EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Mohamed	**v**	**The Government of the State of Kuwait**

Heard at: **Central London Employment Tribunal (by CVP)**

On: **13 January 2023**

Before: **Employment Judge Brown**

Appearances:

For the Claimant: **Ms N Prempeh, Employment Consultant**
For the Respondents: **Mr M Sethi QC**

JUDGMENT AT AN OPEN PRELIMINAARY HEARING

The judgment of the Tribunal is that:

1. **Throughout the Claimant's employment, the Claimant's job functions were exercises of Sovereign Authority and the Respondent had the benefit of state immunity, save in respect of claims for personal injury.**

2. **The Claimant brought claims against the Respondent for personal injury – namely depression - arising from discrimination and harassment. The Tribunal has jurisdiction under s5 State Immunity Act 1978 to consider those claims for personal injury arising from a statutory tort. Those personal injury claims can continue.**

3. **The Claimant's other claims are barred by state immunity.**

REASONS

1. This Open Preliminary Hearing was listed to determine the issue of state immunity in this case, specifically: Whether the Claimant was carrying out functions sufficiently close to the governmental functions of the Respondent so that his employment was a sovereign act.

Background

2. By a claim form presented on 28 September 2020 the Claimant, a medical doctor, brings complaints of direct age, sex and disability discrimination, associative disability discrimination, age and disability harassment, s15 EqA discrimination arising from disability, indirect disability discrimination and harassment, including a claim for personal injury damages, unlawful deductions from wages and a failure to pay holiday pay, against the Respondent.

3. Part of the Claimant's claim is for personal injury arising out of dismissal.

4. I heard evidence from the Claimant and from Dr Wafaa El Sankary, Head of the Medical Auditing Department at the Kuwaiti Health Office. There was a Bundle of documents. Both parties made written and oral submissions. I reserved my decision.

Findings of Fact - The Claimant's Job

5. The Claimant is a British citizen. He was employed by the Respondent from 5 May 2009 until 20 May 2020.

6. The Claimant's written employment contract, p102, is entitled, "Employment Contract for Locally Engaged Staff of Diplomatic Missions of the state of Kuwait" ("Contract"). It is a contract for the employment of staff of diplomatic missions of the sending state.

7. It identifies the "First Party" to the Contract as the employer, namely, "The Government of The State of Kuwait", which is "in London represented by the Head of the Mission".

8. The Contract is signed on behalf of the representative of Kuwait by its Head of Mission and bears the official seal of the "Embassy of Kuwait".

9. It states the Claimant's role to be "Dr" … "at the Embassy of Kuwait in London".

10. This contract was a one year fixed term contract. It was renewed continuously until the Claimant's dismissal.

11. The Claimant worked at the Kuwaiti Health Office, which is part of the Kuwaiti Embassy and therefore part of the State of Kuwait. I accepted Dr El Sankary's evidence that the KHO's functions include: representing the State of Kuwait in the United Kingdom; protecting the interests of the State of Kuwait and its nationals in the UK; and monitoring the state of medical expertise and treatment in the UK and reporting back to the State of Kuwait, amongst other matters. It therefore carries out at least some sovereign functions on behalf of the State of Kuwait.

12. The KHO is an international health service offered by the state of Kuwait to all Kuwaiti nationals when the Kuwaiti health service cannot provide a specific treatment to a patient. In those circumstances, the Kuwaiti health service refers the patient to the Ministry of Health's 'Treatment Abroad Department', which, in turn, refers the patient to a health offices abroad, like the KHO in London. The Under-Secretary of the Ministry of Health in Kuwait is required to give approval for the

referral. As well as the Under-Secretary of the Ministry of Health in Kuwait making referrals, referrals can also be made directly to the KHO by the Kuwaiti sovereign, His Royal Highness, the Emir of Kuwait, through the Emiri Dewan (the Royal Household).

13. Once approval has been given by the Under-Secretary of the Ministry of Health in Kuwait, a patient will travel to the UK for their treatment and the KHO will create a patient file. The patient file will include confidential and sensitive information about the patient, including their detailed medical history, contact details, and next of kin details.

14. It was not in dispute that the KHO has a patient database, containing all patient files. These files include files for patients referred to the KHO by the Emiri Dewan, or Royal Household. Access to the database provides access to all such records. If a patient's allocated Doctor is on annual leave, another Doctor can therefore deal with the patient during that time.

15. The status of a particular patient is apparent on the medical database due to the way their details are entered onto the system. If a patient is part of the Royal Family in Kuwait, they are given the prefix 'Al-Sabah'. If a patient is a Prince or Princess, they will be given the pre-fix 'Sheikh' or 'Sheikha', followed by the surname of the Royal Family, 'Al-Sabah'. If a patient is a diplomat, they will have a unique KHO reference number which begins with 'ES'. Invoices relating to diplomats are called 'Executive invoices'.

16. There was a dispute as to which employees of the KHO have access to the database. Dr El Sankary told the Tribunal that only those who need to access it in their work, including the Health Attaché, Medical Auditors and in-house Doctors have this access. The Claimant told the Tribunal that all employees, including porters who greet visitors to the KHO, have access.

17. Dr El Sankary told the Tribunal that the Respondent's IT department gives different permissions to different users of the database. Each person has their own username and password. Permissions are attached to the individual usernames.

18. I will return to this matter.

19. Once a KHO patient arrives in the UK, they are allocated to an in-house Doctor at the KHO. The in-house Doctor is responsible for arranging all required treatment for the patient while they are in the UK. Such treatments can include chemotherapy for cancer, or complex surgeries, or psychiatric assessments. Before the allocated Doctor can appropriately refer the patient for treatment, they need to understand the patient's medical history. The doctor therefore needs to review the patient's medical file, together with any medical reports.

20. A KHO Medical Auditor is responsible for reviewing invoices presented by private UK hospitals for treatment of patients. The auditor needs to ensure that the relevant patient's treatment was necessary, has been authorized and that the cost of the patient's treatment(s) matches the fees agreed between the KHO and the treating hospital.

21. In order to assess whether treatment was necessary, the Medical Auditor needs to review a patient's medical records, including any medical reports from the hospital.

22. The Claimant worked as an in-house doctor at the KHO from 2009 until 2015, when his role changed to both medical auditor and in-house doctor. From 2017, the Claimant worked as a medical auditor only.

23. The Claimant agreed in evidence that he had access to the KHO database and to the medical reports on it when he needed them for his job.

24. From the evidence in the Bundle, the Claimant had approved at least one invoice for medical treatment of a member of the Kuwaiti Royal Household, p178 – 179.

25. I decided that the Claimant had access to the database and permission to view all the medical reports on it which were relevant to his treatment of patients, when he was a doctor, and to his approval of invoices, when he was an auditor.

26. Even if other employees had access to the database for some purposes, I considered that basic patient confidentiality would dictate that general workers, like porters, would not have permission to read medical reports of patients.

27. Dr El Sankary told the Tribunal that she believed that the Claimant's claim called into question the State's policies on requiring its employees to attend work during the COVID-19 pandemic and the lawfulness of the Regulations for Locally Engaged Staff at diplomatic missions of the State of Kuwait and such decisions and circulars as implement those Regulations. She told the Tribunal that the Respondent was therefore concerned that the nature of the discrimination allegations and the nature of any investigation by a Tribunal into those allegations, will involve an investigation into the sovereign acts of the State of Kuwait.

Relevant Law: State Immunity Law and EU Law

28. 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

29. 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.

30. *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*.

31. *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).

32. 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.

33. 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."

34. *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."

35. 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].

36. Whether there has been such an act in relation to employment 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].

37. 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."

38. 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."

39. In paragraphs [64] – [67] and [70] – [71], Lord Sumption had already cited at length from *Cudak v Lithuania* (2010) 51 E.H.R.R. 15.

40. 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."

41. 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 ..".

42. 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).

43. 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."

44. 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.

45. 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*.

46. 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.

47. 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

48. 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.

49. 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

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

Nature of the Contract Itself

51. The Respondent contended, first, that the Claimant's employment contract itself was an exercise of sovereign authority. It did so relying on the following features of the employment relationship:

    51.1. The written contract of employment [p102] is titled: "Employment Contract for Locally Engaged Staff of Diplomatic Missions of the state of Kuwait" ("Contract"). The Respondent contended that the contract was clearly a contract for the employment of staff of diplomatic missions of the sending state.

    51.2. The contract identifies the "First Party" to the Contract as the employer, namely: "The Government of The State of Kuwait". The employer is said to be "in London represented by the Head of the Mission".

    51.3. The Contract is signed on behalf of the representative of Kuwait by its Head of Mission. The Contract bears the official seal of the "Embassy of Kuwait".

    51.4. The KHO is a diplomatic mission of the State of Kuwait in the UK. The KHO represents Kuwait and its Ministry of Health in the UK. It is part of the Embassy of Kuwait in London.

51.5. The KHO in the UK carries out sovereign functions on behalf of the State of Kuwait.

51.6. Under his contract Clause 1, the Claimant was employed as a Doctor and the place of work was expressly stated to be "at the Embassy of Kuwait in London". Under clause 5: "During the term of the Validity of this contract the second party shall be subject to the regulations for locally-Engaged staff employed at Diplomatic Missions of The State of Kuwait and such decisions and circulars as implement those regulations, where there is no specific provision in this contract."

51.7. Under clause 6: "Any Dispute which may arise between the parties as to the implementation or interpretation of the contract shall be subject to the generally acknowledged principles of International Law."

52. I disagreed. The Respondent appeared to be arguing that, because the Claimant was employed as a member of staff by the State, to work at the Mission, which carries out sovereign functions, his employment was an act of sovereign authority.

53. The Respondent's submission appeared to be inconsistent with the dicta of Lord Sumption in *Benkharbouche*, at [37], [54] and [55] and the approach of the ECHR in, for example, *Cudak v Lithuania.*

54. In *Benkharouche*, Lord Sumption made clear that, "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]. Whether there has been such an act in relation to employment 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].

55. The test for whether the employment of an employee is an exercise of sovereign authority is therefore not whether the employee is employed by a State, to work at the Mission, or whether the Mission itself carries out sovereign functions.

56. In *Benkharbouche* [55], having identified 3 categories of staff employed in a Mission, Lord Sumption suggested that technical and administrative staff, in general, exercise ancillary and supportive functions. He did not suggest that their employment was an exercise of sovereign authority simply because they were employed by the state to work at the mission and/or in 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).

57. 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.

58. Likewise, 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.

59. I therefore rejected the Respondent's contention that the employment of the Claimant was an act of sovereign authority because he was employed by the State, to work at the Mission, which carries out governmental functions.

Job Functions

60. The Respondent also contended that the functions performed by the Claimant in his role fell within the sphere of governmental or sovereign activity and were not of a purely private law character.

61. I decided that the Claimant's functions, as a member of the Respondent's administrative staff, were sufficiently close to the governmental functions of the mission to attract state immunity.

62. I noted Lord Sumption's description of the nature of the functions of a diplomatic mission, at para [55], as ".. 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." The role of technical and administrative staff is by comparison essentially ancillary and supportive. They might also exercise sovereign authority if their functions are sufficiently close to the governmental functions of the mission.

63. The Claimant contended that the fact that he had access to confidential documents was not sufficient for sovereign immunity to apply. He contended that all employees at the KHO had this access. He said that he was part of the technical and administrative staff of a diplomatic mission, but did not undertake any governmental authority or functions closely related to the exercise of governmental authority.

64. I did not agree. The doctors of the KHO, of whom the Claimant was one, are responsible for protecting the interests of Kuwaiti nationals referred to the KHO for medical treatment, expressly authorised by the governmental act of the Under-Secretary of the Ministry of Health in Kuwait and/or the Emir of Kuwait.

65. The nationals who were referred to the KHO during the Claimant's employment included members of the Kuwaiti Royal family and senior government officials.

66. As an allocated doctor to these individuals, the Claimant was required to arrange the patient's treatment while they were in the UK. This included reviewing reports received from UK hospitals concerning the medical condition of KHO registered

patients. Until 2017 the Claimant's functions as an allocated doctor were fundamental to protecting the interests of the sending state, through safeguarding the health of its ruling family and senior government officials

67. Even when acting as a Medical Auditor, he was responsible for safeguarding the medical treatment of ruling family and senior government officials.

68. In order to undertake both his roles, the Claimant needed to have knowledge of the patients' medical conditions. Even after 2017, the Claimant had access to the patient database containing confidential information regarding the medical condition of the patients at the KHO.

69. Throughout his employment, therefore, including after 2017, the Claimant had access to highly confidential information relating to the health of the members of the Kuwaiti Royal family and government. This information could be used by foreign governments, or hostile agents, to undermine the ruling family or the Kuwaiti government.

70. I considered that the Claimant's tasks were not merely administrative and ancillary to the functions of the mission. The Claimant had personal responsibility for decision-making in relation to the health of royal family members and government ministers and in safeguarding confidential information relating to senior officials of state.

71. The Claimant's employment was an exercise of sovereign authority.

Discussion and Decision - Acts of Sovereign Authority in Private Law Employment

72. The Respondent also contended that the Claimant's claims concern acts of sovereign authority, which the Tribunal is not permitted to examine. In particular,
    72.1. The Claimant alleges that the State's PCP under Art 33(7) of the Kuwaiti Regulation on Local Employees and Workers 1999 (governing dismissal for reaching state retirement age) infringes "the Employment Equality)repeal of retirement provisions) regulation 2011 which prohibits the compulsory retirement taking place after 5th October 2012" – paragraph 24 of the Claimant's Particulars of Claim and "discriminates against elderly people in contravention of sections 19 of the Equality Act 2010, who would otherwise choose to continue working until they are no longer capable of doing so, forcing them to retire; while their younger counterparts enjoy the benefits of working life" – paragraph 25 of his Particulars of Claim.;
    72.2. The Claimant further alleges that the State's PCP under Art 33(4) of the Kuwaiti Regulation on Local Employees and Workers 1999 (governing dismissal for "inappropriate health") contravenes "section 15 of the Equality Act 2010, which prohibits discrimination arising from disability. The Claimant's health condition falls within the definition of disability provided under section 6 of the Equality Act 2010." – paragraph 26 of the Particulars of Claim; and
    72.3. He alleges that the State's PCP of requiring its employees to attend the workplace during the COVID-19 pandemic was unlawful – "the Respondent's policy/rule or measure which required all staff members to return to work by the 1st of June 2020. This policy/rule or measure put in place indirectly

discriminated against the Claimant as his age and disability meant he could not return to work as he was required to self- isolate while those members of staff who did not share the Claimant's protected characteristics could return to work."

73. The Respondent pointed out that one of the Claimant's harassment allegations was that "The Respondent relying on the Kuwait local regulations/articles when dismissing the Claimant on the grounds that he had reached retirement age. This Article forces retirement of those aged 60 and 70. Default retirement age was outlawed in the UK in 2011" – Particulars of Claim paragraph 37.d.

74. Regarding the alleged requirement to return to work during the pandemic, I noted that the Claimant had not pleaded that the State, itself, had a rule requiring employees to return to the workplace during the pandemic. He had originally brought his claim against "The Kuwait Health Office". He had pleaded that the KHO had required "staff members" to return to work. As a matter of construction, he had alleged that this rule was applied by the KHO to its staff, not that there was any broader governmental instruction towards state employees generally.

75. I therefore rejected the Respondent's argument that the Claimant's complaint in relation to the instruction to work from the office related to any sovereign act.

76. I noted Lord Sumption's observations in [58] of *Benkharbouche* and the case of *United States v Public Service Alliance of Canada, Re Canada Labour Code* [1993] 2 LRC 78, [1992] 2 SCR 50 to which he referred. That case concerned the introduction of a no-strike clause into all civilian employees' contracts of employment, as the State had decided that this was essential to the military efficiency of the base. Lord Sumption observed, "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."

77. The *United States v Public Service Alliance of Canada, Re Canada Labour Code* involved a challenge to introduction of the clause. It challenged the legality of the rule itself.

78. In the present case, however, I decided that the Claimant's case concerned the application of the rule to him, rather than the introduction of the rule itself.

79. Insofar as there will be an examination of the lawfulness of the relevant PCP, it will involve deciding whether the application of the PCP to the Claimant, himself, was a proportionate means of achieving a legitimate aim. That appeared to be a matter of private, rather than public, law.

80. I noted that, on his pleaded facts, the Claimant was well over the state retirement age when he was dismissed. The question for the Tribunal will therefore be whether the particular decision to dismiss the Claimant was lawful.

81. Regarding his harassment claim, again the Claimant complains of the fact of the application of the rule to him; he complains of his own dismissal because he was a

particular age. The legal test for harassment does not require any broader examination of the legitimacy of the rule.

82. Regarding his disability discrimination claim, the Claimant is alleging he was dismissed for a health related reason. Again, the ultimate test under s15 and or s19 will be whether the decision to dismiss him was justified in relation to him personally. It can be fair and non-discriminatory in UK law to dismiss a person for a health related reason. A disability discrimination, or an unfair dismissal, complaint in the UK does not involve a challenge to UK law. Claimants do not argue that the law is wrong to specific incapacity as a potentially fair reason for dismissal; or that it is always discriminatory to dismiss for a disability-related reason. The issue is the legality of the treatment of the individual at the relevant time.

83. On his pleading, the Claimant had had a health condition for 11 years before he was dismissed.

84. I had already decided that the Claimant's employment, more broadly, was an act of sovereign authority. However, I was not satisfied that the nature of the Claimant's indirect discrimination and harassment complaints were additional reasons for finding that state immunity applied to his claim.

85. If I was wrong in that, I considered that the Claimant's direct discrimination complaints were not additionally barred as they did not relate to the application of a State law.

86. Also if I was wrong, the Claimant might apply to amend the formulation of the PCPs. As I have indicated, on his pleading, he was above retirement age when he was dismissed. On his pleading, he had had a health condition for many years before the decision to dismiss was made. Of course, any such amendment application would not necessarily succeed. Any decision would need to be made applying the appropriate legal principles to the relevant facts.

87. I also considered that it might be possible, in the indirect discrimination complaints, for the ET could accept that, as laws, PCPS had legitimate aims, but examine whether their application in the Claimant's case was a proportionate means of achieving that legitimate aim.

88. All of this is theoretical, in any event, as I have decided, below, that the Claimant can pursue his personal injury claim, which is not barred by state immunity.

Personal Injury Claim

Relevant Law

89. By *s5 SIA*
"A State is not immune as respects proceedings in respect of—
(a) death or personal injury; or
(b) damage to or loss of tangible property,
caused by an act or omission in the United Kingdom."

90. An employee can rely upon the exclusion from state immunity under *s5 SIA* in relation to a personal injury claim for unlawful discrimination: *Ogbonna v. Republic of Nigeria* [2012] ICR 32. In that case, Underhill P held that claim for compensation for psychiatric illness caused by unlawful discrimination is a claim for "personal injury" within the meaning of *s5 State Immunity Act 1978* and an employment tribunal accordingly has jurisdiction to entertain such a claim by an employee of a state even if he or she is a member of mission within the meaning of *s16(1)(a) SIA.* Underhill P held that, while personal injury was not a necessary or even typical part of a discrimination claim, when personal injury occurred in such a claim, the SIA did not bar a claim for damages for it:

91. Underhill P said the following in *Ogbonna:*

" [12] The first point, as helpfully elucidated by Mr Pipi in his skeleton argument and oral submissions, is that the effect of sections 4 and 16 taken together is that a state enjoys absolute immunity in respect of "proceedings relating to a contract of employment" — which includes a claim of infringement of statutory rights: see section 4 (6) — in the case of employees who are members of a mission, and that section 5 has no application in such a case. I cannot accept this submission. Sections 4 and 5 are separate and freestanding exceptions to the general rule of state immunity provided by section 1 : that is so even though on the facts of a particular case, and specifically in a case of a claim for personal injury by an employee, both exceptions might be engaged. Section 16 (1) (a) expressly qualifies that exception as regards section 4 but it has no impact on section 5."

"13 The second limb of the second ground in the notice of appeal is that the claimant's claim for personal injury is "ancillary to" her claim of disability discrimination and can thus only be advanced if and to the extent that that claim is not caught by state immunity, which Mr Pipi submits it plainly is because she was a member of a mission and so fell within the terms of section 16(1)(a). This argument seems to be in substance the same as that which was considered and rejected by this tribunal in Caramba-Coker: see para 18 of the judgment, quoted at para 6(5) above. I should therefore reject the submission unless I am sure it is right. That is not the case."

92. Article 12 of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property ("UNCSI") which provides: "Unless otherwise agreed between the States concerned, a state cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission."

93. The Law of State Immunity (Fox and Webb, OUP, Third edition) at p470 says: "The tortious conduct covered by s5 is confined to acts causing physical damage to the person or property; damage resulting from words, spoken or written, remains immune." See *Yessenin Volpin v Novosti Press Agency, Tass etc* 443 ESupp 849 (SDNY 1978); 63 ILR 127*; Krajina v Tass Agency* [1949] 2 All ER 274; 16 ILR 129;

Grovit v De Nederlandsche Bank NV [2007] 1 All ER (Comm) 106. See also *Schreiber v Germany* 216 DLR (4th) 513.

94. The ILC Commentary on Article 12 says: "(1) This article covers an exception to the general rule of State immunity in the field of tort or civil liability resulting from an act or omission which has caused personal injury to a natural person or damage to or loss of tangible property."

95. Paragraph 4 of the Commentary states: "… the physical injury to the person or the damage to tangible property … appears to be confined principally to insurable risks. The areas of damage envisaged in article 12 are mainly concerned with accidental death or physical injuries to persons or damage to tangible property involved in traffic accidents, such as moving vehicles, motorcycles, locomotives full speed boats. In other words, the article covers most areas of accidents involved in the transport of goods and passengers by rail, road, air or waterways. Essentially, the rule of non-immunity will preclude the possibility of the insurance company hiding behind the cloak of state immunity and evading its liability to the injured individuals. In addition, the scope of article 12 is wide enough to cover all also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination."

96. The State Immunity Act 1978 is to be construed against the background of generally recognised principles of public international law, *Alcom v Republic of Colombia* [1984] A.C. 580, at [597].

97. It is settled law that "there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation"; *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, para. 27 (Lord Hoffmann). See also *Assange v Sweden* [2012] UKSC 22, [2012] 2 AC 471, paras 10 (Lord Phillips), 98 (Lord Brown); 112 (Lord Kerr); 122 (Lord Dyson)).

98. Nevertheless, in *Federal Republic of Nigeria v Ogbonna* [2012] ICR Underhill P (as he then was), considered *Military Affairs Office of the Embassy of the State of Kuwait v Caramba-Coker* EAT 1054/02 and said at [7]:

99. 'It is perfectly clear from that reasoning taken as a whole that this Tribunal in Caramba-Coker decided as a matter of ratio (a) that any claim for compensation for personal injury fell within the terms of section 5 notwithstanding that it was consequent on a discrimination claim, and (b) that in this context a claim of mental ill- health caused by the discrimination complained of constituted a claim for "personal injury". The decision would seem therefore on its face clearly to apply to the circumstances of the present case. The Judge was right to hold that she was bound by it. I am of course not so bound , and Mr Pipi submitted that the section 5 point was only fairly briefly dealt with in Keith J's Judgment and that it did not seem that it had been very fully argued. I accept that; but my starting-point must nevertheless be, on ordinary principles, that I should not depart from Caramba-Coker unless I am satisfied that it was wrong.'

100. Underhill P did not consider that *Caramba – Coker* was wrongly decided. In his judgment, Underhill P reaffirmed the position that an employee of a mission could

pursue a personal injury claim against the mission, in circumstances in which that personal injury claim took the form of a discrimination claim, and that it did not matter whether the Claimant claimed in respect of physical or psychiatric injury, paragraphs [16] – [21] *Ogbonna*.

101. At [21] Underhill P said, "[21] In sum, I find nothing in the international law materials which supports Mr Pipi's submission that there is a recognised meaning in international law to the phrase "personal injury" which is more limited than the natural meaning of those words in domestic law."

Discussion and Decision – No State Immunity in Personal Injury Claim

102. The Claimant has brought a claim for personal injury – namely, "depression arising from the Respondent discriminating against him" – paragraph [38] of his Particulars of Claim.

103. I consider that the Tribunal has jurisdiction to consider this claim because *s5 SIA* disapplies state immunity in respect of such a claim.

104. In *Ogbonna*, Ms Ogbonna also claimed that her dismissal was an act of discrimination and that her dismissal had caused injury, including injury to her mental health (depression), paragraph [2] of the judgment in *Ogbonna*.

105. I consider that I am bound by the decision of the EAT in *Ogbonna* and find that, by reason of *s5 SIA,* the Respondent has no immunity in respect of a claim for personal injury, including a claim for psychiatric injury, arising in the Claimant's discrimination claim.

106. The Respondent contends that this interpretation *s5 SIA* gives 'personal injury' a meaning which does not reflect international agreements and rules of international law which the United Kingdom is bound to respect.

107. I disagree. In its argument, the Respondent relies on Article 12 of the 2004 United Nations Convention on Judicial Immunities of States and their Property. Underhill P considered these international provisions, at [16] – [21] of *Ogbonna*. Underhill P did not consider that these international instruments distinguished between physical injury and psychiatric injury.

108. Further, the Respondent argues that, if the Claimant's claim is only based on *s5 SIA* with no employment contract underpinning it (which is not possible in this case), then the ET does not have the power to adjudicate upon a common law claim (such as negligence) for damages for personal injury in accordance with s3(3) Employment Tribunals Act 1996 which states: "This section does not apply to a claim for damages, or for a sum due, in respect of personal injuries". The Respondent relies on specific exclusion for claims relating to personal injuries under art 3 of the ETs Extension of Jurisdiction (E&W) Order (SI 1994/1623) which provides: "Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) …".

109. Again, I considered that the Respondent made materially the same arguments in *Ogbonna* - as set out in paragraph [12] & [13] of the *Ogbonna* judgment.. The Respondent in that case specifically argued that "that the effect of sections 4 and 16 taken together is that a state enjoys absolute immunity in respect of "proceedings relating to a contract of employment" — which includes a claim of infringement of statutory rights: see section 4 (6) — in the case of employees who are members of a mission, and that section 5 has no application in such a case." [12] of that judgment. The Respondent in *Ogbonna* also argued that "claimant's claim for personal injury is "ancillary to" her claim of disability discrimination and can thus only be advanced if and to the extent that that claim is not caught by state immunity."

110. The EAT in Ogbonna rejected those arguments at [12] & [13].

111. The EAT said that only *s4* was qualified by *s16,* and not *s5.*

112. I noted that *S5 SIA* is, indeed, framed in very wide terms and is not contingent on *s4.* It disapplies immunity " as respects proceedings in respect of— … personal injury …caused by an act or omission in the United Kingdom."

113. Therefore, while a claim for loss of earnings flowing from a discriminatory dismissal might be barred by *s4(6) SIA*, the Claimant's claim for personal injury arising from an act or omission is not so barred, because of the expansive terms of *s5*. The act or omission does not need to be one which also arises under *s4*. The alleged relevant act or omission in this case is a statutory tort, over which the ET has jurisdiction.

114. I am bound by *Ogbonna*, in which Underhill P considered and rejected the distinction between physical and psychiatric injury under *s5 SIA* which the Respondent seeks to make. Underhill P also rejected the argument that a claim for personal injury arising from a breach of statutory rights, based on a contract which is barred by s4 and s16, could not be brought relying on s5 SIA.

115. I consider that Underhill P gave a considered and fully reasoned judgment on these issue in *Ogbonna* and that his conclusion is one which I should follow, for the reasons he gave.

116. Accordingly, the Claimant can bring his personal injury claim, relating to his depression, and it is not barred by state immunity.

Directions

117. I set dates for the Final Hearing and a provisional remedy hearing. These dates were convenient for the parties. The parties agreed that I should send out directions for preparation for the Final Hearing. The parties can agree variations to relevant dates between themselves as appropriate.

ORDERS

Made under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

The Final Hearing

1. The Final Hearing is listed for **7 days on 20 – 24, 27 and 28 November 2023** in person, before a full Tribunal, to consider liability only.

Remedy Hearing

2. A Remedy Hearing is provisionally listed for **7 and 8 March 2024, in person.**

Schedule of Loss

3. By **4pm on 9 February 2023** the Claimant shall send his schedule of loss to the Respondent, setting out the sums he claims and how they are calculated.

Respondent's Response

4. By **4pm on 2 March 2023** the Respondent shall send its substantive Response to the claim to the Tribunal, copied to the Claimant.

List of Issues

5. By **4pm on 16 March 2023** the parties shall agree a List of Legal and Factual Issues in the claim and response and shall send this to the Tribunal.

Disclosure

6. By **4pm on 6 April 2023** the parties shall exchange all documents in their possession and control relevant to all issues in the claim and response, by lists and copies of the same. The Claimant shall disclose his relevant medical/GP records to the Respondent by the same date.

Instruction of Joint Experts

7. The parties shall jointly instruct a psychiatric expert, to produce an expert report on the symptoms, diagnosis, causation, treatment and prognosis of the Claimant's psychiatric condition.

8. By **4pm on 13 April 2023** the Respondent shall supply to the Claimant details of 3 proposed expert(s), including names, relevant discipline and qualifications and estimated fees of each expert, and conformation that the expert can provide a report and answers within the time specified in these directions.

9. By **4pm on 13 April 2023** the Respondent shall supply to the Claimant a proposed letter of instruction to the expert . The letter shall include the purpose of the report, the identity of the parties, a copy of the pleadings and list of issues and the agreed and the date by which the report is required. The letter shall enclose the Claimant's G.P. and other medical records.

10. By 4pm on **4 May 2023** the Claimant shall indicate to the Respondent in writing which of the proposed experts he agrees shall be instructed.

11. By 4pm on **4 May 2023** the parties shall agree the contents of the letter of instruction.

12. By 4pm on **11 May 2023** the parties shall instruct the relevant expert to report.

13. The expert shall provide a report to the parties by **4pm on 13 July 2023.**
14. The parties shall put any questions to the expert jointly by **4pm on 27 July 2023,** or within 14 days of receipt of the expert report, whichever is earlier.

15. The expert shall provide answers to any such questions to the parties by **4pm on 10 August 2023.**

16. The parties shall indicate any concessions arising out of the expert evidence to each other in writing by **4pm on 24 August 2023.**

17. The expert shall not give evidence at the final hearing.

Bundle

18. By **4pm on 7 September 2023** the Respondent shall send to the Claimant a draft bundle comprising all documents relevant to the claims and to the grounds of resistance.

19. By **4pm on 14 September 2023** the Claimant shall notify the Respondent of any additional documents which need to be included in the bundle on behalf of the Claimant.

20. By **4pm on 21 September 2023** the Respondent shall provide to the Claimant a clear, indexed, paginated copy of the bundle, assembled in chronological order and containing all the relevant documents which each party wishes to be included. The Respondent shall bring 5 copies to the Hearing (4 for the Tribunal and one for any witness).

Witness Statements

21. By **4pm on 12 October 2023** the parties shall exchange written witness statements relevant to liability (including one from a party who intends to give evidence).

22. The witness statement should set out all of the evidence of the relevant facts which that witness intends to put before the Tribunal on the issues. If it is intended to refer to any document, the witness statement should refer to page/s in the agreed bundle. A failure to comply with this order may result in a witness not being permitted to give evidence because it has not been disclosed in a witness statement; or in an adjournment of the hearing and an appropriate order for costs caused by such adjournment.

23. Each party shall bring 5 copies of any such witness statement to the hearing.

Cast List and Chronology

24. **By 4pm on 9 November 2023** the Respondent shall send to the Claimant a first draft of a Cast list and a Chronology. The parties shall attempt to agree a Cast list and a Chronology for use at the Final Hearing.

Other matters

Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

You may apply under rule 29 for this Order to be varied, suspended or set aside.

_____24 January 2023_____

Employment Judge Brown

JUDGMENT & ORDERS SENT TO THE PARTIES ON 24/01/2023

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FOR THE TRIBUNAL OFFICE