EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr M Sultan	**v**	**The Cultural Bureau of the Royal Saudi Embassy in London**

PUBLIC PRELIMINARY HEARING

Heard at: **Central London Employment Tribunal (By CVP)** **On: 5 July 2023**

Before: **Employment Judge Brown**

Appearances

For the Claimant: **In person**
For the Respondent: **Mr M Sethi KC, Counsel**

JUDGMENT

The Judgment of the Tribunal is that:

1. **The Claimant's complaints of ordinary and automatic unfair dismissal, for a redundancy payment and for unlawful deductions from wages are struck out.**
2. **The Claimant complaint of unpaid holiday pay based on EU law is not struck out.**

REASONS

This Hearing

1. This Public Preliminary Hearing was listed to decide:
   1.1. Whether the Claimant has brought any claim for holiday pay under EU law; and/or
   1.2. Whether all his claims should be struck out because they derive from UK law and the causes of action arose before 18 October 2017, so they are barred by s1 and s16 State Immunity Act 1978.

The Complaint(s) and Background

2. By a claim form, presented on 31 January 2018, the Claimant brought complaints of unfair dismissal and automatic unfair dismissal, failure to pay holiday pay and

"other payments", redundancy payment and unlawful deductions from wages, against the Respondent.

3. The Respondent presented a Response to the claims on 15 February 2019, asserting state immunity pursuant to ss1 & 16 State Immunity Act 1978.

4. 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 had decided that the doctrine of state immunity in international law applied only sovereign acts, not private acts, of the foreign state concerned. 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. The wider immunity conferred in such employment cases by ss 4 & 16(1)(a) State Immunity Act 1978 was therefore inconsistent with art 6 of the European Convention on Human Rights, and art 47 of the Charter of Fundamental Rights of the EU.

5. The Supreme Court decided that UK employees of foreign States, whose employment was not a sovereign act, would be able to bring claims based on EU law, against

6. However, the Supreme Court made a Declaration of Incompatibility in relation to s *16 & 4 SIA 1978* because it decided that *s 4 & 16(1)(a) SIA* could not be read down, pursuant to the *HRA 1998 s 3(1),* in such a way as to make them compatible with Convention rights. That meant that employees were still barred from bringing claims based on UK law, pending any amendment to the law by the UK Government.

7. On 19 March 2019 EJ Wade conducted a Case Management Preliminary Hearing in this case. She ordered that, by 9 April 2019 the Respondent was to inform the parties in a revised grounds of resistance whether:
   7.1. It agreed that the tribunal currently has jurisdiction over claims which are derived from the European Charter, Article 47.
   7.2. It was in principle prepared to enter into settlement discussion, with or without a judicial mediation.

8. On 9 April 2019 the Respondent emailed the Tribunal saying that it considered that it was not necessary to amend its Grounds of Resistance, but that it accepted that the Tribunal had jurisdiction over claims derived from EU law.

9. The *State Immunity Act 1978 (Remedial) Order 2023*, which addressed the declaration of Incompatibility made in *Benkharbouche,* came into force on 23 February 2023.

10. In summary, pursuant to it, employees of a Diplomatic/Consular Mission in the UK are no longer barred from bringing any type of employment claim against their employing State, so long as:
    10.1. the employee is not a diplomatic agent or consular officer, or
    10.2. the employment was not entered into in the exercise of sovereign authority, or
    10.3. the conduct complained of was not an act of sovereign authority, and

10.4. the employee was a UK national / resident in the UK when the contract was made (or if the employee was not, the State was not a party to the European Convention on State Immunity).

11. However, this only applies to causes of action which arose after 18 October 2017, the date of the Supreme Court judgment in *Benkharbouche.*

12. For causes of action before that date, the Claimants are still limited to EU-law based causes of action, as described in *Benkharbouche.*

The Dates of the Claims in this Case

13. In his claim form, the Claimant contended that he had been required to work longer hours and said that he had not been paid for his overtime. At a private preliminary hearing on 5 June 2023, he confirmed that his claim for unlawful deductions from wages related to pay before he was dismissed on 4 September 2017.

14. In his claim form, he said that he had been dismissed on 4 September 2017.

The Holiday Pay Claim

15. At the private preliminary hearing on 5 June 2023 I asked the Claimant to explain his holiday pay claim. It was not clear to me that the Claimant was bringing a holiday pay claim based on EU law, rather than UK contract law.

16. I ordered that, by 19 June 2023, the Claimant should write to the Tribunal and the Respondent setting out the factual basis for his claim for holiday pay, and explaining how he says that is a claim for holiday pay accrued during the final holiday year, for which he wasn't paid.

17. On 16 June 2023 the Claimant wrote, "I believe that the case of action should be the tribunal's claim date, which was 31/01/2018. The s 16(1)(a) State Immunity Act 1978 was inconsistent with art 6 of the European Convention on Human Rights, and art 47 of the Charter of Fundamental Rights of the EU. My claim of unfair dismissal should be considered under ECHR art 6 and 47 of the CFR EU. (I have dual citizenship of Chad and British on the time of signing my contract). I believe the (Remedial) Order 2023 is not clear yet…".

18. On 4 July 2023 he sent an explanation of his holiday pay claims and a document dated 20 July 2017, in which the Cultural Attache in Britain said that the Claimant would be given holiday from 31 July 2017 for 32 days.

19. At this hearing the Claimant told me that his employment started on 11 September 2011 and the last holiday he had had was from December 2015 to January 2016. He said there was no document which provided for a different start to the holiday year than the anniversary of the start of his employment.

20. He said that the Respondent operated a system whereby employees could accumulate and carry over holiday from one year to the next.

21. The Claimant said that he was claiming for whole of his accrued holiday entitlement. He said he had not taken any holiday from September 2016 until he was dismissed on 4 September 2017.

22. The Claimant said that, while the Respondent told him, on 20 July 2017, to take 32 days holiday during his 2 month notice period (which ran from 4 July – 4 September 2017), he did not agree to do this and did not take leave.

23. He also said that the Respondent had not given him the notice required under *Reg 15 WTRs* to enable it to require him to take the leave. He said that the Respondent was required to give him 64 days' notice - "twice as many days in advance of the earliest day specified in the notice as the number of days … to which the notice relates…", *Reg 15(4).* He relied on

    "WTR Reg 15 …

    (2) A worker's employer may require the worker—(a)to take leave to which the worker is entitled under regulation 13(1); or (b)not to take such leave,on particular days, by giving notice to the worker in accordance with paragraph (3).

    (3) A notice under paragraph (1) or (2)—(a)may relate to all or part of the leave to which a worker is entitled in a leave year; (b)shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and (c)shall be given to the employer or, as the case may be, the worker before the relevant date.

    (4) The relevant date, for the purposes of paragraph (3), is the date—(a)in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and (b)in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates."

24. Regarding his domestic law claims, the Claimant told me that he believed that date of the causes of action was 31 January 2018, because that was the date he presented his claim.

25. Mr Sethi KC for the Respondent said that the UK law- based claims crystallised before 27 October 2017 and all should be struck out.

26. Of the holiday pay claim, Mr Sethi KC said that the claim could only relate to the 4 weeks, or 20 days', holiday entitlement arising under EU law. He said that, of this, notice was given for 11 days holiday. The notice given was sufficient for that period of leave.

Decision

27. I struck out the Claimant' UK law - based claims of unfair dismissal, unlawful deductions from wages and a redundancy payment.

28. I noted that *Cl.1(3) State Immunity Remedial Order 2023* provides

    "*Citation, commencement, extent and application*

    Cl 1(3) This Order applies in relation to proceedings in respect of a cause of action that arose on or after 18 October 2017 (whether those proceedings were initiated before, on or after the day on which this Order is made)."

29. All the Claimant's UK law - based claims arose, or were outstanding, on the date of his dismissal, 4 September 2017. The causes of action all arose before 18 October 2017.

30. As the Remedial Order only amended the *State Immunity Act 1978* in relation to causes of action after 18 October 2017, the Claimant's UK law- based claims all continue to be barred by the unamended provisions of the *State Immunity Act 1978.*

31. However, I did not strike out the Claimant's holiday pay claim. I considered that he was bringing a claim for accrued, but unpaid, holiday on termination of his employment. That is a claim based on EU law. The Claimant contends, at least, that he took no holiday from the start of his holiday year on 11 September 2016 until the date of his dismissal on 4 September 2017. He contends that any attempt by the Respondent to require him to take holiday was ineffective because of the Reg15 WTR requirement for twice the amount of notice to be given as the period of leave to which it relates. He can rely on the EU Charter to bring that claim.

32. The merits of the claim still need to be determined. There may be arguments about time limits and about whether any notice given by the Respondent was effective to require the Claimant to take holiday.

33. The Claimant also claims carried over holiday pay from previous years. EU law may allow that in certain circumstances although, again, the merits of such a claim need to be determined.

34. I gave directions for the future conduct of the case.

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Dated: 5 July 2023

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Employment Judge Brown

JUDGMENT SENT TO THE PARTIES ON

05/07/2023

FOR THE TRIBUNAL OFFICE