing on 7 February 2022, albeit that there had been little progress in the claim as the Claimant wished to await a remedial order arising from *Benkharbouche* in relation to his UK law claims.

23. On 17 October 2018 the Tribunal accepted the ET3 response and sent a copy of it to the parties.

24. It was not in dispute between the parties that the ET3 had been completed and sent to the Tribunal by Celestina Silva, then Administrative Attaché. Mr Joao Manuel, Secretary for the Consulate of Angola, gave a witness statement to the Tribunal saying that Mrs Silva had presented the relevant ET3. It appeared, from

the electronic copy of the ET3, that Mrs Silva had provided her email address as the address to which the electronic receipt for the ET3 should be sent, p24.

25. Mr Manuel told the Tribunal that he is the secretary for the head of mission and works directly with the Consul General. Mr Manuel's witness statement said that all duties performed by an Administrative Attaché require authority from the Consul General.

26. I accepted that evidence. The Claimant also told me that Mrs Celestina Silva would have required the authority of the Consul General, Ms Vicencia de Brito, to make any decision. I noted that this was consistent with Mrs Silva's Job Description which included the following duties, " - Dealing with enquiries relating to grievance proceedings by authority of the Head of Mission - Performing all functions by authority of the Head of the Mission." P85.

27. Mr Manuel's witness statement said that Mrs Silva "had no permission to submit the ET3 form to the Tribunal. As an Administrative Attaché Mrs Celestina Silva was asked to provide her email address so that it could be used as the means of communications with the Tribunal." He said, "She was given clear instructions to provide me all correspondence received from the Tribunal, so that I could pass to the Consul General, who would decide the action to be taken. As far as I know, Ms Celestina Silva had no authority to submit the ET3 … I certainly do not recall seeing an ET3 form prior to its submission nor have I seen or heard the Consular General giving permission to Mrs Celestina da Silva to submit the form. I also recall the Consular General commenting that we should not entertain this or any Tribunal or Court case as it would compromise the exercise of State Immunity."

28. Neither Mrs Celestina Silva nor the Consul General gave a statement for the Tribunal. Neither, therefore, gave evidence that the Consul General did not give authority to Mrs Silva to present the Respondent's ET3 response.

29. I was not persuaded that Mr Manuel, a secretary, would have known what instructions the Consul General gave Mrs Silva, who was the Administrative Attaché, regarding the ET3. From his evidence, Mr Manuel appeared to know little about the Claimant's claim and the circumstances in which the ET3 was sent to the Tribunal.

30. I accepted the Claimant's evidence that Mrs Silva, an Attaché, was a member of the Respondent's diplomatic staff.

31. I considered that it was very likely that the Consul General would have private discussions with her diplomatic staff, without members of secretarial staff being present.

32. I therefore rejected Mr Manuel's evidence that Mrs Silva had no permission to submit the ET3 to the Tribunal – he was simply not in a position to know this. His own evidence was couched in somewhat guarded terms ".. **as far as I know** Ms Celestina Silva had no authority to submit the ET3.." (emphasis supplied).

33. Furthermore, I noted that Mr Manuel did not say when, and in what circumstances, the Consul General commented that the present claim should not be entertained as it would compromise the exercise of State Immunity. If this was ever said, there was no evidence that it was said at the time the ET3 was presented.

34. I accepted Mr Manuel and the Claimant's evidence that Mr Manuel would receive all letters to the Consulate and would open them and pass them to the Consul General. I noted that the Respondent's response had requested to be corresponded with by post. I concluded that the Tribunal's letter of 17 October 2018, accepting the Respondent's Response, and enclosing a copy of it, would have been passed by Mr Manuel to the Consul General shortly after 17 October 2018.

35. The Claimant told me, and I accepted, that he encountered Mrs Silva almost every day. I accepted his evidence that one of Mrs Silva's duties was to order consumables for the Consulate, such as printer paper, but that every purchase order would first have to go to the Consul General for her authorisation.

36. The Claimant told me that, from his experience, Mrs Silva's understanding and use of the English language was relatively poor, so that the Claimant needed to take over her telephone calls to suppliers to communicate Mrs Silva's instructions. I accepted his evidence about this. I also accepted the Claimant's evidence that the Consul General's English was very good, and that she was required to interact with representatives of the UK Government.

37. I concluded, from both the Claimant and Mr Manuel's evidence, that Mrs Silva would not have had the authority, on her own, to present the ET3. She would have required the authority of the Consul General in order to do so.

38. However, on all the evidence, I inferred that the Consul General did give Mrs Silva authority to present the Respondent's ET3, for the following reasons.

39. I rejected Mr Manuel's evidence that Mrs Silva did not have authority from the Consul General – Mr Manuel was not in a position to know this. I noted that neither Mrs Silva nor the Consul General had presented any evidence to the Tribunal about Mrs Silva's lack of authority to present the ET3. They knew the facts but they did not give any evidence to the Tribunal.

40. The ET3 appeared to be a considered document, which contained details of the Claimant's employment and alleged dismissal. The ET3 asserted that the Claimant had been dismissed because he had done things without permission of his superiors. I agreed with the Claimant's submissions that it was unlikely that the person who drafted the ET3 would themselves be acting without authority when they asserted that another employee had been fairly dismissed for doing precisely that.

41. I found that Mrs Silva invariably sought authority from the Consul General to carry out simple tasks such as ordering printer paper. I concluded that it was inconceivable that she would have presented a formal response to a Tribunal claim, which is a more weighty matter than ordering paper supplies, without obtaining authority from the Consul General.

42. I noted that the ET3 was drafted in competent English. I accepted that the Claimant gave Mrs Silva assistance with routine telephone calls in English. I concluded that she would have gained the approval of the Consul General for the contents of the ET3 in English, before sending it to the Tribunal.

43. Further, I concluded that the Consul General would have received the Tribunal's letter dated 17 October 2018, which enclosed the ET3. The Consul General did not, at that time, seek to withdraw the ET3, or to say that it had not been presented with the Consul General's authority. I inferred that this was because the ET3 had been sent with the Consul General's authority in the first place.

44. I therefore inferred from all the facts that the Consul General knew both that Mrs Silva had sent the ET3 response and the contents of that ET3. As I have indicated, the Consul General had approved the contents of the ET3 response in English before it was sent to the Tribunal and the Consul General would have seen a copy of the ET3 which had been accepted by the Tribunal.

Relevant Law – Submission to Jurisdiction

45. S2 State Immunity Act 1978 provides,

"S2 Submission to jurisdiction

(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.

(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.

(3) A State is deemed to have submitted—

(a) if it has instituted the proceedings; or

(b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.

(4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of—

(a) claiming immunity; or

(b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.

(5) subsection (3)(b) above does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.

(6) A submission in respect of any proceedings extends to any appeal but not to any counterclaim unless it arises out of the same legal relationship or facts as the claim.

(7) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be

deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract."

46. State immunity will therefore be lost if the state submitted to the jurisdiction of the court in relation to particular proceedings, *s2(1) SIA.* A state will be deemed to have submitted to the jurisdiction if it has intervened or taken any step in the proceedings, *s 2(3)(b) SIA*, unless it has intervened or taken a step in the proceedings for the purpose only of claiming immunity, *s 2(4)(a),* or if a step was taken in ignorance of facts entitling it to immunity where those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable, *s 2(5).*

47. *S 2(7) SIA* provides that the head of a state's diplomatic mission in the UK, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the state in respect of any proceedings.

48. In *Kuwait Airways Corporation v Iraqi Airways Company and Republic of Iraq* [1995] 1 Lloyd's Rep 25, CA, the Court of Appeal considered the provisions of ss2(3) &(4) SIA 1978. LJ Nourse said, at p31, "What then is the effect of s. 2? Sub-section (3)(b) 'provides that a State (or state entity) is deemed to have submitted if it has intervened or taken any step in the proceedings. But that provision is expressed to be subject to sub-s. (4) which, by par. (a), states that it does not apply to intervention or any step taken for the purpose "only" of claiming immunity. The joint effect of those provisions is to presuppose an intervention or step in the proceedings; the prima facie result of that is a deemed submission to the jurisdiction; but if the intervention or step is made or taken for the purpose only of claiming immunity, there is no submission. Moreover, and this is very important, there is no submission if what is done by the State or State entity does not amount to an intervention or step in the proceedings. In my view s. 2(4) is a relieving provision. It would apply if, for example, a defendant served a defence in which the only claim made was one of immunity. Usually the service of a defence would be the taking of a step in the proceedings. But if it was confined as in the example suggested, s. 2(4)(a) would relieve the defendant from the usual consequences."

49. In *Republic of Yemen v Aziz* [2005] ICR 1391 CA the Court of Appeal considered. was whether the embassy had submitted to the jurisdiction of the tribunal by virtue of the acts of its solicitors in lodging a notice of appearance in which they stated that the respondents intended to resist the claim, and in subsequently amending it. Pill LJ (with whom Sedley and Gage JJ agreed) held:

    (1) By virtue of s 1(2) effect must be given to the s 1(1) immunity, even though the state does not appear in the proceedings. This means that a court or tribunal has a duty to enquire, not only as to whether a state has submitted to the jurisdiction under s2, but, where a party to proceedings may be a state, as to whether it has that status within the meaning of the Act, even though the party may not be present [60].

    (2) Where it is claimed that there has been a waiver of immunity, or a question arises as to the status of the entity claiming to be an emanation of the state, the court or tribunal should scrutinise the available evidence. In either case, the evidence of the ambassador, as representative of the state, is important but not necessarily conclusive evidence of the relevant matters [51].

(3) Where it is claimed that a step has been taken in the proceedings under s 2(3)(b), action taken by a member of the diplomatic mission, or solicitors instructed by the mission, must be taken with the authority of the head of the mission or the person for the time being performing the functions of the head of the mission [55].

(4) The head of the mission has deemed authority to submit to the jurisdiction under s 2(7), and this includes the authority to delegate. If the head of the mission authorises a member of the mission, or solicitors instructed by the mission, to submit, the action taken by such person is the action of the state, within the meaning of s 2. The head of the mission does not need the specific instructions of his government to confer such authority [55].

(5) A step taken by solicitors instructed by the mission cannot constitute a waiver of immunity unless they have been authorised to take it, either directly by the head of the mission or indirectly by a member of the mission who has been authorised by the head of the mission to do so [56].

(6) The doctrine of ostensible authority does not apply either to solicitors instructed by the mission or to a member of the mission (other than the head or acting head of the mission), nor can jurisdiction be created by an estoppel [53, 58].

(7) Where there is a factual issue as to whether there has been a waiver of immunity under s 2, it is open to the fact-finding tribunal, in determining that issue, to infer from all the circumstances that a member of the mission, or solicitors instructed by the mission, acted with the necessary authority [58].

(8) Where state immunity is claimed in appellate proceedings, the court or tribunal may consider evidence called to substantiate the claim because, if substantiated, the court or tribunal below had no jurisdiction to hear the case [51].

50. The requirement for authority from the head of a State's diplomatic mission to submit to the jurisdiction applies both to an actual submission and a deemed submission pursuant to s.2(3) of the 1978 Act, Arab Republic of Egypt v Gamal-Eldin [1996] ICR 13 at [21]. Accordingly, a director of a medical office attached to a mission did not have authority to submit to the jurisdiction on behalf of his state.

51. In *Baccus SRL v Servicio Nacional del Trigo* [1957] 1QB 438 at 474, Parker LJ said,

"In those circumstances it does seem to me that it requires some solemn act of the foreign sovereign to bring to life something which is otherwise completely dead; and, without referring to the cases, I think that The Jassy and the case before Astbury J., In re Republic of Bolivia Exploration Syndicate Ltd. , support that view. So far as this case is concerned, it is true that we have not had the benefit of an affidavit from Senor Cavero, but for my part I cannot impute to him knowledge of the effect of entering an unconditional appearance. Quite apart from that, it seems to me that the evidence is clear that although he is the person, the intermediary, to pass on instructions to English solicitors to deal with a case in England. he is bound to consult the appropriate minister as to whether sovereign immunity should be waived or not. It is true this does open up the rather alarming prospect that a foreign sovereign may allow proceedings to continue for years in this country before taking the point; but for my part I think that that is a theoretical difficulty. I do

not think any person, even though he be a foreign sovereign, would be likely to be believed if in such an extreme case he were to come forward and assert that he had had no knowledge whatever of the proceedings. …".

Discussion and Decision – Submission to Jurisdiction

52. Pursuant to *Kuwait Airways Corporation v Iraqi Airways Company and Republic of Iraq* [1995] 1 Lloyd's Rep 25, CA, presenting a substantive defence to a claim will normally constitute taking a step in proceedings and, therefore, submitting to the jurisdiction.

53. The Respondent presented a substantive response to the Claimant's claims in this case. It asserted that the Claimant had been fairly dismissed and gave details of the dismissal. It did not assert state immunity in its response.

54. The Respondent contended that the Respondent's Administrative Attaché, who presented the ET3, did not have the authority of the Consul General, who was the Head of Mission, to do so. It therefore contended that she did not have the necessary authority to take a step in the proceedings for the purposes of *s.2(3)(b) SIA 1978.*

55. In *Republic of Yemen v Aziz* [2005] ICR 1391 CA, the Court of Appeal said that, where there is a factual issue as to whether there has been a waiver of immunity under s 2, it is open to the fact-finding tribunal, in determining that issue, to infer from all the circumstances that a member of the mission, or solicitors instructed by the mission, acted with the necessary authority [58].

56. I have inferred, from all the facts, that Mrs Silva, the Respondent's Administrative Attaché, did have the necessary authority of the Consul General, who was the Head of Mission, to submit the substantive response. I also found that the Consul General knew the contents of the ET3 which had been submitted.

57. That being so, the Respondent submitted to the jurisdiction, under *s2(1)SIA 1978,* when it took a step in the proceedings under *s2(3)(b) SIA 1978* by presenting its substantive response.

58. I rejected the argument set out in Mr Keen's skeleton that the Respondent did not know that Mrs Silva had presented the ET3 in the terms that she did, or that it did not know the ET3 operated to lose state immunity, so that the Respondent did not have knowledge under *s2(5) SIA*. That was not correct on the facts. The Consul General did know that the response had been presented in those terms.

59. In any event, I did not agree that such an argument came within the terms of *s2(5) SIA.S2(5) SIA* provides that s2(3)(b) "does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable." It applies to cases where the Respondent does not know facts entitling it to immunity. It does not apply to cases where the Respondent does not know the effect of submitting a substantive response. There was no evidence that Respondent, a Consulate, was unaware of the facts entitling it to immunity. It was scarcely credible that a Consulate would be ignorant of its entitlement to immunity.

Sovereign Authority :The Claimant's Employment – Findings of Fact

60. The Claimant was employed by the Angolan Embassy as a "clerk of 2nd class" under a "contract of employment" dated 2 January 2010, p77.

61. The Claimant's company also had a contract to repair and maintain IT equipment at the Embassy, for 12 months starting on 1 September 2009, p80.

62. I accepted the Claimant's evidence that that contract between the Embassy and his company was short-lived and was not renewed.

63. From early in his employment, the Claimant's job duties comprised checking documents which were submitted by visa applicants.

64. In August 2015, the Claimant and other clerical staff were informed that Consular Services would move from the Visa Section of the Embassy to the new Consulate opening in Bedford Square, London, WC1.

65. The Claimant moved to the Consulate on 1 September 2015. The Head of the Consulate was the Consul General, Ms Vicencia de Brito.

66. The visa system at the Consulate included the following:

    (I) A visa application, passport and other supporting documents (such as the invitation letter from the employer in Angola and proof of address in the UK) would be scanned onto the Consulate's IT system and forwarded to the Consul General.

    (II) The Consul General would decide which applications should be forwarded to the Claimant in the back office to check.

    (ill) The Claimant would check the passport and other documents. For example, he would check that the name and number on the passport matched those on the application form; he would check the expiry date on the passport; and that the applicant's details on the invitation letter from the employer in Angola matched the details on the passport; and that the proof of address document tallied with the address on the other documents.

    (iv) If the documents passed the Claimant's checks, he would confirm that the application had been verified and the application would be passed to the Consul General to consider.

    (v) If the documents did not pass the checks, the Claimant would record the reason and forward the application to a colleague to deal with.

67. The Claimant did not decide who should be granted a visa, he undertook clerical checks on the documents submitted.

68. The Claimant was dismissed on about 26 May 2016. The Respondent's ET3 set out what it says were the grounds for dismissal – that he had created an email address and website for the Consulate without permission.

69. Mr Manuel's statement said that the creation of an unofficial email and website left the Consulate vulnerable to leaking confidential information and consular activities.

Law State Immunity: Contracts of Employment

70. 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'.

71. 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.

72. 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.

73. 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).

74. 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.

75. 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."

76. 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."

77. 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].

78. 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].

79. 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."

80. 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."

81. 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."

82. In *Webster v United States of America* [2022] EAT 92, paras [27] and [40] the EAT made clear that the analysis in *Sengupta v Republic of India* [1983] ICR 221, that work at a diplomatic mission necessarily involves participation in public acts of a foreign sovereign, cannot stand, because it is inconsistent with the reasoning of the Supreme Court in *Benkharbouche,* and was expressly disapproved.

83. Also in *Webster* at para [22] the EAT said that. in considering whether the functions of an employee are sovereign or governmental, it is necessary to consider what the employee actually does, rather than what the employee could be required to do under a contract of employment, or how they are described in their job title or description. Furthermore, the functions of the employee are not to be assumed because of the entity for whom, or the location at which, the work is performed

84. 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.

85. 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.

86. 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.

87. 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

88. 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.

89. 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

90. Mr Keen's skeleton argument contended that

90.1. The Claimant's post was plainly concerned with exercising governmental and consular functions. It was not purely collateral to it but was an integral part of it;

90.2. In order to investigate the Claimant's claims the Tribunal will be required to investigate the sovereign acts of Republic of Angola and in particular its processes for dealing with and granting visas. This directly interfered with the State of Angola's procedures and processes for the control of its borders;

90.3. Any declaration or remedy will interfere with the Respondent's right to engage and dismiss employees engaged in visa processing in accordance with its own policies and practices

The Claimant's work functions

91. I decided that the Claimant's job functions at the Consulate General comprised inspecting supporting documents supplied by Visa applicants and checking that the factual details on the documents matched the information given elsewhere in the application. If the documents did match the information, he noted this on a system. If they did not, he also recorded this and passed the matter to a colleague to deal with.

92. His job functions did not involve decision making as to whether the visa should be granted, or refused.

93. I accepted that a state's control of its own borders is one of the state's core functions and primary duties and is within the remit of a state's authority.

94. On my findings of fact, however, while the visa-granting function of the Respondent 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]. The Claimant performed a straightforward fact-checking, administrative task which facilitated substantive decision-making by others. He did not make any substantive decisions on the granting or refusal of visas.

95. His employment was not an exercise of sovereign authority.

Investigation of the Respondent's Procedures

96. The Respondent's case is that the Claimant was dismissed because he instituted an email address for visa applicants to communicate with him and an Embassy website, both without authority.

97. I did not agree with Mr Keen's contention that his claim would inevitably require the Tribunal to investigate and sit in judgment upon the mechanisms that the Republic of Angola has established to manage visas.

98. The question for the Tribunal appeared to be whether the Claimant had permission to set up an Embassy email address or Embassy website. This might not involve an examination of the visa application process at all, but whether the Claimant acted without authority. Acting without authority is a conduct issue which might arise in many different factual scenarios.

99. To the extent that the evidence might involve the Respondent's visa processes, however, it would only relate to the Claimant's administrative task of checking the factual details given on supporting documents. The Claimant's role did not involve any governmental decision-making on the granting or refusal of visas, or the implementation of governmental policy on visas.

100. Any consideration of the Respondent's visa procedures would relate only to the collateral task of checking the validity of documents. It would not involve

interrogating the substance of any broader governmental policy on the granting or refusal of visas.

101. I agreed with Mr Keen's contention that the Tribunal would need to determine whether, on the information before the Respondent, it was within the range of reasonable responses for the Respondent to dismiss the Claimant for that reason. I did not however, agree that this Tribunal would be asked to sit in judgment on Angola's governmental policy.

102. I have already explained why I do not consider that governmental visa policy would be engaged.

103. I noted that the Response said that Respondent is a Consulate mission and has strict rules on confidentiality and actions that can be carried out by its employees. In conduct dismissals the Tribunal is frequently referred to workplace policies on misconduct and confidentiality. The existence and content of such policies is rarely in dispute. More particularly, the fact that an employer has rules on proper authority for decision-making, or maintaining the confidentiality of its information, is also rarely a matter of dispute.

104. The Claimant's claim does not suggest that the content of, or the policy objectives behind, the Respondent's procedures on workplace misconduct or confidentiality are in issue in this case.

105. In any event, I did not consider that rules on confidentiality of workplace information, or authority for decision-making, were inherently governmental, rather than normal workplace expectations.

106. It is not suggested that the Respondent's dismissal of the Claimant was in pursuit of any other particular government policy objective at Embassies, or otherwise.

107. I did not agree, therefore, that the Respondent's immunity extended to Claimant's dismissal. His dismissal did not engage the state's sovereign interests. I did not agree that the Tribunal would need to examine inherently governmental considerations in deciding the Claimant's substantive claims.

108. By reason of the Respondent's submission to the jurisdiction, the Tribunal has jurisdiction to consider all the Claimant's complaints. The claim will proceed to a Final Hearing.

Dated: 7 July 2022

Employment Judge Brown

ORDERS SENT TO THE PARTIES ON

07/07/2022.

FOR THE TRIBUNAL OFFICE