Case Number 2204871/2019

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr L Fenniche	**v**	**1. Kuwait Health Office**
		2. The Government of the State of Kuwait

Heard at: **Central London Employment Tribunal**
Remotely by Cloud Video Platform

On: **22 January 2021**

Before: **Employment Judge Brown**

Appearances:

For the Claimant: **Mr A Otchie, Counsel**
For the Respondents: **Mr M Sethi QC**

JUDGMENT AT AN OPEN PRELIMINARY HEARING

The Judgment of the Tribunal is that:

1. The Claimant's employer was the Government of the State of Kuwait, so the Government of the State of Kuwait is the correct Respondent to the claim.

2. The Kuwait Health Office is removed as a Respondent to the claim.

3. The Claimant presented his claim before IP Completion day, so Art 47 of the Charter of Fundamental Rights continues to apply in relation to his complaints based on EU law.

4. Throughout the Claimant's employment, the Claimant's job functions were exercises of Sovereign Authority and the Respondent had the benefit of state immunity, save in respect of claims for personal injury.

5. The Claimant brought claims for personal injury damages for race discrimination and harassment against the Respondent. Only these can continue. The Claimant's other claims are barred by state immunity.

6. The parties shall send agreed directions, including a revised time estimate, for the Final Hearing, to the Tribunal by 7 days.

REASONS

1. The Open Preliminary Hearing was listed to determine: the correct identity of the Claimant's employer and, therefore, the correct Respondent to the claim; and whether any Respondent has the benefit of state immunity in respect of any of the Claimant's claims.

2. On 12 November 2019 the Claimant, a medical doctor, presented complaints of race discrimination and harassment, unfair dismissal, wrongful dismissal and failure to give written reasons for dismissal against the First Respondent.

3. On 15 November 2019 the Tribunal sent the First Respondent a Notice of Claim.

4. On 12 December 2019 the First Respondent presented an ET3 Response which stated that the correct identity of the Respondent was the Government of the State of Kuwait.

5. At this Preliminary Hearing the Claimant and Dr Abdulaziz Ahmad Al Rasheed gave evidence. Both parties made submissions. I reserved my decision. After the conclusion of OPH, I sent further questions to the parties regarding the law. The parties provided their responses to these by 25 February 2021.

The Facts

6. Having heard evidence, I found the following facts.

7. The Claimant was employed as an in-house Doctor at the Kuwait Health Office ("KHO") in London from 7 July 2004 until 6 July 2019.

8. There was only one contract of employment which existed between the parties, Bundle p110. It was undated but was signed by the Claimant, Bundle p112.

9. The contract was entitled "Employment Contract for Locally Engaged Staff of Diplomatic Missions of the State of Kuwait". In it, the contracting parties were expressly identified as "The Government of the State of Kuwait" as "the first party" and the Claimant as the "the second party".

10. Clause 1 of the contract provided that the Claimant's place of work was "The Embassy of Kuwait in London".

11. Clause 6 provided, "Any Dispute which may arise between the parties as to the implementation or interpretation of the contract shall be subject to the generally acknowledged principles of international law."

12. Pursuant to clause 5, the Claimant was expressly "subject to the regulations for locally Engaged staff employed at Diplomatic Missions of the State of Kuwait and such decisions and circulars as implement those regulations where there is no specific provision in this contract."

13. The relevant regulations are the Regulation on Local Employees and Workers 1999, p65. Art 9 of these Regulations requires approval of the appointment of an employees by the Kuwaiti Ministry of Foreign Affairs. Under Art 10 of the Regulations, the employee and the Head of Mission are required to sign the Contract. (The Claimant's contract provides for the signature of the Head of Mission). Under Art 14 the Contract must be filed with the Kuwaiti Ministry of Foreign Affairs.

14. There was never any variation to the contract. The contract did not refer to the KHO at all.

15. The Claimant was told to sign the contract and that he would be working for the KHO. He did always work at the KHO.

16. The Claimant's manager from 2004 to 2017 was Abdelrahman Asfour, who was also based at the KHO at 40 Devonshire Street. The Claimant's role as an in-house/medical coordinator during these years involved reviewing reports received from UK hospitals concerning the medical condition of KHO registered patients. Upon receipt of those reports he was required to invite the patients to the Kuwait Health Office, explain the medical reports to them, check whether they had been assessed by the private hospitals as claimed, and then approve (or not) a letter of guarantee to the hospital from the KHO. The Claimant's role involved reading and translating medical reports from English to Arabic for the patients.

17. In 2017, the Claimant's role was unilaterally changed by his new manager, Faisal Alsafi, to a role which simply involved issuing letters of guarantee.

18. Managers in the Kuwait Health Office were in charge of the Claimant's day to day work. Decisions about his working hours and holidays were made by his manager at the Kuwait Health Office.

19. The Claimant's payslips named the KHO as his employer, as did his P60 and P45.

20. However, the Embassy of the State of Kuwait issued the Claimant with disciplinary sanctions: first written warnings p115, p150, second written warning p120, and deductions from salary p126, 132, 136, final warning p157, warning and deduction p160. A further warning dated 5 January 2019 p163 stated "Kindly note that this office is a part of the Embassy of the State of Kuwait."

21. The Claimant made holiday applications on Kuwaiti Embassy forms p129, 139.

22. While the KHO was named as the Claimant's employer on payslips, the Embassy of the State of Kuwait actually paid his salary. The bank Payment Detail Report relating to his final wages payments dated 24 July 2019, p169, and 23 August 2019, p172, identify the paying account name as "Embassy of the State of Kuwait – Health".

23. Dr Abdulaziz Ahmad Al Rasheed is Head of the KHO and reports into Dr Mostofa Riddah, Kuwaiti Government Under Secretary of State for Health. Dr Mostofa Riddah in turn, reports to Dr Basil AI Sabah, the Minister of Health for Kuwait. Dr Basil AI Sabah is also a member of the royal family in Kuwait.

24. The funding for the KHO is provided by the Ministry of Health in Kuwait. The KHO sends monthly reports to the Under Secretary of State for Health on matters of importance. The Ministry of Health approves pay scales for Doctors who work at the Kuwait Health Office.

25. When the health service in Kuwait cannot provide a specific treatment to a patient, that patient will be referred to the Ministry of Health's 'Treatment Abroad Department'. This department will refer the patient to one of the Kuwaiti Government's health offices abroad. The Under Secretary of the Ministry of Health in Kuwait is required personally to authorise all medical referrals to the Heath Attaches outside Kuwait. The majority of referrals are made to the KHO in London.

26. The KHO therefore deals with patients who have been referred to it by the Kuwaiti Government. Referrals are also made directly to the KHO by His Royal Highness, the Emir of Kuwait, through the Emiri Dewan (the royal office). The KHO does not have patients who are introduced in any other way.

27. When a patient is referred to the KHO, a patient file is created. This includes private and confidential information about the patient, such as their medical history, contact details, home address and next of kin details. A patient reference number is also created which is used to identify a patient.

28. When the patient arrives in the UK for their treatment, they are allocated to a Doctor, such as the Claimant. Patients are allocated to Doctors based on a Doctor's availability.

29. It is this Doctor's responsibility to arrange the patient's treatment while they are in the UK. In order to carry out their functions, the Doctor needs to have knowledge of the patient's medical condition.

30. A significant number of the KHO's patients have a strong connection to the state of Kuwait. The KHO has patient files for most of the state's highest ranking officials, including members of the royal family, government ministers, diplomats, ambassadors and senior members of the Kuwaiti military. These patients receive treatment for serious, life threatening illnesses, as well as more sensitive illnesses.

31. Access to patient records is controlled by a username and password and is limited to those who need to have access to it, including all Doctors at the KHO. All Doctors have access to all patient records, regardless of whether a patient has been allocated specifically to that Doctor. This ensures that a patient's treatment is not disrupted if their allocated Doctor is unavailable. All Doctors at the KHO therefore have access to patient records for patients referred by the Emiri Dewan.

32. The Claimant had access to medical records of high ranking officials in three ways: firstly, his access to the database; secondly, when covering for a Doctor who was unavailable; and thirdly, when covering the patient helpline.

33. If a KHO patient is from the ruling family in Kuwait, they will have the prefix ‘Al—Sabah', which is the surname of the ruling family in Kuwait. If a patient is a Prince, he will have the prefix ‘Sheikh', followed by the surname of the ruling family, ‘Al—Sabah'. This allows a Doctor to identify the status of a particular patient.

34. Between 2004 and 2017, as well as having access to the medical records of all individuals who were treated at KHO, the Claimant was the allocated Doctor for some of these patients. From the Claimant’s patient list, in 2004 the Claimant was the allocated Doctor to a Sheikh (Prince) belonging to the royal family in Kuwait.

35. From the Claimant's patient list in 2017, the Claimant was the allocated Doctor for a patient who was a high ranking Minister as well as being a member of the royal family. This patient has the potential to be the future Emir (King) of Kuwait.

36. The Claimant has also dealt with a high ranking official as a result of covering for another Doctor. Bundle p124 is an example of a letter of guarantee issued for a patient, authorising their treatment. The “Patient Name’ heading records that this patient has the surname ‘Al Sabah’, and therefore that they are a member of the royal family. The Claimant approved the referral. P122 shows that the treatment this royal patient needed was "oncology"..

37. I accepted Dr Abdulaziz Ahmad Al Rasheed’s evidence that the State of Kuwait would want to keep the highly sensitive medical information associated with its high ranking officials completely confidential and out of reach of unauthorised persons who do not have the State's clearance to access these records.

38. Dr Abdulaziz Ahmad Al Rasheed told me that the KHO is a diplomatic office of the Kuwait embassy and reports directly to the Under Secretary of the Ministry of Health in Kuwait. He said that the Kuwait government is the employer of all staff at the KHO. Dr Abdulaziz Ahmad Al Rasheed has had diplomatic status since September 2016 and the Medical, IT, Medical Audits and Finance departments report to him at the KHO.

39. After 2017, the Claimant remained employed as an in-house Doctor and received his normal salary. Issuing letters of guarantee involves using medical knowledge to assess whether the treatment a patient has received is part of the agreed treatment package. To carry out this duty, the Claimant needed to have access to the patient database. After 2017 the Claimant still had full access to the patient database containing confidential and highly sensitive information of high ranking, recognisable Kuwaiti state officials and royalty.

40. At p181 bundle was an extract from the KHO’s patient database. Patient number 821 on page 181 of the bundle was a direct referral from the Emiri Dewan. The in-house Doctor allocated to this patient was the Claimant.

41. The Claimant disclosed some photographs of his desk after his removal from allocated Doctor duties. The Respondents enlarged the photograph at p185 and zoomed in on it, p185a. The photograph showed an appointment guarantee letter for a patient with the surname ‘Al Sabah’ (a member of the Kuwaiti royal family). The patient is also a relative of a current serving Cabinet member in Kuwait.

42. According to the London Diplomatic List, the First Respondent is part of the State of Kuwait’s diplomatic mission in the United Kingdom.

43. The Claimant presented a claim against the First Respondent on 12 November 2019. His claim form, box 8.1, stated that he was bringing claims of unfair dismissal, race discrimination and wrongful dismissal.

44. Under the heading, "Discrimination and harassment on the grounds of Race /ethnicity", his grounds of claim set out a number of allegations, at paragraphs [28] – [43]. These race discrimination/harassment allegations included his dismissal on 6 July 2019, paragraph [43]. The Claimant relied on his dialect and his Algerian nationality in these complaints.

45. Paragraph [44] of the Grounds of Complaint stated that the Claimant's dismissal was "automatically unfair as he was dismissed on the grounds of his race (ethnicity)".

46. Paragraphs [55] and [56] of his Grounds of Complaint said:

    "55.The Claimant's health, safety and welfare was not protected, in that the Respondent failed to protect the Claimant from harassment by Dr Eid, from unsafe working conditions, when his desk was placed in the corridor next to the female and gent's toilette having to inhale unpleasant odour daily, placing the Claimant in the corridor to work, where regular renovations took place. The Claimant's desk being placed by the loft, where equipments were regularly being taken up and down.

    [56].On the 12th of June 2019, the Claimant was admitted to hospital for Chest Pain (onset of heart attack), due to stress at work and being unfairly dismissed."

Relevant Law

State Immunity

47. 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'.

State Immunity: Contracts of Employment

48. State immunity does not apply in the case of proceedings relating to a contract of employment between the state and an individual where the contract was made in the UK or the work is to be wholly or partly performed there, *s 4(1) SIA*. On the other hand, *s4(1) SIA* itself does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Vienna Convention on Diplomatic Relations or the members of a consular post within the meaning of the Vienna Convention on Consular Relations, *s 16(1)(a) SIA*.

49. *Art 1 VCDR* defines: (1) The "members of the mission" as including "members of the staff of the mission": *art 1(b);* (2) The "members of the staff of the mission" as including "members … of the administrative and technical staff … of the mission": *art 1(c);* and (3) "The "members of the administrative and technical staff of the mission" are the members of the staff of the mission employed in the administrative and technical service of the mission": *art 1(f).*

50. Thus, where the provisions of *s 16(1)(a) SIA* apply, state immunity can operate to prevent employees from bringing claims relating to their contract of employment. Lord Sumption in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs; Secretary of State for Foreign and Commonwealth Affairs* and *Libya v Janah* Benkharbouche v Republic of Sudan ors [2018] IRLR 123, [2017] ICR 1327 SC at [1]: "the effect of *section 16(1)(a)* is that a state is immune as respects proceedings concerning the employment of members of a diplomatic mission, including its administrative, technical and domestic staff."

51. However, *Art 6.1 ECHR* provides: "In the determination of his civil rights and obligations…., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

52. *Art 47 Charter provides*: "47 Right to an effective remedy and to a fair trial Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article."

53. 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 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].

54. 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].

55. At [55] Lord Sumption distinguished between the three categories of embassy staff as follows:

    (1) "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."

56. The Supreme Court decided that, the employment of purely domestic staff employed in a diplomatic mission is not an inherently governmental act, but is an act of a private law character. It decided that there is no basis in customary international law for the application of state immunity in an employment context to such acts. The wider immunity conferred in such employment cases by *ss 4(2)(b) and 16(1)(a) State Immunity Act 1978* was therefore inconsistent with *art 6 European Convention on Human Rights*, and *art 47 Charter of Fundamental Rights of the EU*.

57. Following *Benkharbouche*, Tribunals did have jurisdiction to hear complaints brought by domestic staff against foreign states based on EU law, if the employment relationship was of a purely private law character. Tribunals also have jurisdiction to hear complaints brought by administrative staff, if the employment relationship was of a purely private law character. As *Art 47* of the Charter provides for the right to an effective remedy and a fair trial, the Supreme Court decided that the Charter provided the power to disapply the provisions of the *SIA 1978* entirely, to ensure that the Claimants were able to pursue an effective remedy for the alleged contravention of their EU law rights.

58. Under the State Immunity Act 1978, Tribunals still did not have jurisdiction to hear complaints based on national law only. While a Declaration of Incompatibility was made in *Benkharbouche*, domestic law claims remain barred by the *SIA 1978* because the Supreme Court decided that neither *s 4(2)(b) nor s 16(1)(a) SIA* could be read down, pursuant to the *HRA 1998 s 3(1),* in such a way as to make them compatible with the Convention rights.

Art 47 : Horizontal Direct Effect: Court of Appeal in *Benkharbouche*

59. The *EU Charter of Fundamental Rights,* known also as the *EU Charter*, is an EU legal document which lists the fundamental rights, freedoms and principles protected under EU law. Although it is not incorporated in the EU Treaties, Article 6 of the Treaty on European Union grants it the same legal status as the EU Treaties. The Charter codified rights and principles which already existed in EU law.

60. The Court of Appeal judgment in *Benkharbouche* [2015] EWCA Civ 33 at [76]-[81] considered whether *Art 47 Charter* had horizontal direct effect. Where a dispute arises between two private parties, EU law which has horizontal direct effect can impose an obligation on a private party they would not otherwise have, but for the effect of EU law.

61. The Master of the Rolls, giving the judgment of the Court, said,

"[76] In our judgment, for the reasons given below, an EU Charter right can be relied on "horizontally" in certain circumstances.

[77] The CJEU gave general principles of EU law horizontal direct effect before the EU Charter came into effect. In Case C-144/04 *Mangold v Helm* [2005] ECR I-9981, there was a dispute between a private employer and an employee who

claimed that a provision of his employment contract discriminated against him on the grounds of age. He argued that national law was incompatible with Directive 2000/78 but that Directive had not been transposed into national law and the time for doing so had not expired. The conventional route for enforcing non-implemented Directive rights is through the EU law doctrine of direct effect, but that is not applicable where the time for transposition has not expired. The CJEU agreed that the national law was contrary to Directive 2000/78. It went on to hold that the provisions of the Directive were applicable even though it had not been transposed into national law and the time for transposition had not expired. Its reasoning was that the Directive implemented the principle of non-discrimination, and that was a general principle of EU law which had to be applied anyway. National law had to be set aside in order to give effect to the general principle.

[78] It is therefore perhaps not surprising to find that the CJEU has applied Mangold to the equivalent Charter provision after the Lisbon Treaty came into effect. Case C-555/07 *Kücükdeveci v Swedex* [2010] IRLR 346 was another dispute between private parties about age discrimination where again national law had not properly transposed Directive 2000/78. (The time for transposition had in this case just expired). The CJEU again held that there was a general principle of non-discrimination in EU law which had to be given effect. It noted that Article 21 EU Charter now contained the principle of non-discrimination. The CJEU also stated, without apparent qualification or elaboration, that the Lisbon Treaty (specifically Article 6, Treaty on the Functioning of the EU) provided that the EU Charter had the same status as the Treaties. This was significant because, as Lord Kerr pointed out in Rugby Football Union v Consolidated Information Services Ltd [2012] 1 WLR 3333 at [26]:

"[I]n its initial incarnation the Charter had persuasive value: the CJEU referred to and was guided by it: see, for instance, the Promusicae case [2008] All ER (EC) 809, paras 61–70."

[79] A question which remained after Kücükdeveci was whether the CJEU's statement about the status of the EU Charter means that the Lisbon Treaty had elevated all the rights, freedoms and principles in the EU Charter to a level equivalent to Mangold general principles. The CJEU to an extent addressed this question in Case C-176/12 Association de Mediation Sociale (AMS) [2014] ECR I-000 ("AMS") which was decided after Langstaff J. gave his judgment. In this case, a trade union representative sought to rely on Article 27 of the EU Charter (workers' right to information and consultation) against a private employer. The relevant directive had again not been duly implemented by national law and it did not have direct effect. The CJEU held that Article 27 could not be invoked horizontally because it required specific expression in Union or national law, but expressly distinguished Kücükdeveci. The same objection does not apply to Article 47, which does not depend on its definition in national legislation to take effect.

[80] The CJEU did not, however, go on to make it clear which rights and principles contained in the EU Charter might be capable of having horizontal direct effect, and which would not. In our judgement, however, Article 47 must fall into the category of Charter provisions that can be the subject of horizontal direct effect. It follows from the approach in Kücükdeveci and AMS that EU Charter provisions which reflect general principles of EU law will do so. The Explanations prepared under the authority of the Praesidium of the Convention which drafted the EU

Charter, which Article 52(7) EU Charter requires the court to take into account when interpreting the EU Charter, state that the CJEU has "enshrined" the right to an effective remedy "as a general principle of Union law". The Explanations cite Case 222/84 Johnston [1986] ECR 1651; Case 222/86 Heylens [1987] ECR 4097 and Case C-97/91 Borelli [1992] ECR I-6313. In Borelli, for instance, the CJEU held:

"14. As the Court observed in particular in Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, paragraph 18, and in Case 222/86 UNECTEF v Heylens [1987] ECR 4097, paragraph 14, the requirement of judicial control of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."

[81] We therefore conclude that the right to an effective remedy guaranteed by Article 47 EU Charter is a general principle of EU law so that Article 47 accordingly has horizontal direct effect."

State Immunity: Personal Injury Claims

62. By *s5 SIA* a State is not immune from proceedings in respect of death or personal injury caused by an act or omission in the United Kingdom. An employee can rely upon the exclusion from state immunity under *s5 SIA* in relation to a personal injury claim for unlawful discrimination: *Ogbonna v. Republic of Nigeria* [2012] ICR 32. In that case, Underhill J made clear that *s16(1)(a*) SIA has no impact on *s 5 SIA* and that, while personal injury was not a necessary or even typical part of a discrimination claim, when personal injury occurred in such a claim, the SIA did not bar a claim for damages for it.

Brexit

63. The *European Union (Withdrawal) Act 2018* ("Withdrawal Act") converted European law underlying rights and principles into UK law.

64. The fundamental right of non-discrimination, recognised in the Treaty on European Union, is part of the retained EU law in the Withdrawal Act.

65. *s5 Withdrawal Act 2018* provides

"Exceptions to savings and incorporation

(1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day.

(2) Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.

(3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after exit day of any enactment or rule of law

passed or made before exit day if the application of the principle is consistent with the intention of the modification.

(4) The Charter of Fundamental Rights is not part of domestic law on or after exit day.

(5) Subsection (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).

(6) Schedule 1 (which makes further provision about exceptions to savings and incorporation) has effect.

66. *Schedule 1, para 2 and 3* of the *Withdrawal Act,* provide:

"General principles of EU law

2 No general principle of EU law is part of domestic law on or after exit day if it was not recognised as a general principle of EU law by the European Court in a case decided before exit day (whether or not as an essential part of the decision in the case).

3 (1) There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law.

(2) No court or tribunal or other public authority may, on or after exit day—(a) disapply or quash any enactment or other rule of law, or (b) quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law.

67. *S.5(4) Withdrawal Act 2018* therefore states: "The Charter of Fundamental Rights is not part of domestic law on or after exit day". 'Exit day' is defined by *s.20* (as amended) *Withdrawal Act 2018* as 31st January 2020. This date was amended by *section 25(4) EU (Withdrawal Agreement) Act 2020*, to substitute "IP Completion day" for "Exit day". "IP Completion Day" is defined as 11pm 31st December 2020 *(s.39*).

68. The Explanatory Notes to the Withdrawal Act state:

"100. Section 5 sets out two exceptions to the saving and incorporation (referred to as preservation and conversion in these notes) of EU law provided for under sections 2, 3 and 4.

101 The first exception is the principle of supremacy of EU law (see paragraph 62 of these notes). The principle of supremacy means that domestic law must give way if it is inconsistent with EU law. In the UK this can mean that a court must disapply an Act of Parliament, or a rule of the common law, or strike down UK secondary legislation even if the domestic law was made after the relevant EU law.

102 The effect of subsections (1) and (2) is that this principle will not apply in respect of the disapplication of legislation which is passed or made on or after exit

day (an Act is passed when it receives Royal Assent). So, for example, if an Act of Parliament is passed on or after exit day which is inconsistent with EU law which is preserved or converted by the Act (for example, a retained EU regulation), that new Act of Parliament will take precedence.

103 Where, however, a conflict arises between pre-exit domestic legislation and retained EU law, subsection (2) provides that the principle of the supremacy of EU law will, where relevant, continue to apply as it did before exit. So, for example, a retained EU regulation would take precedence over pre-exit domestic legislation that is inconsistent with it. The principle would not, however, be relevant to provisions made by or under this Act or to other legislation which is made in preparation for the UK's exit from the EU.

104 The principle of supremacy also means that domestic law must be interpreted, as far as possible, in accordance with EU law. So, for example, domestic law must be interpreted, as far as possible, in light of the wording and purpose of relevant directives. Whilst this duty will not apply to domestic legislation passed or made on or after exit day, subsection (2) preserves this duty in relation to domestic legislation passed or made before exit.

105 Finally, subsection (3) sets out that the principle of supremacy can continue to apply to preexit law which is amended on or after exit day where that accords with the intention of the modifications.

106 The second exception is the Charter of Fundamental Rights. The Charter did not create new rights, but rather reaffirmed rights and principles which already existed in EU law. By converting the EU acquis into UK law, those underlying rights and principles will also be converted into UK law, as provided for in this Act. References to the Charter in the domestic and CJEU case law which is being retained, are to be read as if they referred to the corresponding fundamental rights.

107 Given that the Charter did not create any new rights, subsection (5) makes clear that, whilst the Charter will not form part of domestic law after exit, this does not remove any underlying fundamental rights or principles which exist, and EU law which is converted will continue to be interpreted in light of those underlying rights and principles.

69. The explanatory notes also state, regarding Schedule 1,

"**General principles of EU law**

209 Paragraph 2 provides that only the EU general principles which have been recognised in CJEU cases decided before exit, will form part of domestic law after exit. These include, for example, some fundamental rights, non-retroactivity, and proportionality. More detail on the general principles is set out at paragraph 59 of these notes.

210 Paragraph 3 provides that there is no right of action in domestic law post-exit based on failure to comply with the EU general principles. Courts cannot disapply domestic laws post-exit on the basis that they are incompatible with the EU general principles. Further, domestic courts will not be able to rule that a particular act was unlawful or quash any action taken on the basis that it was not compatible

with the general principles. Courts will, however, be required under section 6 to interpret retained EU law in accordance with the retained general principles.

211 Paragraph 3 is subject to the transitional provisions set out under paragraph 39 of Schedule 8. …".

70. As the Court of Appeal explained in *Benkharbouche*, the ECJ had already recognized the horizontal effect of Charter rights in Case C-555/07 *Kücükdeveci v Swedex* [2010] IRLR 346.

71. Schedule 8 para 39 of the Withdrawal Act provides:

"39 (2) Section 5(4) and paragraphs 1 to 4 of Schedule 1 do not affect any decision of a court or tribunal made before exit day [IP completion day].

(3) Section 5(4) and paragraphs 3 and 4 of Schedule 1 do not apply in relation to any proceedings begun, but not finally decided, before a court or tribunal in the United Kingdom before exit day [IP completion day]."

General principles of EU law

72. The explanatory notes say, of general principles of EU law,

"59 The general principles are the fundamental legal principles governing the way in which the EU operates. They are a part of EU law which the EU institutions and member states must comply with. The general principles are applied by the CJEU and domestic courts when determining the lawfulness of legislative and administrative measures within the scope of EU law, and they are also an aid to interpretation of EU law. Examples of the general principles include proportionality, non-retroactivity (i.e. that the retroactive effect of EU law is, in principle, prohibited), fundamental rights, equivalence and effectiveness.

60 UK laws that are within the scope of EU law and EU legislation (such as directives) that do not comply with the general principles can be challenged and disapplied. Administrative actions within the scope of EU law must also comply with the general principles."

The Charter of Fundamental Rights

73. The explanatory notes say, of the Charter,

"61 The Charter of Fundamental Rights sets out various rights and principles. It includes 'EU fundamental rights', which have been recognised as a general principle of EU law by the CJEU. In 2009 the Charter was given the same legal status as the EU Treaties. The Charter sets out fifty rights and principles, many of which replicate guarantees in the European Convention on Human Rights and other international treaties."

74. *s 6 Withdrawal Act 2018* 'Retained case law', provides that case law contained in judgments given before IP completion day by the UK courts or the European Court on EU-derived law, will remain binding, subject to the exception provided by s 6 and the *European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 SI 2020/1525* that the Supreme Court, the Court of

Appeal, the Northern Ireland Court of Appeal and the Inner House of the Court of Session are not so bound.

State immunity : procedural immunity

75. In *Al-Malki v Reyes* [2017] ICR 1417 SC Lord Sumption (with whom on this issue the other justices agreed) at [40] held that: "Diplomatic immunity, like state immunity, is an immunity from jurisdiction and not from liability."

76. Lord Sumption at [40] cited with approval a passage from *Germany v Italy: Greece Intervening (Jurisdictional Immunities of the State)* [2012] ICJ Rep 99 which stated: "The rules of state immunity are procedural in character and are confined to determining whether or not the courts of one state may exercise jurisdiction in respect of another state. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful."

77. In *Al-Malki* the diplomat enjoyed immunity under *art 31(1*) of the *VCDR* whilst he remained in post. He was in post when the ET1 was presented to the ET. However, by the time the case came to be heard before the Supreme Court, he had left his post and was only entitled to residual immunity afforded by *art 39(2)* and that residual immunity was held not to apply to him at the time of the SC hearing. [48]

78. At [49] Lord Sumption said: "Does it matter that Mr and Mrs Al-Malki were entitled to immunity under article 31(1) and 37(1) respectively at the time when the present proceedings were commenced? In my opinion it does not. An action brought against persons entitled to diplomatic immunity is not a nullity. It is merely liable to be dismissed. There are therefore valid proceedings currently on foot. Diplomatic immunity is a procedural immunity. The procedural incidents of litigation normally fall to be determined by a court as at the time of the hearing."

Amendment to Add Respondent

79. In *Drake International Systems Ltd v Blue Arrow Ltd* [2016] ICR 445, Langstaff J decided that there was no requirement for the Claimant to go through the EC process with each of the subsidiaries of a company as a precondition of the Tribunal having jurisdiction to decide his claim. He rejected an argument that the power of the Tribunal under *r 34 ET Rules of Procedure 2013* was restricted by the introduction of the EC scheme, so that no new Respondent could be added or substituted, unless the Claimant first embarked on the EC process in relation to it. At [27] it was held that there is nothing in *r 34* that is inconsistent with the EC rules.

80. In *Mist v Derby Community NHS Trust* [2016] ICR 543 Judge Eady came to the same conclusion [60]; the EC rules only apply to the pre-claim stage of litigation.

Discussion and Decision

Identity of Claimant's Employer: Correct Respondent to the Claim

81. I decided that the Claimant was employed by the Government of the State of Kuwait. It was an express term of the Claimant's contract that the Government of

the State of Kuwait was his employer. The contract was signed by the Claimant, Bundle p112.

82. There was never any variation of the express term of that contract. The Claimant did not contend that there had been an express variation.

83. While there were matters which indicated that the Kuwait Health Office employed the Claimant (for example, his wage slips and P60 and P45), other factors were consistent with the express contractual position, including the disciplinary sanctions applied to the Claimant by the Kuwaiti Embassy, which is itself part of the State of Kuwait. On the facts, the First Respondent is part of the Second Respondent in any event, which explains the two entities being used interchangeably in communications relating to the Claimant's employment.

84. In *Johnson v Unisys Limited* [2001] ICR 480, the House of Lords held that implied terms can supplement the express terms of a contract, but cannot contradict them. In any event, there was no evidence of any implied variation of the contract.

85. The Second Respondent has already been properly added as a Respondent to the claim. Following *Drake International Systems Ltd v Blue Arrow Ltd* [2016] ICR 445, and *Mist v Derby Community NHS Trust* [2016] ICR 543 there is no requirement for the Claimant to go through the Early Conciliation process before a Respondent can be added by way of amendment to an existing claim.

86. As the Second Respondent was the Claimant's employer, it is the correct Respondent to the claim and the proceedings shall continue against the Second Respondent.

Effect of Brexit on Charter Rights and *Benkharbouche*

87. The Court of Appeal in *Benkharbouche* [2015] EWCA Civ 33 at [76]-[81] decided that the right to an effective remedy guaranteed by Article 47 EU Charter is a general principle of EU law, so that Article 47 has horizontal direct effect. This meant that Art 47 could be used to disapply domestic legislation which was incompatible with Art 47 of the Charter.

88. Pursuant to the Supreme Court decision in *Benkharbouche*, tribunals could disapply provisions of the *SIA 1978*, to ensure that the employee Claimants were able to pursue an effective remedy for the alleged contravention of their EU law rights.

89. The Respondent contends that, if the Respondent did not have state immunity from the current claim prior to IP Completion Day because the SIA could be disapplied (following *Benkharbouche*), it now does have immunity because UK courts and tribunals are no longer able to disapply domestic legislation which is incompatible with art 47 of the Charter.

90. The Charter contains 'EU fundamental rights', which have been recognised as general principles of EU law by the CJEU.

91. However, the Charter itself is no longer part of domestic law as a legal instrument from 11pm on 31 December 2020 (IP completion day).

92. Further, by *Schedule 1 para 3 of the Withdrawal Act*, no court or tribunal may, on or after (IP completion day), disapply any enactment because it is incompatible with any of the general principles of EU law.

93. So, pursuant to *Sch 1 para 3 Withdrawal* Act, it might appear that the tribunal cannot disapply *s16 SIA* relying on Art 47 of the Charter after IP completion day.

94. Nevertheless, this is itself subject to the transitional provisions in *Schedule 8 para 39 Withdrawal Act*,

    "39 (2) Section 5(4) and paragraphs 1 to 4 of Schedule 1 do not affect any decision of a court or tribunal made before exit day [IP completion day].

    (3) Section 5(4) and paragraphs 3 and 4 of Schedule 1 do not apply in relation to any proceedings begun, but not finally decided, before a court or tribunal in the United Kingdom before exit day [IP completion day]."

95. Accordingly, in relation to proceedings already begun before IP completion day (31 December 2020), the Charter continues to be part of UK law and Claimants can rely on general principles in EU law to disapply Acts of Parliament (*Withdrawal Act 2018 Sch 8 para 39(3)*).

96. With regard to employment claims and state immunity, in cases already brought before IP completion day (31 December 2020), the general principles in the Charter continue to apply and Claimants can rely on the Charter, as described in *Benkharbouche,* to disapply the *SIA* where it is incompatible with those general principles (Withdrawal Act 2018 Sch 8 para 39(3)).

97. It is therefore clear that, in relation to the Claimant's claim, which was begun before IP completion day, the tribunal can still use the horizontal direct effect of Art 47 Charter to disapply *s16 SIA* (if the Claimant was not a "member of the mission").

98. For claims brought since 31 December 2020, the Charter is no longer part of UK law and the general principles it contains, although already contained in UK law, cannot be used to disapply Acts of Parliament (*Withdrawal Act 2018 s5(4) and Schedule 1 para 3*).

99. This itself may be subject to the provisions of *Sch 8 para 39 (2) Withdrawal Act*, " Section 5(4) and paragraphs 1 to 4 of Schedule 1 do not affect any decision of a court or tribunal made before exit day [IP completion day]." Given that *Benkharbouche* was decided before IP completion day, it may be that the law as stated in *Benkharbouche* also continues to apply to employment claims where state immunity is asserted.

100. *s 6 Withdrawal Act 2018* 'Retained case law', also provides that case law contained in judgments given before IP completion day by the UK courts or the European Court on EU-derived law, will remain binding,

101. It is not necessary for the Claimant to rely on *Sch 8 para 39 (2) Withdrawal Act* in the present case, because his claim was begun before IP Completion day.

102. The Claimant also relies on the Supreme Court's decision in *Unison v. Lord Chancellor* [2017] ICR 1037, at para [66], to assert that the constitutional right of access to Courts is inherent in the rule of law. However, the Supreme Court in *Benkharbouche* only made a declaration of incompatibility in relation to *s16 SIA,* regarding national law claims. The Supreme Court was unable to read *s16 SIA* compatibly with the domestic law right of access to Courts. There is no overriding right of access to the Courts in domestic law which will disapply the provisions of statutes which are incompatible with this right of access to Courts.

103. In the current claim, therefore, the Claimant can rely on Art 47 of the Charter to disapply *s16 SIA* in relation to his discrimination and harassment claims which are based on EU law. He is still unable to rely on EU law, or his domestic law constitutional right of access to Courts, to disapply *s16* in relation to his domestic law claims.

Claimant's Functions were Exercises of Sovereign Authority

104. I decided however, that the Claimant's functions, as a member of the Respondent's administrative staff, were sufficiently close to the governmental functions of the mission to attract state immunity.

105. I took into account Lord Sumption's dicta in *Benkharbouche*: "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]. Further, 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].

106. I noted Lord Sumption's description of the nature of the functions of a diplomatic mission, at para [55], as ".. 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." The role of technical and administrative staff is by comparison essentially ancillary and supportive. They might also exercise sovereign authority if their functions are sufficiently close to the governmental functions of the mission.

107. The Claimant contended that the mere possibility that he had access to confidential documents was not sufficient for sovereign immunity to apply. He contended that his role was purely administrative, with no government functions attached to it, and neither did his role relate to any governmental function. He said that he was part of the technical and administrative staff of a diplomatic mission, but did not undertake any governmental authority or functions closely related to the exercise of governmental authority.

108. I did not agree.

109. It was correct that the Claimant's functions did not involve dealing with UK governmental agencies. They did not involve him publicly representing the state of Kuwait in the UK.

110. However, the doctors of the KHO, of whom the Claimant was one, are responsible for protecting the interests of Kuwaiti nationals referred to the KHO for medical treatment, expressly authorised by the governmental act of the Under-Secretary of the Ministry of Health in Kuwait and/or the Emir of Kuwait.

111. The nationals who were referred to the KHO included members of the Kuwaiti Royal family and senior government officials.

112. As an allocated doctor to these individuals, the Claimant was required to arrange the patient's treatment while they were in the UK. This included reviewing reports received from UK hospitals concerning the medical condition of KHO registered patients, explaining reports to the patients, checking whether they had been assessed by the private hospitals as claimed, and approving (or not) a letter of guarantee to the hospital from the KHO. The Claimant's role involved reading and translating medical reports from English to Arabic for the patients. Until 2017 the Claimant therefore played an important role in safeguarding the health of the Kuwaiti Royal family and government members.

113. Even when producing letters of guarantee after 2017, he was responsible for safeguarding the medical treatment of ruling family and senior government officials.

114. The Claimant's functions as an allocated doctor were fundamental to protecting the interests of the sending state, through safeguarding the health of its ruling family and senior government officials

115. In order to do these tasks, the Claimant needed to have knowledge of the patients' medical conditions.

116. Even after 2017, the Claimant had access to the patient database containing confidential information regarding the medical condition of the patients at the KHO.

117. Throughout his employment, therefore, including after 2017, the Claimant had access to highly confidential information relating to the health of the members of the Kuwaiti Royal family and government. This information could be used by foreign governments, or hostile agents, to undermine the ruling family or the Kuwaiti government.

118. I considered that the Claimant's tasks were not merely administrative and ancillary to the functions of the mission. The Claimant had personal responsibility for decision-making in relation to the health of royal family members and government ministers and in safeguarding confidential information relating to senior officials of state.

Personal Injury Claim

119. By *s5 SIA* a State is not immune from proceedings in respect of death or personal injury caused by an act or omission in the United Kingdom. An employee can rely upon the exclusion from state immunity under s5 SIA in relation to a personal injury claim for unlawful discrimination: *Ogbonna v. Republic of Nigeria* [2012] ICR 32. In that case, Underhill J made clear that *s16(1)(a) SIA* has no impact on *s 5 SIA* and that, while personal injury was not a necessary or even

typical part of a discrimination claim, when personal injury occurred in such a claim, the SIA did not bar a claim for damages for it.

120. I decided that the Claimant had brought claims for race discrimination and harassment, as set out in paragraphs [28] – [44] of his Grounds of Complaint. These paragraphs included allegations that the Claimant's dismissal was an act of race discrimination and was "automatically unfair" because the dismissal was because of race.

121. Paragraph [55] of the Grounds of Complaint alleged that the Respondent had failed to safeguard the Claimant's health and safety in that it failed to protect him from harassment.

122. Paragraph [56] of the Grounds of Complaint alleged that Claimant was admitted to hospital for Chest Pain (onset of heart attack), due to stress at work and being unfairly dismissed.

123. I considered that the Claimant had alleged that he had suffered injury to his health by reason of race harassment and the allegedly discriminatory dismissal.

124. He had brought a personal injury claim.

125. The Claimant can rely on upon the exclusion from state immunity under *s5 SIA* in relation to a personal injury claim for unlawful discrimination: *Ogbonna v. Republic of Nigeria* [2012] ICR 32.

126. The Claimant's claim for personal injury damages for race discrimination and harassment can therefore continue.

127. The Claimant's other claims are barred by state immunity.

Dated: 23 March 2021

Employment Judge Brown

JUDGMENT SENT TO THE PARTIES ON
23/03/2021..

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FOR THE TRIBUNAL OFFICE