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EMPLOYMENT TRIBUNALS

Claimant	**AND**	**Respondent**
Mr R Luchmun		Commonwealth Telecommunications Organisation

Heard at: London Central **On**: 30 June 2017

Before: Employment Judge Auerbach (sitting alone)

Representation

For the Claimant: Ms A Halker, counsel

For the Respondent: Mr E Kemp, counsel

REASONS

1. The Respondent is an inter-governmental treaty organisation established under the constitution of the Commonwealth Telecommunications Organisation (CTO) of 1966 and the **Commonwealth Telecommunications Act 1968**. It is an international organisation which has a Headquarters Agreement with the UK Government and offices located in West London. Its mission is to provide information in communication technologies leadership in the Commonwealth and beyond. Its purposes include promoting effective co-operation and partnership amongst countries in the attainment of its objectives. Its members include countries who are members of the Commonwealth, as well as others.

2. The Claimant was employed by the Respondent for some years until he resigned in October 2016. Following compliance with the ACAS Early Conciliation process he presented a claim form to the Employment Tribunal on 10 February 2017. His complaint against a second respondent, his former manager, was rejected upon initial consideration, because there had been no separate early conciliation process in relation to him.

3. Originally, the claim form included claims for notice monies and holiday pay but these were later compromised, withdrawn and dismissed upon withdrawal. The Claimant's representatives also confirmed that he was not seeking to assert any complaint under the **Equality Act 2010**. However, the complaint that he does seek to pursue, and which, subject to the jurisdictional issue that came before

me at this hearing, remained live, was for unfair dismissal. The Claimant having resigned, the complaint, more specifically, was one of constructive unfair dismissal.

4. The Respondent claimed immunity from suit and put in a response, and then an amended response on the footing that it did not otherwise submit to the jurisdiction. The Claimant did not accept that the Respondent had immunity from suit and this preliminary hearing was listed in order to determine that issue.

5. I had the benefit of written and oral submissions from Mr Kemp, for the Respondent, and Ms Halker for the Claimant, and I was referred to various authorities and background materials. I gave an oral reasoned decision at the conclusion of the hearing, and the written judgment was subsequently promulgated. Mr Kemp requested written reasons, and these are now provided.

6. The source of the immunity claimed is the **Commonwealth Telecommunications Organisation (Immunities and Privileges) Order 1983** (SI 1983/144). That was made pursuant to the **International Organisations Act 1968**. In particular, section 1 of the 1968 Act gives power to Her Majesty, by Order in Council, to specify an organisation to which that section applies and make any one or more of certain provisions in relation to it. These include, under section 1(2)(b), to "provide that the organisation shall, to such extent as may be specified in the Order, have the privileges and immunities set out in Part 1 of Schedule 1 to this Act." Part 1, paragraph 1 refers to: "Immunity from suit and legal process".

7. It is clear that, potentially, the immunity which may be conferred on a particular organisation, in exercise of that power, could be very broad indeed. On the face of it, it could be comprehensive. The issue, however, is what is the scope of the immunity that has *in fact* been conferred on the Respondent, by the 1983 Order, and, specifically, whether it extends to a complaint of unfair dismissal.

8. Article 5 of the 1983 Order provides as follows:

> **5.**—(1) Within the scope of its official activities the Organisation shall have immunity from suit and legal process except:
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> (a) to the extent that the Organisation shall have expressly waived such immunity in a particular case;
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> (b) in respect of any contract for the supply of goods or services, and any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation;
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> (c) in respect of a civil action by a third party for damage arising from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Organisation, or in respect of a traffic offence involving such a vehicle;
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> (d) in respect of a civil action relating to death or personal injury caused by an act or omission in the United Kingdom;
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> (e) in the event of the attachment or, in Scotland, arrestment, pursuant to the final order of a court of law, of the salaries, wages or other emoluments owed by the Organisation to a staff member;
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> (f) in respect of a counter-claim directly connected with proceedings instituted by the Organisation;

(g) in respect of the enforcement of an arbitration award made under Article 21 of the Agreement; and

(h) in respect of proceedings relating to a contract of employment between the Organisation and a staff member.

(2) Paragraph (1) of this Article shall not prevent the taking of such measures as may be permitted by law in relation to the property and asses of the Organisation in so far as they may be temporarily necessary in connection with the prevention of, and investigation into, accidents involving motor vehicles belonging to, or operated on behalf of, the Organisation.

9. Accordingly, unless the matter does not fall within the scope of the Respondent's official activities (and there was no suggestion that this particular matter did not do so), the Respondent has general immunity from suit and process, except as provided at sub-paragraphs (a) to (h), and subject to paragraph (2).

10. The Claimant's case was that the exception created by sub-paragraph (h) applies here, because a complaint of unfair dismissal is "proceedings relating to a contract of employment between the Organisation and a staff member." The Respondent's case was that those words do not cover a complaint of unfair dismissal. It was on the construction of that sub-paragraph that, ultimately, this issue turned. In the course of the written and oral arguments, a number of matters were canvassed before me, which, it was agreed, or I concluded, did *not* materially help me to decide that question. I consider each of these first.

11. Firstly, I was referred to the decisions in **Bertolucci v European Bank for Reconstruction Development and Others,** EAT/276/97 and **Mukoro v European Bank for Reconstruction and Development** [1994] ICR 897**,** which **Bertolucci** largely followed. In both of those cases it was found that there was no jurisdiction to entertain complaints brought in the Employment Tribunal against the European Bank of Reconstruction and Development. However (beyond a general observation mentioned below), those decisions do not materially assist me, because in neither of those cases was there an exemption to immunity in wording identical, or similar, to that found in Article 5(1)(h) of the 1983 Order.

12. Secondly, it was common ground that I should not and cannot take the same general approach to the issue before me, as might be taken to an issue arising under the **State Immunity Act 1978**, because the origins, governing treaties and purpose and objectives of that Act, and of the measures with which I was concerned, are quite distinct and different. Both counsel agreed upon that and indeed, for that reason, both of them were of the view at the start of the hearing, that there was no need to await the pending decision of the Supreme Court in the **Benkharbouche** case (UKSC/2015/0063). I will however come back later to the 1978 Act on a more specific point concerning its drafting.

13. Thirdly, consideration of principles of European Community law is of no assistance, because this complaint is solely of unfair dismissal, which does not derive in any way from European Community law.

14. Fourthly, it was common ground before me that, whilst the Tribunal, as a public body, has certain duties under the **Human Rights Act 1998** and in some

cases issues turning on Convention rights, in particular under Article 6, can have a bearing on the outcome, this is not such a case; and Ms Halker confirmed that she did not rely on any such line of argument. That was, in particular, because she accepted, and agreed with Mr Kemp, that the availability to the Claimant of a notice money claim in this case would be sufficient to meet the principle of proportionality as explained in cases such as **Waite and Kennedy v Germany** [1999] 30 EHRR 261. Furthermore, it was common ground that, even had it been argued, and had I accepted, that Convention rights might theoretically point to a different outcome than the Article read alone, I could not have given effect to that, as there would not have been scope to rely on such rights to rewrite Article 5. Nor does the Employment Tribunal have any power to issue a declaration of incompatibility.

15. Finally, I raised in discussion that the words “related to” or “relating to” do crop up in employment and discrimination legislation, such as in section 26 **Equality Act 2010**, the definition of harassment, and whether it might be pertinent to consider any authorities from that field. However, it was common ground that it would not be of assistance to look to such sources, because of the different policy considerations underpinning, and background to, such legislation, and indeed, in the case of the 2010 Act, the fact that it is underpinned by rights derived from Community law. Ms Halker agreed with Mr Kemp about that, and indeed Mr Kemp urged upon me that to draw on the interpretation of words found in such a different legislative context would be an error; and I have not done so.

16. Pausing there, these were all other areas of law or authority from which I could therefore derive no specific assistance in my task of construing the relevant provisions of Article 5. My focus must be on this instrument itself.

17. The general principles to be applied to such a task of statutory construction are well-established in the authorities and were not in dispute before me. My task was to establish Parliament’s intention by considering the natural meaning of the words, including, to the extent that there was any material ambiguity or room for different shades of meaning or interpretation, by construing the words in the particular context of the wider provisions of the instrument in which they are found, and the underlying Parliamentary purpose, to the extent that it could be divined.

18. Mr Kemp made the general submission that the context was that Article 5(1) confers a general immunity, and that Article 5(1)(h) conferred a specific *exception* to that general immunity. That exception should, therefore, not be construed as going any wider than is apparent from the plain meaning of its language. However, I noted that the exception created by Article 5(1) is itself by way of qualification of an *immunity*, from what would ordinarily be the rights and remedies that could be asserted against the Respondent under the ordinary law. As Mummery P, in the **Mukoro** case, observed, such a claim to immunity must therefore be “carefully scrutinised” and “can only be justified by an overriding public policy or interest.”

19. The place to start, in any event, is to consider the natural meaning of the particular words, and whether that meaning is entirely clear, or whether, read alone, they are materially ambiguous or open to different shades of interpretation.

20. Reading the words of Article 5(1)(h) alone, my starting point is that in my judgment the natural meaning of the phrase “in respect of proceedings relating to a contract of employment between the Organisation and its staff member” embraces proceedings for unfair dismissal. This is for the following particular reasons.

21. Firstly, the core hinge is the words “relating to”. That is, in its natural meaning, a relatively broad term. One thing, or its subject matter, can be said to be “relating to”, or to relate to, more than one other thing, including mainly one other thing, but also to yet others, though it is not *mainly* relating to those other things. Of course, though broad in its natural meaning, the concept has its limits. For one thing to be fairly described as “relating to” another thing (whether or not exclusively that other thing), the link forged between the former, or its subject matter, and the latter, must be more than merely tenuous, entirely peripheral or purely by way of incidental background which has no other significance.

22. But in my judgment a complaint of unfair dismissal passes that test of meaning, in terms of whether unfair dismissal proceedings are proceedings “relating to” the contract of employment of a staff member. Plainly, the concern here is not with the factual subject matter of a *particular* complaint of unfair dismissal, or with what matters may or may not be in dispute in a specific case. It is with whether a claim of unfair dismissal, as a *type of legal proceedings*, is properly described as a complaint of a type relating to the contract of employment.

23. To be entitled to bring a claim of unfair dismissal you must be someone who was an employee, which is specifically defined in the **Employment Rights Act 1996** (section 230(1)) as someone who (where the relationship has ended) entered, or worked under, a contract of employment. That is not an incidental matter, but a fundamental cornerstone of the right. Furthermore, for the right to be invoked, there has to have been a dismissal. This is itself a defined term, and there are various ways that a dismissal can come about – see section 95 – but all of them involve, one way or another, the termination of the contract of employment. Again, this is not merely an incidental or background feature.

24. An unfair dismissal claim is plainly, itself, a statutory claim, and the substantive elements of the test of fairness in section 98 are not rooted in contract. But the existence of the contract of employment, and the termination of that contract of employment, are the fundamental and necessary substratum of the right to claim unfair dismissal in every case.

25. The fact that the particular complaint in the present case happens also to be one of *constructive* unfair dismissal also brings to mind how the contract of employment, and the law relating to it, feeds into unfair dismissal law in other ways as well. While “constructive dismissal” is shorthand for a statutory test of dismissal to be applied where the employee has resigned (found in section 95(1)(c)), that test has itself been held, in long-established authority, to depend (in part) on whether the conduct of the employer amounted to a fundamental breach of the express or implied terms of the contract of employment, at common law. I stress that the answer to whether this complaint of unfair dismissal was one relating to the contract of employment, does *not* depend on the fact that it happens to be one

of constructive unfair dismissal; but this aspect serves further to illustrate how the contract of employment, and the law relating to it, permeate unfair dismissal law.

26. This reading of the grasp of Article 5(1)(h) is further enhanced by the choice of the word "proceedings" in the phrase "proceedings relating to", read also in the context of Article 5(1) as a whole. The opening words of Article 5(1) confer "immunity from suit and legal process". "Suit and legal process" could, itself, take many forms: a civil private law claim, a criminal prosecution, enforcement proceedings or other forms of suit or legal process. Looking at the various exemptions that fall under Article 5(1) as a whole, they are more or less specific about the types of suit or legal process that they encompass. Paragraph (1)(b) covers *any* suit or legal process *if* it relates to any of the matters mentioned there. Paragraphs (c), (d), (e) and (g) relate to civil actions, attachment or arrestment and enforcement proceedings of the types stipulated in those respective paragraphs. Those are themselves a number of different types of suit or legal process.

27. Within that context, the word "proceedings" is itself of potentially wide import, and not necessarily, by itself, tied to one particular type of legal proceedings, although in some paragraphs the drafter has then chosen to specify a very particular type of proceedings. But the exception under paragraph (1)(h) is not so restricted. It applies to *any* proceedings relating to a contract of employment. If Parliament had wanted to specify, for example, that the exception applied solely to claims for a remedy for breach of the contract of employment, or otherwise for enforcement of the contract of employment, it could have so provided, in one form of words or another. But it has chosen not to be so restrictive, but to embrace, more generally, any type of proceedings "relating to" such a contract of employment.

28. Mr Kemp submitted that an unfair dismissal claim is a form of legal proceedings not relating to the contract of employment but relating to UK labour law. But, as I have observed, a particular type of proceedings might be fairly described as relating to more than one thing. Unfair dismissal proceedings might be said to be proceedings relating to employees, to the contract of employment, to the termination of the contract of employment, *and* to the fairness of such termination. Even if they may also, at a higher level of generality, also be said to be proceedings relating to UK labour law, these things are not mutually exclusive.

29. Is there anything else, however, in the wider context, which suggests that Parliament did *not* intend the exception to cover a complaint of unfair dismissal? As I have noted, Ms Halker did not seek to argue that there was any, as it were *a priori* or external legal reason why it was *necessary* for Parliament to grant an exception to the general immunity, in order to allow complaints of unfair dismissal to be brought. She merely contended that this was what it had, in fact done. But the focus, at this point in the argument, is on the different question of whether there is anything in the wider context to suggest that it *cannot* have intended the exception in paragraph (1)(h) to embrace unfair dismissal complaints.

30. Here, Mr Kemp submitted that consideration needed to be given to the wider context of the nature of the Respondent as an international organisation, and the general policy purpose behind conferring upon it immunities from proceedings

and suit in the first place. Here, he referred to the decision in **Waite and Kennedy v Germany** (above) for its discussion of the policy considerations behind giving such immunity to organisations of this type. In summary, the rationale is that the immunity helps ensure that such an international organisation can operate free from unilateral interference by the government of one country or another. In that case, the particular issue concerned the impact of ECHR Article 6 on the immunity concerned. The ECtHR observed (at 72) that:

To read Article 6(1) of the Convention and its guarantee of access to court as necessarily requiring the application of national legislation in such matters would in the Court's view thwart the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international corporation.

31. Similarly, argued Mr Kemp, to allow jurisdiction for a claim of unfair dismissal against the Respondent would run counter to that same underlying policy. In his written submissions, he put it like this:

… the Claimant's contended interpretation undermines the CTO's personality as an international organisation set up as a collective enterprise to promote effective corporation and partnership between some 40 state members across the world. If one member can subject to all the others to its own national labour laws, then all could and the independence and international character of the organisation is destroyed.

32. He drew also, again for the insight given by the discussion of the policy rationale, in relation to such international organisations, on a passage in the decision in **in re International Tin Council** [1987] Ch 419, at 452D:

Sovereign states are free, if they wish, to carry on a collective enterprise through the medium of an ordinary commercial company incorporated in the territory of one of their number. But if they choose instead to carry it on through the medium of an international organisation, no one member state, by its legislative or judicial action, can assume the management of the enterprise and subject it to its own domestic law. For if one could, then all could; and the independence and international character of the organisation would be fragmented and destroyed ...

33. I accept that the Respondent is an international organisation in respect of which such policy considerations have informed the granting of such immunities in this area as it does in fact enjoy. I observe, however, that the International Tin Council (ITC) case, was concerned with the specific question of whether the ITC could be wound up by the High Court under the Companies Act 1985. One can readily see the force of the argument that a winding up process strikes at the entire fabric, not merely of an organisation's management but indeed of its continued existence. It might be difficult to imagine a type of legal process in respect of which the foregoing general policy argument could be stronger. But I do not think that example assists very much when considering whether the bringing of an unfair dismissal claim undermines the policy objectives behind the existence, activities and management of organisations such as the Respondent.

34. Further, it bears repeating that, while the 1968 Act would *enable* a given organisation to have conferred upon it a very wide legal immunity, it does not follow that such a thing is necessary, or always necessary to the same extent, in

order to secure those policy objectives in every case. The 1968 Act left it open to be determined on a case by case basis what (if any) immunity needed to be conferred on each particular organisation. It cannot be inferred from the powers contained in the 1968 Act itself that Parliament considered that any particular minimum level, or type, of immunity, would always be necessary to the integrity of the management, functioning and objectives of all such organisations.

35. In this particular case Article 5 of the 1983 Regulations creates a number of wide-ranging exceptions to the immunity, in relation to a variety of types of suit or process (in addition to catering for the possibility of voluntary waiver). It was not suggested that the general fact that this Respondent is exposed to the possibility of legal claims and liabilities in the range of circumstances plainly covered by Article 5 has thwarted, or is likely to thwart, the proper management or functioning of it as an international organisation. It is also hard to see how permitting the exercise of the right to claim unfair dismissal would allow one state to dominate this organisation or usurp the position of the others, bearing in mind that the enjoyment of the right to claim unfair dismissal is itself subject to other jurisdictional hurdles, including territorial and international jurisdiction. It is also not obvious why allowing an ex-employee who worked in London to bring a domestic claim for breach of contract would not offend or threaten such principles, but allowing them to bring an unfair dismissal claim would.

36. In summary, it seems to me that there is nothing in the wider context of Article 5, or the 1983 Order as a whole, to suggest that the conclusion that the Article would permit a former employee who was otherwise qualified to do so, to present a complaint of unfair dismissal to the Employment Tribunal, goes against the grain or overall purpose of this Order, in terms of the types of claim or legal process to which this Respondent may, more generally, be exposed.

37. As I have noted, it was common ground that the **State Immunity Act 1978** has a distinct background, and is driven by distinct policy considerations, so that a read-across from the jurisprudence relating to the immunities conferred by it, to the issue with which I was concerned, would not be appropriate.

38. Nevertheless, reference was made, in the course of argument before me, to the wording of sections 4(1) and (6) of that Act, which provide:

(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.

(6) In this section “proceedings relating to a contract of employment” includes proceedings between the parties to such a contract in respect of any statutory rights or duties to which they are entitled or subject as employer or employee.

39. Mr Kemp submitted that the 1978 Act was an instance of Parliament expressly and unambiguously providing an exception to immunity in relation to complaints invoking the statutory rights and duties of employer and employee – such as unfair dismissal. Consideration of the framing of these provisions supported the conclusion, he submitted, that, in the absence of such express provision, the phrase “proceedings relating to a contract of employment” would not

be apt to cover such a complaint. Alternatively, since Parliament could have chosen, in the 1983 Order, to take the same approach as it had in the 1978 Act, but had not done so, it could be inferred that this was because it did not, on the occasion of the 1983 Order, intend such complaints to fall within the exception.

40. Ms Halker's submission was to precisely opposite effect. It was noteworthy, she said, that the 1978 Act did not create distinct exceptions: one for claims under the contract of employment, and one for statutory claims. Instead, it provided that proceedings relating to a contract of employment *include* statutory claims, suggesting that the drafter considered that the former wording was at least potentially apt to include such complaints, and that sub-section (6) was not intended as an extension of, or addition to, sub-section (1), but as confirming or clarifying its scope. In any event, nothing could be inferred from a consideration of the 1978 Act, as to the intention of the drafter of the 1983 Regulations.

41. I agreed with Ms Halker on both points. Taking them in reverse order, firstly, although concerned with similar subjects, the 1978 Act and the 1983 Order are separate pieces of legislation which have distinct contexts, purposes and backgrounds. I do not think the approach taken by the drafter of the 1978 Act can be safely relied upon as directly illuminating the approach and intentions of the drafter of the 1983 Order. Secondly, however, I agree with Ms Halker, that, in any event, the drafter of the 1978 Act does appear to have assumed that an exception in relation to statutory claims by employees, in one sense or another, could be treated as falling under the umbrella of an exception for claims relating to the contract of employment; so that if consideration of the drafting style of the 1978 Act offers any illumination as to how the 1983 Order should be construed, it does not obviously support the Respondent's case, rather than the Claimant's.

42. For all of these reasons I concluded that the phrase "proceedings relating to a contract of employment between the Organisation and a staff member" in Article 5(1)(h) of the 1995 Order embraces proceedings for unfair dismissal. Accordingly, the immunity conferred by that Article does not bite, and the Tribunal has jurisdiction to entertain the Claimant's claim of unfair dismissal.

Employment Judge Auerbach
7 August 2017