EMPLOYMENT TRIBUNALS

Claimant		*Respondents*
Mr DB Shrestha	**AND**	**Embassy of Nepal (Federal Republic of Nepal)**

Heard at: London Central **On**: 3 September 2020

Before: Employment Judge Brown

Representation

For the Claimant: **Ms R Jones, Counsel**
For the Respondent: **Mr R Cohen, Counsel**

JUDGMENT AT A PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The Respondent submitted to the jurisdiction of the Tribunal when it presented its ET3 Response.

REASONS

The Claim

1. By a claim form presented on 30 April 2019 the Claimant brought complaints of unfair dismissal, failure to pay redundancy payment and failure to pay notice pay, against the Respondent.

2. The Respondent responded to the claim.

Open Preliminary Hearing

3. At a Case Management Preliminary Hearing on 11 June 2020 EJ Spencer listed this Open Preliminary Hearing, to consider whether the Tribunal has jurisdiction to consider the Claimant's claim or whether the Respondent is immune under the provisions of the State Immunity Act 1978.

4. It is not in dispute that the Respondent is the diplomatic representative of the State of Nepal in the United Kingdom and that the Claimant is a Nepali national.

5. The Claimant contended, however, that the Respondent had submitted to the jurisdiction of the Tribunal when it presented its ET3 Response, including a defence to the claim.

6. The Claimant's skeleton argument also contended that the provisions of the *State Immunity Act 1978* ("the 1978 Act") on which the Respondent relied would contravene the Claimant's rights under the *European Convention on Human Rights ("ECHR")*: In particular, that a. *Section 16(1)(a)* of the 1978 Act, if it were applied to the Claimant, would be contrary to the Claimant's right to access the courts, guaranteed under *Article 6 ECHR: Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2019] AC 77; [2017] UKSC 62.1 (Section V) b*. Section 4(2)(a)* of the 1978 Act, if it were applied to the Claimant, would be both contrary to *Article 6 ECHR* and unlawful and disproportionate discrimination on grounds of national origin, prohibited by *Article 14 ECHR.*

7. The parties agreed, however, that I should determine the issue of whether the Respondent had submitted to the jurisdiction of the Tribunal first. If it had, it would have lost the protections of *ss4 & 16 SIA 1978* in any event and the Claimant's arguments regarding incompatibility would not arise.

8. The Claimant submitted a short statement of evidence for this hearing. Mr Cohen indicated that, for the purposes of this Open Preliminary Hearing only, it was not in dispute that the Claimant had been employed as a driver at the Respondent's Embassy and that the Claimant is a permanent resident of the UK.

9. It was also agreed between the parties that, if a State has submitted to the jurisdiction of the Tribunal, it is not open to it, later, to seek to resile from that submission to the jurisdiction. See *sections 2(1) and 2(3)(b) State Immunity Act 1978 Act* and *High Commissioner for Pakistan in the UK v National Westminster Bank plc* [2015] EWHC 55, at [74.5].

10. At this Preliminary Hearing, the Respondent did not argue that its ET3 was presented without the authority of the Nepalese ambassador. It did not present any evidence from the relevant ambassador. The issues in *Republic of Yemen v Aziz* [2005] EWCA Civ 745, [2005] ICR 1391 did not arise.

11. This Hearing was conducted remotely by videolink (CVP – Cloud Video Platform). Members of the public could attend the hearing. None did attend.

12. There was an agreed bundle containing the parties' detailed skeleton arguments, authorities, statutes and relevant documents. All attendees at the hearing had this bundle. The parties were able to hear what the Tribunal heard. From a technical perspective, there were no difficulties.

The Respondent's ET3 Response

13. When the Respondent presented its ET3 Response, it stated, at box 6.1, that it wished to defend the claim. It set out the following matters on which it relied to defend the claim:

"Mr Dambar Bahadur Shrestha, a Nepalese citizen (Nepalese Ordinary Passport No. 06609100) served in the Embassy from 15 January 2018 to 14 January 2019 under the employment contract signed on 13 January 2018.The latest contract was temporary and for the period of one year only. It was based on the Local Employee Management Directives, 2072(2015) of the Ministry o1 Foreign Affairs of the Government of Nepal.

The Embassy has the policy of recruiting locally stationed staff for a short period only, and the employment contract may not be renewed if the Embassy thinks the service of same person is not required any more.

Mr. Shrestha had verbally informed the Embassy that he was returning to Nepal due to family reasons and he was not ready to continue service. He happily received all his dues and payments. Embassy had not dismissed him from the service. The contract agreement was expired.

On account of being entitled for the diplomatic privileges and immunities, the Embassy has informed the esteemed Foreign and Commonwealth Office of the Government of the United Kingdom about the recruitment and expiry of service of the locally recruited staff of this Embassy."

14. The Respondent did not state that it was legal represented in its ET3 Response. There was no evidence at this Hearing that it was legally represented, or that any legally qualified person had drafted the Response.

Relevant Law

15. *Section 1 State Immunity Act 1978* ('the 1978 Act') provides, "(1)(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act. (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question."

16. By *s22* of the *1978 Act* 'court' includes 'any tribunal'.

17. *Section 2 State Immunity 1978 Act* provides that a State is not immune if it submits to the jurisdiction of the United Kingdom's courts:

"**S2 Submission to jurisdiction**

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

(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to

be governed by the law of the United Kingdom is not to be regarded as a submission.

(3) A State is deemed to have submitted—
(a) if it has instituted the proceedings; or
(b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.

(4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of—
(a) claiming immunity; or
(b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.

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

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

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

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

19. LJ Nourse relied on Lord Denning M.R.'s test in *Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd* [1978] I Lloyd's Rep. 357 at p. 361:

20. “What then is a "step in the proceedings"? It has been discussed in several cases. On principle it is a step by which the defendant evinces an election to abide by the Court proceedings and waives his right to ask for an arbitration. Like any election, it must be an unequivocal act done with knowledge of the material circumstances….. On those authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a "step in the proceedings" must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration.”

21. Simon-Browne LJ in the same case said, “But Mr. Beloff' s third argument I do accept. That is that s. 2 as a whole, so far from imposing on States a more rigorous than usual test of submission to jurisdiction (i.e. a test more likely to be inadvertently failed), should be construed rather as affirming that a State will not be held unintentionally to have submitted to jurisdiction merely for having required the Court to determine whether or not its claim to immunity is well founded - for invoking, in other words, the Court's "jurisdiction".”

Discussion and Decision

22. Mr Cohen for the Respondent urged me not to take an overly technical approach to the wording of the ET3. Mr Cohen said that I should decide that the Respondent had asserted state immunity in box 6.1 and that the other matters stated therein were preliminary to that assertion of state immunity. Mr Cohen said that the ET3 was not drafted by a lawyer. He reminded me that, in Employment Tribunal proceedings, unnecessary formality is to be avoided that that parties ought not to be penalized for imperfect drafting.

23. I decided that the Respondent had submitted to the jurisdiction by presenting its ET3 Response in the terms that it did.

24. Usually the service of a defence will amount to the taking of a step in the proceedings, per LJ Nourse in *Kuwait Airways Corporation v Iraqi Airways Company and Republic of Iraq* [1995] 1 Lloyd’s Rep 25, CA.

25. However, if, a respondent serves a response in which the only assertion made is one of immunity, s. 2(4)(a) SIA 1978 operates to ensure that the respondent is not treated as having submitted to the jurisdiction of the Tribunal by doing so, *Kuwait Airways Corporation v Iraqi Airways Company and Republic of Iraq* [1995] 1 Lloyd’s Rep 25, CA..

26. In this case, I decided that it was not clear, even in the concluding paragraph of the Respondent’s ET3 box 6.1, that the Respondent had claimed state immunity in its response.

27. Even if it had, I decided that the Respondent’s ET3 Response went beyond "only" claiming immunity.

28. I noted that box 6.1 disputed the facts stated in the Claimant's claim form and, on the contrary, stated that the Claimant had only been employed for a year by the Respondent. Box 6.1 also denied that the Claimant had been dismissed (stating that, instead, the Claimant did not want to continue in employment). Both those assertions amounted to substantive defences to the Claimant's unfair dismissal claim: the Claimant could not claim unfair dismissal if he had not been dismissed; and the Tribunal would not have jurisdiction to determine his unfair dismissal claim if the Claimant did not have the 2 year qualifying period under *s108 ERA 1996.*

29. Further, in relation to the Claimant's notice pay and redundancy pay claims, the Respondent's assertion that the Claimant had "happily received all his dues and payments", amounted to a substantive denial that any money was owing to him.

30. I decided that the Respondent's ET3 Response went well beyond a step taken for the purpose "only" of claiming immunity under *s2(4)(a) SIA 1978*.

31. By asserting substantive defences to the claim, the Respondent impliedly affirmed the correctness of the proceedings and its willingness to go along with a determination by the Courts of the substantive claim, as Lord Denning MR described in *Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd* [1978] I Lloyd's Rep. 357 at p. 36.

32. I therefore decided that the Respondent had submitted to the jurisdiction of the Tribunal and that, therefore, it was not able to rely on *ss4 & 16 State Immunity Act 1978* to defend the Claimant's claim.

Consequential Directions

33. I gave directions for a Final Hearing.

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Employment Judge **Brown**

Date: 3 September 2020

SENT to the PARTIES ON

.04/09/2020.

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FOR THE TRIBUNAL OFFICE