



EMPLOYMENT TRIBUNALS

Claimant
Mr A Gale

v

Respondent
The Kingdom of Eswatini

Heard at: Central London Employment Tribunal (By CVP)

On: 21 January 2025, 22 January 2025 (In Chambers)

Before: Employment Judge Brown

Appearances

For the Claimant: Mr T Lowenthal, Counsel
For the Respondent: Ms N Hart, Counsel

JUDGMENT AT A PUBLIC PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The Claimant's employment was not an exercise of sovereign authority.
2. The Claimant's claim is not barred by state immunity and can proceed.

REASONS

Background

1. By a claim form, presented on 27 August 2023, the Claimant brought complaints of unfair dismissal, wrongful dismissal, race discrimination, failure to pay notice pay and unlawful deductions from wages in relation to overtime pay, against the High Commission of the Kingdom of Eswatini. The Claimant gave his dates of employment as 21 September 2022 – 20 June 2023. In his grounds of complaint, he said that he had been subjected to race discrimination as a Jewish person. He also said that he had not been paid holiday pay.
2. The Respondent presented a Response to the claims on 7 June 2024, asserting state immunity pursuant to ss1 & 16 *State Immunity Act 1978*.

3. Its grounds of resistance said that the Claimant's contract of employment as a member of the staff of the High Commission was entered into in the exercise of the Respondent's sovereign authority, s16(1)(aa)(i) SIA, because it said that the functions which the Claimant was employed to perform were closely connected to the performance of governmental functions and exercise of sovereign authority. It said that the Claimant was employed as the High Commission's chauffeur and was responsible for transporting the Respondent's High Commissioner and other diplomatic agents in the United Kingdom, members of the Kingdom's royal family and other senior dignitaries and government figures, including to official events. It said that the Claimant was entrusted with maintaining the security of these individuals and the High Commission and was privy to confidential information. It said that he was therefore closely involved in protecting, in the UK, the interests of the Kingdom of Eswatini and of its nationals within the meaning of Article 3(1)(b) of the Vienna Convention on Diplomatic Relations.
4. The Respondent also said that the identity of the correct Respondent is The Kingdom of Eswatini.
5. This hearing was listed to determine the state immunity issues in the claim. At a previous preliminary hearing, I had identified the state immunity issues as follows
 - 5.1. Who is the correct Respondent?
 - 5.2. Whether the Claimant's claims are barred by State Immunity pursuant to s1 Statute Immunity Act 1978:
 - 5.2.1. What functions was the Claimant employed to perform?
 - 5.2.2. Were the functions which the Claimant was employed to perform sufficiently close to the governmental functions of the mission that his employment was an inherently sovereign or governmental act?
 - 5.2.3. Was the Claimant's employment an exercise of sovereign authority so as to be barred by state immunity under international law?
6. The Claimant agreed, at the start of the hearing, that the correct Respondent is The Kingdom of Eswatini.
7. I heard evidence from the Claimant. Much of his witness statement concerned the merits of the substantive claim. I confirmed, at the start of the hearing, that I would disregard the parts of his witness statement which were not relevant to the issue of State Immunity in this case.
8. I read the witness statements of Thandazile P Mbuyisa, the High Commissioner of the Kingdom of Eswatini High Commission and Temnotfo Nkambule, Counsellor at the High Commission of Eswatini. They did not give evidence because they both hold diplomatic posts. Unfortunately that meant that I did not have the benefit of their evidence in cross examination. Nevertheless, I took their evidence into account in coming to my decision.

9. Both parties made submissions. They provided dates of availability for a case management hearing, in the event that the Claimant's claim was not barred by State Immunity.

The Facts

10. The Claimant was employed by the Respondent from 21 September 2022 to 20 June 2023, at the High Commission of Eswatini in London, as Chauffeur, reporting to the High Commissioner, p89 -90

11. By clause 2.2, his contract of employment provided,

"2.2 Your duties will be notified to you from time to time. Any job description that is provided to you verbally or in writing shall not limit your duties and you may be required to undertake other duties from time to time as the Mission may reasonably require. You will follow all reasonable and lawful directions given to you by the High Commission."

12. The contract provided that the Claimant would be paid a basic salary of £36,000 (clause 4.1). There was no evidence that the Claimant was ever paid more than the normal salary for a Chauffeur.

13. Following successful completion of his probationary period, the Claimant was contractually entitled to a Chauffeur's uniform, clause 4.4.

14. Clause 13.1 of his contract provided,

"You acknowledge that during the course of your employment, you will be privy to confidential information about the business and affairs of the High Commission, its clients, visitors and staff, some of which will be personal. You therefore shall not use or disclose to any person, and shall use your best endeavours to prevent the use or disclosure of, either during or at any time after your employment with the High Commission, any such confidential, personal or private information. ...". P94.

15. The High Commission of Eswatini in London is a small diplomatic Mission. During the Claimant's employment, the diplomatic members of the mission were: the High Commissioner; the Counsellor; the First Secretary Information; the Third Secretary; the Administrative Attaché ; and the Education Attaché. The Mission also had 3 Royal Aides.

16. The Mission aims to promote the political and socio-economic interests of Eswatini in the United Kingdom. I accepted the evidence of Ms Mbuyisa, the High Commissioner, that the Mission works to: Strengthen diplomatic ties, as well as economic and trade relations with countries of accreditation; Promote trade and foreign direct investment to Eswatini, and to promote Eswatini as an attractive tourist destination; Facilitate education and cultural links with countries of accreditation; Secure technical and development assistance through multi and bilateral relations; Facilitate mobilisation of external resources and enhance Eswatini's participation in the Commonwealth organization, and to; Provide services and assistance to people from Eswatini living in the countries of accreditation, multilateral and bilateral partners, investors, tourists, charitable organisations and business people.

17. The Claimant was one of the Mission's locally engaged staff. The other locally engaged staff were 2 drivers, a receptionist and a cleaner.
18. The Claimant acted principally as chauffeur to the High Commissioner. He used the appropriate diplomatic form of address for the High Commissioner – "Her Excellency". The Claimant also drove the Mission's other diplomatic agents, senior government dignitaries - for example, the Principal Secretary of the Ministry of Foreign Affairs - and members of the Royal Family, mainly to official events.
19. The High Commission had Schedules of Work for the Claimant and the drivers, showing their driving tasks, including the date, venue, host and who they would be driving, pp234–806. Occasionally, the Claimant would drive the High Commission's diplomatic agents to personal engagements, such as health appointments.
20. Naturally, as chauffeur to the High Commissioner, the Claimant's role was, as described by the Mission's Counsellor in her witness statement, "an important position of trust and responsibility".
21. The Kingdom of Eswatini is one of the last remaining absolute monarchies in Africa. His Majesty King Mswati III was crowned in 1986. His role is not just ceremonial, but also political. The King plays a leading role in the governmental affairs of Eswatini.
22. Ensuring the comfort, security and wellbeing of the 9 royal children who attend school and University in the UK is a key aspect of the Mission's role in protecting Eswatini's interests in this country.
23. The Claimant undertook driving duties for members of Eswatini's Royal Family, and, in particular, the children of that family, to their boarding schools. The Royal children would be accompanied by the Counsellor or other member of the diplomatic staff. Occasionally the Claimant would drive the Royal Family adult children unaccompanied for a short journey, for example to University in London. He shared these driving duties with the other drivers employed by the Mission.
24. During the time of the Coronation of King Charles III, the detailed coronation events schedule was shared with the Claimant. The Claimant was in contact with the close protection officer and Chauffeur who had been assigned by the UK Government to King Mswati III of Eswatini, in case the Claimant needed to follow their vehicle. The Claimant met King Mswati III during his visit to Britain for the coronation.
25. None of the Mission cars which the Claimant drove had a partition separating the Chauffeur from the passengers. The Claimant could overhear the conversations which were taking place within the car and on the phone. The High Commissioner would speak in her own language, Siswati, as well as in English.
26. There was a dispute of fact between the Respondent and the Claimant as to whether the diplomats at the Mission discussed official business and took sensitive calls in the Claimant's presence. The High Commissioner's evidence was that she took telephone calls from colleagues at other embassies, or government officials from Eswatini. The Claimant denied that he discussed diplomatic matters with his passengers. His evidence was that he would discuss their destination, or any

significant events or successes which had been reported. The Claimant said that the majority of his passengers' conversations would be in Siswati.

27. I did not find that the Claimant's diplomatic passengers discussed confidential matters with him, or in front of him, in English. The Claimant clearly was interested in business and in pursuing his business interests. From the documentary evidence, it appeared that he sought to introduce himself and his contacts to the Mission and to Ministers, with a view to promoting his business interests. However, from the documentary evidence, the diplomats at the Mission did not reciprocate, or provide information to him. On the documentary evidence, they certainly did not disclose any confidential governmental matters, or strategic interests, to him. I concluded that the diplomats were careful not to disclose any confidential information to the Claimant. I found that it was very unlikely that they would have disclosed any such material in conversation in his car, either.
28. Given the small size of the High Commission, its staff typically helped out with tasks when other members of staff were not available. The Claimant helped deliver paper files between members of the Mission. These could include confidential documents. There was no evidence that he read the contents of these files.
29. On a few occasions, he also acted as receptionist, transferring calls to the appropriate recipient. I did not find that he was given any significant confidential information when performing this role. It is unlikely that a caller would disclose substantial confidential material to an unknown receptionist.
30. The Claimant was contacted in December 2022 by an Estate Agent regarding the rental of a home for one of the children of the Royal Family, p127 -129. In one message, the Estate Agent offered a reduced monthly rent for a property. He passed the messages on to the Counsellor at the Mission. In one of the exchanges on 29 December 2022, the Counsellor responded, "Thanks for the message. Please ask him to send an email [the Counsellor's email address]". From the documentary evidence, the Counsellor, and not the Claimant, was conducting the search for rental accommodation. The Counsellor did not invite the Claimant to become involved.
31. On 4 January 2023, the Claimant reminded the Counsellor to contact the Estate Agent. The Counsellor replied that there was no response from Eswatini and that the head office was negotiating the rate. The Claimant replied that the Claimant had managed to reduce the monthly rent and said, "... but certainly the owner will not take less. Better to let it go if not willing to reach the offer in my humble opinion." The Counsellor did not respond.
32. From the messages, I concluded that the Estate Agent had passed a message through the Claimant that an owner was willing to accept a reduced monthly rent. The Claimant then described this as the Claimant having secured a reduced rate. He offered unsolicited advice to the Counsellor, who was not conducting the negotiations herself anyway, and the Counsellor did not respond to the Claimant at all. It appeared to me that, at the time, the Claimant was positioning himself as having some involvement in the negotiations, but the Counsellor declined to engage with this.

33. In March 2023 Ms Nkambule, the Counsellor at the Mission, asked the Claimant to identify hotels near Golders Green for the Principal Secretary for the Ministry of Foreign Affairs. The Claimant conducted a Google search and sent Ms Nkambule the details for a range of hotels in North London, with a range of nightly rates, p 893.
34. I accepted the Claimant's evidence that he was not aware of the High Commission's financial information and budget. He surmised that the budget for housing and schooling the Royal children was substantial, from his knowledge of them and the schools they attended.
35. When he applied for the role of Chauffeur, the Claimant mentioned that he had a wide network of contacts which could potentially bring value to the Mission and Country of Eswatini. During his interview, he discussed his personal business interests, and explained that he wanted to continue to work on these during any downtime, p196.
36. On 20 March 2023, Ms Mbuyisa, the High Commissioner, extended the Claimant's 6 month probationary period, p156. She gave the following reasons, "1 . Failure to exercise patience while on duty, resulting in unprofessional behavior. 2. Need to improve on Diplomatic driving etiquette. 3. Time management." The High Commissioner also said, "On the positive side we are impressed that you are a great team player always ready to assist others in engagements even beyond your scope. We also appreciate your proactiveness and problem-solving expertise." P157.
37. During his employment with the Respondent, the Claimant sought to introduce the Mission and High Commissioner to contacts which he had, who might provide services of interest to the High Commission and Eswatini government ministers.
38. The High Commission had a stall at the World Travel Market on 7 & 8 November 2022, at the ExCel Centre in London, to promote Eswatini as a tourist destination. The Claimant was given a Trade Visitor, so that he could attend the event having driven the Mission's attendees there. The Claimant has a number of contacts engaged in the travel industry. His father in law promotes safaris and had a stall at the event. The Claimant also knows a Mr Anthony Leyens, who was the National Geographic Traveller Chief Executive at the time of the event. The Claimant met Mr Leyens while he was at the World Travel Market and introduced Mr Leyens to those at the Eswatini stall. Later that day, Mr Leyens sent various options for paid promotional features in publications to the High Commission, p810. Mr Leyens also forwarded that email to the Claimant, who, in turn, forwarded it to the High Commissioner herself on 18 November 2022, p810.
39. On 28 February 2023, the Claimant forwarded the email to the Counsellor at the Mission, saying, "Please see attached the email Antony sent I intend to touch base with Antony this week to reschedule a planned diner [sic] so would be good to get some feedback. I forwarded this to Her Excelency [sic] upon receipt." P884.
40. The Mission did not follow up on Mr Leyens' email. I accepted the Claimant's evidence that no one at the High Commission asked him to introduce tourism related contacts.

41. In April 2023, the Claimant also sought to introduce to the High Commission a contact of his, Joerg Enge, who specialized in satellite surveying for geothermal and petroleum resources. In a WhatsApp to the Mission's Counsellor, on 17 April 2023, the Claimant said that he had asked Joerg Enge to "prepare a proposal that would make sense for the country !!" p134. Joerg Enge produced a report titled "Evaluation of the Geothermal and Petroleum Exploration potential of Eswatini and Neighbouring Areas", p164. Under the subheading "Scope of Service", the report said, "Main objective is to assess the hydrocarbon potential for the project area by means of studying the fault and fracture systems, and lineaments in several depth intervals, as well as the evaluation of stratigraphic units and/or sedimentary sequences ...".
42. On 1 June 2023, the Claimant sent an email to Dlamini Charlazi, a government official employed by the Ministry of Natural Resources and Energy in Eswatini, saying "It was a great privilege ... to have driven and to have had the opportunity to talk and get to know ... you all last week. ... As promised, please find attached the documents I printed and gave to PS last Friday ... Following our discussion and his explanation of what he [Joerg Enge] has successfully completed in South Africa, I asked him to prepare an offer to present to the government of Eswatini for consideration which is attached. ", p897. The Claimant attached the Report titled "Evaluation of the Geothermal and Petroleum Exploration potential of Eswatini and Neighbouring Areas".
43. The "PS" to whom the Claimant was referring was the Principal Secretary for the Ministry of Natural Resources and Energy. The Claimant met the Principal Secretary when he drove her from her hotel to the 3rd Biennial Commonwealth Sustainable Energy Transition Forum (the "Energy Transition Forum on 24 - 26 May 2023. On 27 May 2023, p145, the Claimant had Whatsapp'd the High Commission's Counsellor, telling her that he had given the satellite surveying documents to the Principal Secretary. He said, "I do hope I can help with contacts and ideas to reduce the upcoming pain caused by load shedding."
44. Load Shedding is, essentially, rationing of power, which South Africa has had to implement because of increased demand on its electricity network. Eswatini imports electricity from South Africa, primarily through ESKOM, a South African electricity utility company. Given the increasing electricity demands in South Africa, it is possible that ESKOM will cease exports to neighbouring countries on expiry of its current supply contract.
45. Nothing came of this approach by the Claimant.
46. There was substantial building work being carried out beside the High Commission building; the two neighbouring properties had been completely demolished. A party wall surveyor had been instructed by the neighbouring property owners to deal with party wall issues. Cracks had appeared in the High Commission walls, but the party wall surveyor advised that these were not significant, p137. The Claimant suggested to the High Commission Counsellor that the Claimant's surveyor friend could look at the damage and the relevant paperwork and recommend a different surveyor to advise, p137.
47. There was no evidence that the Counsellor, or anyone else at the Mission, did pass the paperwork to the Claimant, or engage with his surveyor friend.

48. Eswatini is a sugar producing nation. The Claimant would drive the diplomats at the Mission to meetings at the International Sugar Organization. The Claimant had a contact, Terje Lein, who was interested in buying sugar for Bangladesh. He arranged for Terje Lein to meet the High Commissioner at the High Commission on 9 November 2022. The High Commissioner referred Terje Lein to the CEO of Eswatini Sugar Association. The High Commissioner had no further involvement in the prospective deal.
49. In his Schedule of Loss the Claimant claimed for losses arising from the “significant opportunities for Eswatini which I had been working on and developing during my time at the Mission” p229.
50. On the facts, I concluded that, during his employment, the Claimant attempted to promote his business contacts to the High Commission of Eswatini, so that the government of Eswatini, or the High Commission, would enter into business deals with the Claimant’s contacts.
51. On the facts, for the most part, the diplomats at the High Commission and government ministers did not respond to overtures from the Claimant’s contacts at all. On one occasion, the High Commissioner met with the Claimant’s contact, Terje Lein, and referred them to the Sugar Association in Eswatini.
52. There was no evidence that the High Commission, or any of the diplomats there, ever asked the Claimant to do any of this. On the evidence, it was clear to me that the Claimant was attempting to leverage his position at the Mission to further his own and his friends’ business ambitions. He sought to promote business deals to the Mission, rather than the Mission instructing, or using, him to seek business deals for it.

Law - State Immunity

53. Foreign states enjoy a general immunity from the jurisdiction of the courts in the UK, pursuant to the State Immunity Act 1978 (“SIA”). By SIA 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'.
54. The Tribunal is required to give effect to state immunity even if the State does not appear in the proceedings, s1(2) State Immunity Act 1978.
55. Regarding employment claims, s4 SIA provides,

“4 Contracts of employment

(1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there. ...”

56. Regarding diplomats and those employed by diplomatic missions, s16 SIA 1978 further provides,

“16 Excluded matters

(1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968; and—

(a) section 4 above does not apply to proceedings relating to a contract of employment between a State and an individual if the individual is or was employed under the contract as a diplomatic agent or consular officer;

(aa) section 4 above does not apply to proceedings relating to a contract of employment between a State and an individual if the individual is or was employed under the contract as a member of a diplomatic mission (other than a diplomatic agent) or as a member of a consular post (other than a consular officer) and either—

(i) the State entered into the contract in the exercise of sovereign authority; or

(ii) the State engaged in the conduct complained of in the exercise of sovereign authority;]

57. Employees of a Diplomatic/Consular Mission in the UK are therefore not barred by s16 SIA from bringing any type of employment claim against their employing State, so long as:

57.1. the employee is not a diplomatic agent or consular officer, or

57.2. the employment was not entered into in the exercise of sovereign authority, or

57.3. the alleged unlawful conduct complained of was not an act of sovereign authority.

58. These provisions of ss4 and 16 State Immunity Act 1978 are as amended by the State Immunity Act 1978 (Remedial) Order 2023, which came into force 23 February 2023.

59. The amendments were intended to give effect to the Supreme Court judgement 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. In that case, 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.

Employment Entered into in the Exercise of Sovereign Authority

60. As stated, in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs; Secretary of State for 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].

61. 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].

62. 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.”

63. Article 3 VCDR sets out the essential functions of a diplomatic mission, and performance of any of the Article 3 functions constitutes acts done in the exercise of sovereign authority.

“Article 3

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.”

64. In *The Royal Embassy of Saudi Arabia (Cultural Bureau) v Alhayali* [2023] EAT 149 per Bourne J, the EAT said that, in deciding whether employment of a member of embassy staff was an exercise of sovereign authority, the Tribunal must clearly identify any sovereign activity in order to decide whether the Claimant’s work was sufficiently close to it [90].

65. The EAT also held that the test for s16(1)(aa)(i) was whether the employee’s work was “sufficiently close” to the exercise of sovereign authority, which could be contrasted with work which was “purely collateral to the exercise of sovereign

authority”: [92]-[93]. It held that not all of an employee’s tasks have to meet the section 16(1)(aa)(i) test. It is sufficient if “some of the claimant’s activities throughout the period of her employment passed the test”: [96]-[97].

66. At [93], Bourne J gave examples of work which were, and were not, sufficiently close to the governmental functions of the mission as to be exercises of sovereign authority, “So, whilst the Head of the Cultural Affairs department was exercising sovereign authority, a person who cleaned his office was not. Nor was a person who drove him to work. A person who merely typed documents was probably not, though the Governor of Pitcairn case shows that a certain degree of trust or confidentiality might carry that individual across the line.”
67. In *Webster & Wright v USA* [2022] EAT 92, Leading Counsel for the Respondent State “accepted that the authorities establish that: [22.1] in considering whether the functions of an employee are sovereign or governmental, it is necessary to consider what an 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”, at paragraph [22].
68. Regarding confidential matters, in *Kingdom of Spain v Lorenzo* [2024] EWCA Civ 1602, Bean LJ, giving the judgment of the Court said, at [29], “ We were not shown any authority demonstrating that, as a matter of customary international law or UK domestic law, anyone employed at an embassy who has any access to confidential documents or conversations must be treated as barred by state immunity from bringing a tribunal claim. Cleaners, at least in the era of hard copy documents, may have the opportunity to read confidential documents if they choose to do so. Most employees who work for senior diplomats may know about their confidential activities or overhear their confidential conversations. This does not elevate the employee to become the equivalent of a diplomatic agent.”

Discussion and Decision

69. I took into account all my findings of fact and the relevant law in coming to my decision.
70. It was not in dispute that the Claimant was a member of the technical and administrative staff of the High Commission of the Kingdom of Eswatini.
71. The Respondent contended that the Claimant’s job functions encompassed and/or were close to the following functions of the High Commission:
 - 71.1. “Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law” (Article 3(1)(b) VCDR); and
 - 71.2. “Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations” (Article 3(1)(e)).
72. The Respondent contended that, in driving diplomats, government ministers and young members of the Royal Family, the Claimant was protecting in the receiving

State the interests of the sending State and of its nationals: it was in Eswatini's interests that those individuals were kept safe.

73. I acknowledged that members of diplomatic staff are key representatives of State and that their safety is protected under diplomatic law. However I did not accept that, because a chauffeur would be expected, in the course of their work, to convey their passengers safely to their destination, that a chauffeur was thereby charged with protecting the interests of the State's important nationals in the sending State.
74. Safe driving would incidentally, at a basic level, protect the health of a car's occupants. However, I did not accept that ensuring the safety of those key representatives of the State was a function of a chauffeur. A chauffeur's functions primarily involve the act of driving itself. The ability to drive is significant as it is something which children, for example, are not legally allowed to do. Holders of overseas driving licences may not be permitted to drive in the UK, either. There are other circumstances in which the holder of a UK driving licence may not lawfully drive, for example when they are unfit to do so. The chauffeur, by driving, also allows their passengers to undertake other tasks.
75. A chauffeur's functions additionally involve conveying their passengers, on time, to the correct location, using their local knowledge of roads.
76. Any private individual driving a car would carry out the same functions in relation to their passengers.
77. As Mr Lowenthal for the Claimant pointed out, it cannot be that every employee at a Mission, whose work tangentially ensures on the safety of the Royal Family or diplomats, thereby protects the interests of the State and its nationals. An electrician who installs safe electrical wiring and fire alarms is not transformed, by the safety critical nature of their work, into an employee whose functions encompass the sovereign functions of the Mission. Other domestic staff; cooks who prepare safely cooked food, with non-poisonous ingredients; and cleaners who ensure a hygienic environment, free of slips and trips, are not "protecting the interests of the sending State and of its nationals".
78. It may be that some drivers, for example, those who drive armoured vehicles and are trained in defensive / escape driving manoeuvres, might carry out the sovereign functions of the Mission when conveying senior members of the Royal Family or government. Their duties might effectively be safety duties, rather than driving duties. However, there was no evidence that the Claimant was such a driver. He was a driver, much like any private hire taxi driver, who drove his passengers from one location to another.
79. It was also notable that, when the Claimant drove any children of the Royal Family, who were under 18, a member of the diplomatic staff always accompanied them. It was that member of staff who was responsible for the children, not the Claimant. The Claimant was the physical means by which the junior Royal children were conveyed. His responsibility was limited to exercising his driving skill to ensure their timely travel in his vehicle.

80. I therefore decided that, when the Claimant conveyed diplomats and members of the Royal Family in the Mission's car, his work did not involve protecting the State's or its nationals' "interests." It was a practical, functional activity, unrelated to any State aims.
81. Further, on my findings of fact, the Claimant's diplomatic passengers did not discuss confidential matters with him, or in front of him. I accepted that employees who were privy to the Mission's confidential information might be so close to its functions that their employment would be an exercise of sovereign authority (for example the cypher clerk and confidential secretary mentioned by Lord Sumption in *Benkharbouche*). However, as the occupants of his car did not disclose confidential matters to the Claimant, his driving functions were not close to the functions of the Mission – his work was purely collateral.
82. I accepted that the Claimant was required to observe diplomatic driving etiquette. However, there was little or no evidence as to what this involved, other, perhaps, than addressing the High Commissioner with her appropriate diplomatic title. There was no evidence that the Claimant undertook any sovereign functions when observing diplomatic driving etiquette.
83. I accepted Ms Hart's submission for the Respondent that, in light of *Webster* (EAT), it is necessary to consider the broader role which the Claimant performed, in fact, beyond that described in his formal employment contract.
84. The Claimant occasionally delivered files within the High Commission and, also on occasion, he acted as receptionist.
85. However, there was no evidence that he ever looked at the contents of any files which might have been confidential. As a receptionist, the Claimant transferred calls to the appropriate recipient. I did not find that he was given any significant confidential information when performing this role.
86. On 2 occasions in December 2022 and January 2023, the Claimant acted as the conduit for messages from an Estate Agent to Ms Nkambule, the Counsellor at the Mission, regarding the rental of a home for one of the children of the Royal Family. It was not clear to me that the fact that a child of the Royal Family was renting a property was a confidential matter. Indeed, the messages were from an Estate Agent, who was himself a private individual.
87. In March 2023 Ms Nkambule, the Counsellor, asked the Claimant to identify hotels near Golders Green for the Principal Secretary for the Ministry of Foreign Affairs to stay in. He did so by conducting a Google search.
88. These tasks were isolated and sporadic. They were also tasks which a private individual would routinely undertake in an administrative function, in an ordinary office. I did not find that they involved any governmental functions. Even if they did, on the facts, the Claimant's task on each occasion was collateral to the governmental functions of the Mission.
89. There was little evidence that these additional tasks involved any, or any significant, engagement with confidential information. I considered that the

observations of the Court of Appeal in *Kingdom of Spain v Lorenzo* [2024] EWCA Civ 1602, at [29] were apt in the context of these occasional administrative tasks: “We were not shown any authority demonstrating that, as a matter of customary international law or UK domestic law, anyone employed at an embassy who has any access to confidential documents or conversations must be treated as barred by state immunity from bringing a tribunal claim. Cleaners, at least in the era of hard copy documents, may have the opportunity to read confidential documents if they choose to do so. Most employees who work for senior diplomats may know about their confidential activities or overhear their confidential conversations. This does not elevate the employee to become the equivalent of a diplomatic agent.”

90. Accordingly, I did not find that these additional tasks brought the Claimant's functions sufficiently close to the governmental functions of the Mission so that his employment was an act of sovereign authority.
91. The Respondent contended that the Claimant was involved in a number of different initiatives (spanning, among others, tourism, mineral exploration and sugar trade negotiations) in an attempt to help advance the Kingdom's interests. The Claimant himself has described these as “significant opportunities for Eswatini” which he “had been working on and developing” in the course of his employment [229]. The Respondent contended that this was a clear example of him being directly involved in “[p]rotecting ... the interests of the sending State” and “[p]romoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations” within the meaning of Article 3(1)(b) and (e) VCDR.
92. However, on the facts, I have decided that, in reality, in each of these matters, it was the Claimant who attempted to promote his business contacts to the High Commission of Eswatini, so that it, or the government of Eswatini, would enter into business deals with the Claimant's contacts. There was no evidence that the High Commission, or any of the diplomats there, ever asked the Claimant to do this. For the most part, the diplomats at the High Commission and government ministers did not respond to overtures from the Claimant's contacts. On one occasion, the High Commissioner met with the Claimant's contact, Terje Lein, and referred them to the Sugar Association in Eswatini.
93. On the evidence, it was clear to me that the Claimant was attempting to leverage his position at the Mission to further his own and his friends' business ambitions. He sought to promote business deals to the Mission, rather than the Mission instructing, or using, him to seek business deals on its behalf. Moreover, it was not the case that the Mission even allowed the Claimant to do work on its behalf in these areas. It was clear from the facts that the Mission and its employees did not generally engage with the Claimant's overtures.
94. On the one occasion when the High Commissioner met with a contact of the Claimant, she passed that person on to another department. There was no evidence that the Claimant was present and there was no evidence that the Claimant was further involved.
95. The Claimant's role did not therefore include, “Protecting in the receiving State the interests of the sending State”, or, “Promoting friendly relations between the

sending State and the receiving State, and developing their economic, cultural and scientific relations.” I accepted that he may have sought to do so. On the facts, the Respondent neither required him to do this, or allowed him to do it.

96. To be clear, I considered whether all the functions and roles which the Claimant undertook during his employment, together, involved him, even in small way, in “Protecting in the receiving State the interests of the sending State”, or, “Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.” Even taking them all together, I did not find that they did. In reality, the Claimant worked primarily as a driver of a vehicle, much as a private hire taxi driver would work. His occasional other administrative tasks were also tasks which a private clerical worker would undertake. His attempted business ventures were, essentially, quietly rebuffed by the Mission.

97. On all the facts, none of the Claimant’s functions was “sufficiently close” to the governmental functions of the Mission for his employment to be an exercise of sovereign authority.

98. His claim is not barred by State Immunity and it can proceed.

Employment Judge Brown

Dated: 27 January 2025

JUDGMENT SENT TO THE PARTIES ON

31 January 2025

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FOR THE TRIBUNAL OFFICE