



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr K Onurcan

v

Malaysia

PUBLIC PRELIMINARY HEARING

Heard at: Central London Employment Tribunal (By CVP)

On: 24 & 25 June 2024

Before: Employment Judge Brown

Appearances

For Mr Onurcan

In person

For the Respondent:

Mr O Jackson, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's employment was not an exercise of sovereign authority.
2. Insofar as the Claimant brings a breach of contract claim only, in relation to his grade and pay, that claim does not engage the state's sovereign interests.
3. The Claimant's breach of contract claim is not barred by state immunity and can proceed.

REASONS

Preliminary

1. By a claim form in claim number **2203565/2021**, presented on 2 June 2021, the Claimant, Mr Onurcan, brought complaints of breach of contract and unlawful deductions from wages against the Respondent.

2. The Respondent defended the claims, asserting state immunity.
3. 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
 - 3.1. Whether the Claimant's claim against the Respondent are barred by State Immunity pursuant to s1 Statute Immunity Act 1978:
 - 3.1.1. What functions was the Claimant employed to perform?
 - 3.1.2. 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?
 - 3.1.3. Is the conduct of which the Claimant complains an exercise of sovereign authority?
4. I heard evidence from the Claimant. I read the witness statement of Ahmad Fadhilzil Ikhrum Abdullah, First Secretary (Bilateral) at the Malaysian High Commission in London. He did not give evidence. His statement pointed out that, as a diplomat, he could not be compelled to give evidence. I took his evidence into account in coming to my decision. Both parties made submissions.

The Facts

The Claimant's Employment

5. The Claimant has been employed by the Respondent from 6 June 2001 as a Driver on its "Locally Recruited Staff scheme" at the Malaysian High Commission in London.
6. The Malaysian High Commission has two types of employees - locally recruited staff and home based staff. Locally recruited staff are employed in the UK. Home based staff are employed in Malaysia and posted by the Malaysian Foreign Ministry to work at the High Commission in the UK for periods of time. These home based employees include diplomats.
7. The Claimant's job is to drive the Malaysian High Commissioner, senior members of the Malaysian Government, members of the Malaysian Royal Family and home based staff, including diplomats, to and from official functions, dinners, receptions and airports. Such individuals may arrive at the private areas of London airports, and the Claimant has received clearance to drive into the secure area of Luton airport to meet them directly off the plane
8. The Claimant was part of the motorcade team transporting their Majesties Seri Paduka Baginda The Yang Di-Pertuan Agong and Seri Paduka Baginda the Raja Permaisuri Agong, the King and Queen of Malaysia, to the United Kingdom in October 2022. He was told where and when these royal family members were going when he was part of the motorcade. I accepted that that information was

sensitive information. I did not accept that it was necessarily secret – their official duties, for example, would be made public.

9. About once a month the Claimant delivers diplomatic bags to the London Heathrow cargo area. He is not allowed to handle the bags alone; a home based staff member accompanies him at all times.
10. The Claimant also delivers letters to the UK FCDO (Foreign Commonwealth and Development Office) and other Embassies in London. In doing so, he is generally accompanied by a messenger. The letters are in sealed envelopes.
11. To carry out his duties, the Claimant has personal security clearance - and clearance for his vehicle - to drive into secure areas, such as other Missions in London, where necessary.
12. The Claimant does not speak Malay. He is unable to understand conversations in Malay.
13. He does speak English. He told the Tribunal that he did not believe that the diplomats he has driven have had confidential conversations while in his car. He gave evidence that his passengers would ask him about local restaurants and the weather and how long he had been driving and for how many High Commissioners. I accepted his evidence.

The Claimant's Claim

14. In his claim form, the Claimant said that he was bringing, "another type of claim", which he described as, "On the last pay rise review on 1st July 2020 my yearly increment tears(seniority) was T18 , then second pay rise review on 1st November 2020 my yearly increment tears (seniority) dropped from T18 to T14 without any explanation."
15. In Box 8.2 of his claim form, the Claimant gave further details:
16. The Claimant said that he had received a first letter about his salary increment dated 1 July 2020, notifying him of a new salary increment with effect from 1 January 2019, to scale T18, at £468 pounds each week. He said that he had received a second letter dated 1 November 2020, saying that his new salary would in fact be at scale T14 and £452 a week. He asserted that he received a further letter dated 1 December 2020, saying that if he did not accept the second letter offer, he would be paid his old salary at T18, or £389 a week and would not receive any pay rise until his service ended.
17. The Claimant contends that his appointment salary scale has 20 yearly increments, starting from T1 and finishing at T21, because he started work at the Malaysian High Commission on 6 June 2001
18. In his claim, the Claimant relies on the "Terms and Conditions of Service of Locally Recruited Staff Serving in Diplomatic Missions, Trade Commissions and Students' Departments of Malaysia Overseas with effect from January 1977". P 55.

19. He points out at, with paragraph 65, these provide, "Notwithstanding the provisions in this regulations all local practices which are mandatory shall prevail." P71.
20. He relies on provisions relating to Salary Scale, at paragraph 20. "The salary to be drawn by an employee on first appointment shall be the initial point within the salary scale of the appointment. Nevertheless, emplacement on a higher point up to a maximum of 3 increments may be given and it should be based on one increment for every one completed year of service experience". P59.
21. The Claimant asserts that the Respondent is in breach of contract.
22. The relevant letters, referred to in the Claimant's claim form, were in the Bundle. The letter dated 1 July 2020 told the Claimant that his salary scale had increased from old salary scale T18 (£389 per week) to new salary scale T18 (£468 per week).
23. The 1 November 2020 letter stated,

"I wish to refer to the above matter and the High Commission's letter dated 01 July 2020.

 2. In response to the High Commission's feedback, the Ministry has decided to review all Locally Recruited Staff (LRS) salary scale. In view of this, please note the salary you received from 01 January 2019 to 31 October 2020 is void and no longer applicable.
 3. The details of your new salary scale and backdated payments are as follows:
 - 3.1 Your new salary scale is GBP400.00 x 4.00 - 480.00 as opposed to the previous salary scale which was GBP338.00 x 3.00 - 398.00;
 - 3.2 From 01 January 2019, your new salary scale of T14 is GBP452.00 per week compared to the previous salary scale, T18 of GBP389.00 per week;
 - 3.3 From 01 August 2020 to 31 October 2020, we have overpaid your salary by GBP208.02. This will be deducted from the arrears you've received from 01 January 2019 to 31 October 2020 amounting to GBP5, 247.62. As such, the final arrears owed to you is GBP5, 039.60; and
 - 3.4 Your old job title, Driver (Pemandu) will remain the same. ..."
24. In evidence, the Claimant agreed that he is challenging the decision to reduce his scale from T18 – T14. He agreed that this was a decision of the Malaysian Ministry of Foreign Affairs, following feedback from the High Commission in London.
25. The Respondent produced documents setting out the Mission's posts and expenditure in 2022 as mandated by the Malaysian Parliament and Government. Both documents were entitled, "LIST OF POSTS IN MINISTRIES AND DEPARTMENTS IN THE FEDERAL ESTIMATED EXPENDITURE 2022", p90 & 105.

26. They showed 5 drivers at the UK High Commission, being paid £389 at p93.
27. Ahmad Fadhilzil Ikham Abdullah, First Secretary (Bilateral) at the Malaysian High Commission in London, said, in his witness statement that, "The roles permitted and pay for all staff of missions of Malaysia around the world is ultimately set by the Malaysian Parliament through its finance budgets, passed in a similar way to the Westminster system. Detailed budgets are then agreed between each Ministry and the Public Service Department, including pay structures. Mr Onurcan's salary is paid by the High Commission from monies paid to us by and budgeted by our foreign ministry, the Ministry for Foreign Affairs. the government will change roles and pay over time in line with their national and political priorities. We at the High Commission are told of the structure, roles and pay that must be adopted, and from time to time this is changed. ... There is very limited (if any discretion) for each individual Mission to award someone a higher rise outside these bands. Indeed, it was a correction imposed by this structure mandated by the Ministry of Foreign Affairs that was the cause of Mr Onurcan's current complaint. ... This is as a result of the considered priorities and deliberations of the Malaysian Government. The High Commission does not therefore have a discretion to give the Claimant a pay adjustment he is seeking. His pay is a decision of the Malaysian Parliament and Government (the Public Service Department and the Ministry of Foreign Affairs). To change it (or justify it) would involve politicians and officials from the Malaysian Parliament and government." I accepted this evidence.

Law - State Immunity in Employment Contracts

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'.
29. 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*.
30. 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. ...".

31. Regarding diplomats and those employed by diplomatic missions, *s16* 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;] ...”.

32. 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.

33. 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.

34. As a result of the amendments to s16 *SIA*, employees of a foreign Embassy in the UK are generally no longer be barred from bringing any type of employment claim against their employing State, so long as the employee is not a diplomatic agent or consular officer, or the employment was not entered into in the exercise of sovereign authority, or the conduct complained of was not an act of sovereign authority.

Law - Employment Entered into in the Exercise of Sovereign Authority

35. 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].

36. In general, 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].

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. 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.”

39. 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].

40. 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].

Acts Engaging Sovereign Interests

41. However, in *Benkharbouche*, Lord Sumption also cautioned that the character of the employment would not always be decisive. At [58], he made clear that state immunity may extend to some aspects of its treatment of its 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 and the introduction of a no-strike clause for civilian staff at a US military base in Canada, which had been deemed to be essential to the military efficiency of the base.
42. Lord Sumption commented, of the latter, “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, at p 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.” [58].

Discussion and Decision

Whether the Claimant’s Employment was an Exercise of Sovereign Authority

43. In this case, the Respondent contended that the Claimant’s employment fell into the second category identified by Lord Sumption in paragraph [55] of his judgment in *Bekharbouche*: (ii) administrative and technical staff. I agreed. The Claimant’s duties involved work outside the Mission, on behalf of the Mission, delivering letters to other Missions. His role therefore included official, rather than wholly domestic, duties.
44. The Respondent contended that his employment was barred by state immunity under s16(1)(aa) SIA as an exercise of sovereign authority because his “*functions are sufficiently close to the governmental function of the mission*”.
45. I disagreed. First, I did not find that any of the Claimant’s functions, which I have identified, came within Article 3 VCDR.
46. I decided that his duties did not include “Representing the sending State in the receiving State.” He was a driver of people and of documents. His interaction with people did not include conducting, or hearing, diplomatic communications, but were confined to everyday conversations about restaurants and superficial descriptions of his own service as a driver. Any documents he handled were in sealed envelopes – he had no sight or knowledge of their contents. When he conveyed a diplomatic bag, a home staff member always accompanied it – that member of staff was responsible for it, not the Claimant.
47. Nor did his duties involve, “Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law”. The Claimant may have conveyed diplomats and members of the Malaysian Royal family in his car. That did not involve protecting their “interests.” It was a practical,

functional activity, unrelated to any state aims. While he had clearance to drive into restricted areas in order to undertake these duties, this again did not involve any state aims or interests. It was a limited authorisation for the purposes of driving duties.

48. His duties certainly did not involve, “Negotiating with the Government of the receiving State”; or, “Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State”. There were no facts which suggested he did these things.
49. I also decided that the Claimant’s role did not include, “Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.” He may have been friendly, on an interpersonal basis, to the occupants of his car, but his interactions were ordinary person- to- person conversations about non-governmental matters. I accepted his evidence that diplomatic conversations were not conducted in English in his car and that he does not understand Malay, in any event.
50. Even if I was wrong in my conclusion that the Claimant’s functions did not come within Art 3 VCDR, I was satisfied that his functions were purely collateral to any Art 3 VCDR duties, or other exercise of sovereign authority.
51. Contrary to the Respondent’s contentions, the Claimant was not himself “trusted with the welfare” of Malaysian VIPs such as the King and Queen of Malaysia on high-profile and sensitive diplomatic occasions vital to Malaysia’s international interests, nor was he himself entrusted with carriage of confidential diplomatic bags,. He was the physical means by which those people and bags were conveyed. His responsibility was limited to exercising his driving skill to ensure their safe and timely conveyance in his vehicle. The diplomatic bag was always accompanied, personally, by a member of the Mission’s diplomatic staff.
52. The Claimant’s personal security clearance to drive into high security areas such as other diplomatic missions, the UK Parliament, the UK FCDO, and the tarmac of the runway at London airports, was always ancillary to carrying out his driving work.
53. He may have been told some sensitive and confidential details of VIP schedules, but that was only to ensure that he drove the relevant people and documents to the right place at the right time. His knowledge of sensitive and confidential matters was therefore extremely limited.
54. I accepted that the Claimant was a longstanding member of staff and that he was not a member of the domestic staff. He sometimes conveyed letters to other Missions and UK government departments in his car and was not accompanied by another member of staff when he did so. Those letters were not part of the diplomatic bag and were always in sealed envelopes. None of those facts brought any of his duties sufficiently close to the exercise of sovereign authority to make his employment an exercise of sovereign authority. The length of his service and his pay did not change the nature of his duties, which were truly ancillary and supportive to the functions of the mission.

55. On all the facts, none of the Claimant's duties was "sufficiently close" to the exercise of sovereign authority so that his employment by the Mission would have been an exercise of sovereign authority.

Acts Engaging Sovereign Interests

56. The Respondent also contended that, because the Claimant's salary was changed pursuant to the Ministry's review of Locally Recruited Staff's (LRS) salary scale, the Respondent's treatment of the Claimant in this case, of which the Claimant complains, engages the state's sovereign interests.

57. In his claim form, the Claimant ticked the box, "another type of claim". He told me that he asserted that the Respondent is in breach of contract.

58. If the Claimant sought to challenge the Malaysian government's decision making regarding the new pay structure for locally recruited staff, including allocation of particular T grades to particular categories of staff, for example T14 to drivers, I agree with the Respondent that that would be a claim which engaged the State's sovereign interests. On the facts, the Claimant's grade appears to have been changed pursuant to a wholesale governmental review of staff grades and pay, conducted by the Malaysian Government and applicable to all international staff. I accepted Mr Abdullah's evidence that this was, "... as a result of the considered priorities and deliberations of the Malaysian Government." I considered that the policy decisions of the Malaysian government regarding the fair grading of all its employees employed overseas would engage the Malaysian's government's sovereign interests. It would not be appropriate for a UK Tribunal to examine the fairness of a foreign government's grading decisions made in respect of classes of its employees.

59. However, the Claimant asserts that the Respondent is in breach of contract.

60. In *Benkharbouche*, Lord Sumption stated that there is a need to identify the juridical nature of the alleged unlawful act.

61. Insofar as the Claimant's claim is limited to a breach of contract claim, I consider that a claim for pay agreed under a contract relates to an act of a commercial, or private, nature, and not a sovereign act.

62. If the Claimant's claim is limited to a breach of contract claim, in relation to whether, under his contract, the Claimant is entitled to a T18 grade and therefore to be paid a T18 salary, that would not involve an examination of the policy making of a foreign government. The Tribunal's fact finding enquiry would be limited to the terms of the Claimant's own contract. Such a claim would not be barred by state immunity.

Conclusion

63. Accordingly, the Claimant's employment was not an exercise of sovereign authority.

- 64. Insofar as the Claimant brings a breach of contract claim only, in relation to his grade and pay, that claim does not engage the state's sovereign interests.
- 65. His breach of contract claim is not barred by state immunity and can proceed.
- 66. A short case management hearing will be listed.

Employment Judge Brown

Dated: 21 August 2024

SENT TO THE PARTIES ON

23 August 2024

.....
FOR THE TRIBUNAL OFFICE