



# EMPLOYMENT TRIBUNALS

## Claimant

Mr Peter Dowling

v

## Respondent

United States of America

**Heard at:** Cambridge

**On:** 10 September 2024

**Before:** Employment Judge Tynan (sitting alone)

## Appearances

**For the Claimant:** Ms Arya, Counsel

**For the Respondent:** Professor D Sarooshi KC

## PRELIMINARY HEARING RESERVED JUDGMENT

1. The correct identity of the Respondent is “United States of America” and the name of the Respondent is amended accordingly.
2. The Respondent is a sovereign state entitled to rely on the principle of state immunity.
3. The Respondent has not submitted to the jurisdiction of the Employment Tribunals.
4. The Tribunal does not have jurisdiction to hear the claim and it is therefore dismissed.

## REASONS

1. The Claimant claims that he was unfairly constructively dismissed by the Respondent (who I shall refer to as the “US” at times in these Reasons). He was employed by the Respondent as a Motor Pool Supervisor based at the US Embassy Annex at RAF Croughton in Northamptonshire (“the Annex”). The Claimant’s employment commenced on 10 April 2014 and ended on 19 July 2023 following his resignation. He presented his claim to the Tribunals on 23 June 2023. On 16 January 2024 the Respondent filed form ET3 and Grounds of Resistance solely in order to assert the Respondent’s immunity from the Tribunal’s jurisdiction. The case came before me to determine this as a preliminary issue.

2. I heard evidence from the Claimant and, on behalf of the Respondent, from Ms Rachida Linnard, a Supervisory Human Resources Specialist based at the US Embassy in London. I was provided with a Witness Statements Bundle extending to 424 numbered pages. Any page references in these Reasons correspond to that Bundle.

## **Facts**

3. The Claimant has set out his core functions and responsibilities in his witness statement. His evidence in that regard is essentially unchallenged and, as I shall come back to in a moment, was fleshed out in the course of cross examination. He was an impressively articulate witness: I can understand why he garnered positive feedback and was positively appraised throughout his employment with the Respondent.
4. In her witness statement, Ms Linnard provides a detailed and helpful overview of the US Embassy's operations in the UK, including how they are structured. The Claimant's role sat within the General Services Office, which performs management services regarding the direct operation of the diplomatic mission of the US in the UK ("the US Mission"). As well as the driver pool this includes procuring supplies, leasing diplomatic residences, diplomatic courier services and handling logistics of visits by important US Government officials. These services overlap and are interrelated.
5. The US Mission employs both US "Direct Hires", who are US citizens (often members of the US Civil Service) and locally employed staff (that is to say UK nationals and others who are legally resident in the UK). The Respondent has similar arrangements in place across the world. The Claimant was a locally employed member of staff. In her witness statement, Ms Linnard explains the balance that the Respondent endeavours to strike between respect for local laws, regulations, customs and practices, whilst also maintaining the supremacy of US laws and regulations as appropriate.
6. The Claimant's written particulars of main terms of employment (pages 13 to 20) provide that the employment relationship is governed primarily by the US Government's Foreign Affairs Manuals and Foreign Affairs Handbooks, the Mission's Local Compensation Plan and an individual's Personal Services Agreement. The Claimant's specific responsibilities towards the US, its Constitution and laws are spelled out in the written particulars. The Employee Handbook for locally employed staff confirms that that the US may claim sovereign immunity in any legal proceedings.
7. Ms Linnard's witness statement includes a detailed explanation of the compensation performance policies and plans applicable to the Claimant's employment, together with details of the disciplinary, grievance and nepotism policies contained in the Employee Handbook. For reasons I shall come back to, it is not necessary for me to make any findings in relation to these matters.

8. The General Services Office provides and co-ordinates all transport requirements for the US Embassy, whether relating to the transportation of people, documents or assets and supplies. The Claimant reported directly to the Annex Management Officer, a role that was required to be filled by a US Direct Hire. His role was stated to be a mixed position, namely sixty per cent Motor Pool Supervisor and forty per cent Chauffeur (I shall use the term 'driver' hereafter). Notwithstanding its confusing page numbering, the position description for the Claimant's role extends to five pages (pages 3 – 7), the Claimant's major duties and responsibilities for the supervisory and driving elements of his role being set out separately. The Claimant was required to undertake 'Smith' driver safety training on commencing his employment with the Respondent and every two years thereafter. 'Smith' is recognised and established in the US as a safe system of driving. The US Department of Transportation requires US Government drivers to undertake 'Smith' training.
9. I have referred already to the fact that the Claimant has summarised his core functions and responsibilities in his witness statement. Ms Linnard groups these under five key areas as follows:
  1. Ensuring the security of US Government travellers, dependents and VIP officials during their travel to and from various destinations including the US Embassy, the Annex and all UK airports.
  2. Exercising management and control over other motor pool drivers to ensure that Annex transportation requirements were fulfilled in conjunction with US Embassy management and, at times, deciding matters alone.
  3. Ensuring that any Annex transportation issues were brought to the prompt attention of US Government management and working proactively to provide and implement solutions to these issues.
  4. Together with US Government management, organising the secure transport of official documents and passports, including mail, to various foreign embassies in London.
  5. Training drivers in relation to various US Government policies and requirements and ensuring that drivers at the Annex were both aware of and adhered to any policy and procedural changes implemented by US Government management.
10. I am satisfied that it is reasonable to group the Claimant's core functions and responsibilities under those broad headings even if the finer detail is to be found within paragraph 12 of the Claimant's witness statement, paragraphs 49 – 55 of Ms Linnard's witness statement and in various documents in the Witness Statements Bundle, supplemented in particular

by the Claimant's evidence in the course of cross examination. I shall deal with the five key areas in turn.

Ensuring the security of US Government travellers, dependents and VIP officials during their travel to and from various destinations including the US Embassy, the Annex and all UK airports.

11. Ms Linnard highlights the Claimant's alleged responsibilities to determine the safest and most secure route for transporting personnel and to adhere to security regulations at the US Embassy and Annex, as well as his alleged responsibility to confirm the identity of travellers. I consider that she has overstated the Claimant's responsibilities in this regard. Whilst drivers are encouraged to vary their routes, I find that their responsibility towards their passengers extends no further than the basic duty that all employees are under to take reasonable care for the health and safety of others who may be affected by their acts or omissions when they are working. I accept in particular the Claimant's evidence that the diplomatic officers and contractors being transported by the Claimant and his driver colleagues took responsibility for their own security, liaising directly with others at the US Embassy and Annex if they had any requirements or concerns. The Claimant was not trained in self-defence, nor as to any action to take in the event that a security issue arose. On this issue, 'Smith' training is focused on safe driving rather than personal security. The Claimant was provided with a number in London to call if he required assistance, including, he understood, in the event of a security issue. However, there is no evidence that the Claimant or indeed any of his driver colleagues had ever required security advice or assistance. At Tribunal the Claimant said that he was not aware of ever having been followed, though equally it was not suggested that he had ever been trained to recognise this. He was neither required nor encouraged to check his vehicle if it had been left unattended for any period of time. It seems there were no protocols in terms of where vehicles could, for example, be parked in London when couriering documents between embassies. As regards confirming the identity of travellers, this extended no further than establishing people's names and introducing himself, rather than undertaking any form of ID or other verification checks.

Exercising management and control over other motor pool drivers to ensure that Annex transportation requirements were fulfilled in conjunction with US Embassy management and, at times, deciding matters alone.

12. There is significant overlap in terms of the Claimant's and Ms Linnard's evidence in this area. She points to the Claimant's supervisory functions having included checking the accuracy of time and attendance records for the other drivers. She also elaborates in terms of the Claimant's responsibilities for appraising the other drivers which included writing their Annual Work Plan, undertaking mid-year reviews, giving performance feedback throughout the year, writing Employee Performance Reports at the end of the rating cycle and drafting for each driver a Chauffeur Merit Based Compensation Programme Report as part of the Respondent's

merit based compensation scheme. The Claimant readily accepted that the score he gave to the drivers in the motor pool directly impacted the amount of their annual bonuses. He also confirmed that where a driver was struggling to meet the requirements of their role, he would discuss this with the driver and identify both the necessary improvements as well as how the Respondent might support them in reaching the required level of performance.

Ensuring that any Annex transportation issues were brought to the prompt attention of US Government management and working proactively to provide and implement solutions to these issues.

13. In paragraph 12(h) of his witness statement, the Claimant provides a short, somewhat generic description of his responsibilities for liaising with the US Embassy regarding the Annex motor pool. Ms Linnard's witness statement is more descriptive. However, the parties essentially agree that the Claimant had a considerable measure of authority and discretion in terms of how he performed his role. It was one of a number of issues that came alive in the course of the Claimant's evidence. I am in no doubt, as the Claimant said, that he was always pro-active. He struck me as someone with high standards, including high expectations of himself and a strong work ethic, who took his responsibilities seriously. This was effectively acknowledged by the Respondent when, for example his performance in 2021 was reviewed and it was noted in his Employee Performance Report that he had been pro-active and strategic around additional transport requirements that had arisen in the context of the ongoing pandemic: amongst other things, he had implemented measures to ensure that Covid vaccines being transported to RAF Croughton were kept at the correct temperature at all times. It was noted that the Claimant had,

“met all such new challenges with adaptability and flexibility... he took the initiative to bring any conflicts along with proposed solutions to the attention of USG Management to ensure they were resolved.”

(page 59)

It was later noted in the same Report that the Claimant had,

“exceeded expectations for his outstanding filing system of the vehicle records” (page 61)

14. During cross examination the Claimant described joining a team that lacked adequate systems and processes, and the various actions he had taken to address these shortcomings. He also referred to arrangements that he had implemented during the pandemic to reduce the risk of drivers and passengers alike becoming infected. His evidence was that he had,

“definitely taken lead in terms of Covid compliance”.

15. Similarly, he had taken the lead when he had identified that the Respondent's 'Day 1' knowledge requirements for prospective recruits were acting as a barrier to recruitment and also in recommending that the Annex did not need to maintain a fleet of larger, more expensive to run vehicles given the range of jobs being undertaken and varying loads being carried.

Together with US Government management, organising the secure transport of official documents and passports, including mail, to various foreign embassies in London.

16. It is common ground between the parties that the Claimant delivered documents from the Annex to various foreign embassies in London. Whilst I did not understand him to have carried diplomatic bags, he did convey sealed envelopes and packages, including visa applications for travel to third countries. The Claimant was routinely required to collect visas and passports from foreign embassies which often involved opening envelopes to check that they contained the correct documentation.

Training drivers in relation to various US Government policies and requirements and ensuring that drivers at the Annex were both aware of and adhered to any policy and procedural changes implemented by US Government management.

17. Again, the parties are agreed as to the ambit of the Claimant's responsibilities. It is common ground that the Claimant trained the Deputy Motor Pool Supervisor with a view to ensuring that there was effective cover and continuity during a period of planned extended absence.
18. In addition to the five areas above, the Claimant and Ms Linnard each referred to drivers' involvement in support flights which form part of the US Embassy supply chain. There were regular trips in a lorry to RAF Fairford. The Claimant and his team would transport potentially bulky items to RAF Croughton under the supervision of diplomatic officers. The Claimant and his driver colleagues were not permitted within the vicinity of aircraft carrying loads bound for RAF Croughton and the crates themselves were sealed.
19. Finally, the Claimant refers in paragraph 12(e) of his witness statement to 'Driver Familiarisation Training' that was provided to US Direct Hires and their adult dependents with a view to ensuring they drove safely in the UK in compliance with UK driving laws and regulations. The Claimant was specifically tasked to devise and ensure delivery of this training given his history as a serving police officer. The perceived need for training originally arose because of a high level of reported damage to hire vehicles being driven by US Direct Hires in the UK. However, it assumed greater importance and prominence following the death in 2019 of Harry Dunn who died following a road traffic accident involving a US national based at RAF Croughton who had driven on the wrong side of the road when she emerged from the base. Mr Dunn's death was reported extensively in the media and continued to be reported over an extended

period. In the aftermath of his death the Driver Familiarisation Training was made mandatory. It was a significant undertaking to deliver the training across the Annex. In the course of his evidence, the Claimant referred to approximately six hundred people based at the Annex as having participated in the training, though he did not say over what period of time this training had been delivered or confirm the extent of his involvement in its delivery. However, he confirmed that he had both devised and thereafter reviewed and updated the content of the training from time to time to ensure its relevance and the necessary compliance.

### **The Law**

20. Section 1 of the State Immunity Act 1978 (“SIA 1978”) provides that States are immune from the jurisdiction of the UK courts (and tribunals) except as provided for in the Act. Section 4 goes on to provide as follows in relation to contracts of employment:

(1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.

21. However, section 16 sets out certain excluded matters, including as follows:

(aa) section 4 above does not apply to proceedings relating to a contract of employment between a State and an individual if the individual is or was employed under the contract as a member of a diplomatic mission (other than a diplomatic agent) or as a member of a consular post (other than a consular officer) and either—

- (i) the State entered into the contract in the exercise of sovereign authority; or
- (ii) the State engaged in the conduct complained of in the exercise of sovereign authority;

It is common ground between the parties that the Claimant was a member of the US Mission but that he was not a diplomatic agent, so that the question is whether either of sub-paragraphs (i) and (ii) apply in his case.

22. Ms Arya and Professor Sarooshi are agreed as to the applicable law and relevant legal principles, even if there may be some difference between them in terms of emphasis. Professor Sarooshi has set out the position in a little more detail than Ms Arya, including the background to the enactment of s.16(1)(aa) of the State Immunity Act 1978 (“SIA 1978”). I have not thought it necessary to rehearse the legal principles given how comprehensively they have been set out in their respective skeletons, though shall return in a moment to the Supreme Court’s judgment in Benkharbouche v Secretary of State for Foreign and Commonwealth

Affairs [2019] AC 777 as well as to the House of Lords' judgment in Holland v Lampen-Wolfe [2000] 1 WLR 1573 (HL).

23. In terms of the potential difference in emphasis between Ms Arya and Professor Sarooshi, in so far as it may be suggested by Ms Arya that Article 3 of the Vienna Convention on Diplomatic Relations (VCDR) defines or limits the scope of what amounts to the 'exercise of sovereign authority', I would not agree with her. The term is not defined by the SIA 1978. Article 3 of VCDR provides a non-exhaustive list of the functions of a diplomatic mission. If Parliament intended that the exercise of sovereign authority should be determined solely with reference to those functions it might have said so, particularly as other terms in the 1978 Act are to be construed in accordance with the Convention. As I say, the list of factors is non-exhaustive, indeed Article 3 specifically provides that nothing in the Convention shall be construed as preventing the performance of consular functions by a diplomatic mission. Whilst due regard must undoubtedly be had to the Article 3 functions, which Lord Sumption in Benkharbouche described as inherently governmental and the exercises of sovereign authority, I do not consider myself to be constrained by them. It seems to me that the point is well-illustrated by Holland in which the provision of educational services to military personnel and their families on US bases involved the performance of US sovereign or governmental functions in the UK. Article 3 of VCDR makes no obvious reference to the provision of educational services as a function of a diplomatic mission.
24. I should briefly mention the recent judgment of London Central Employment Tribunal in Onurcan v Malaysia, a copy of which was included in Ms Arya's Authorities Bundle. In the course of the hearing, I drew the parties attention to the "Rule in Hollington v Hewthorn" (Hollington v F Hewthorn & Co. Limited [1943] K.B. 587). Hollington is longstanding authority for the principle that findings of fact made in earlier proceedings are not admissible as evidence to the facts so found in later proceedings. There are well established exceptions to the 'rule', but it was not suggested by Ms Arya and there seems to me no basis for thinking that this case falls within those exceptions. Onurcan was a decision involving two parties unrelated to these proceedings and was decided on its own particular facts, as a brief reading of the judgment confirms. I derive no assistance from that decision.

## **Conclusions**

25. In her submissions, Ms Arya invites the Tribunal to ask the following two key questions:
- 25.1. What functions was the Claimant employed to perform and whether his employment was an exercise of the Respondent's sovereign authority; and
- 25.2. Whether the Claimant's dismissal was an act engaging the Respondent's sovereign interests?



26. The second question is only engaged should I conclude that the Claimant's employment was not an exercise of the Respondent's sovereign authority.

27. Ms Arya notes that the Claimant was not a diplomatic agent or a consular officer, but instead part of the Respondent's locally employed staff engaged as a Motor Pool Supervisor. She says,

"His duties were *essentially* related to driving, chauffeuring, vehicle and fleet maintenance, and administrative and supervisory duties vis-à-vis the fleet".

She goes on to submit that his job was either a domestic or "*at best*" an administrative and technical role in the circumstances.

28. I do not agree that the Claimant's role can be said to have been a purely domestic role, or in the words of Article 1 of VCDR "in the domestic service of the mission". The Claimant's duties involved work on behalf of the US Mission, for example couriering sealed envelopes and sensitive travel documentation between the US Embassy in London, the Annex and various foreign embassies across the capital, as well as moving sealed crates between RAF Fairford and RAF Croughton as part of the US Embassy supply chain. As I shall come back to, he also had significant responsibilities in terms of the Annex motor pool to ensure that the Annex transport requirements were fulfilled. In my judgement, the Claimant's employment came within the second category of "administrative and technical staff" referred to in Article 1 of VCDR and paragraph 55 of Lord Sumption's Judgment in Benkharbouche. In which case, the question is whether his functions were sufficiently close to the governmental or sovereign functions of the US Mission that his employment could be said to be the exercise of sovereign authority.

29. Professor Sarooshi cites the following comments by Lord Sumption in Benkharbouche (the emphasis is Professor Sarooshi's):

*"53. As a matter of customary international law, if an employment claim arises out of an inherently sovereign or governmental act of the foreign state, the latter is immune. ...*

*54. In the great majority of cases arising from contract, including employment cases, **the categorisation** [of the acts as sovereign/governmental or private in nature] **will depend on the nature of the relationship between the parties to which the contract gives rise. This will in turn depend on the functions which the employee is employed to perform.**"*

30. He also cites Lord Hope in Holland:

*"The process of characterisation requires that the act must be considered in its context... regard must be had to the place where the*

*programme was being provided and to the persons by whom it was being provided and who it was designed to benefit – where did it happen and whom did it involve? The provision of the programme on the base at Menwith Hill was designed to serve the needs of US personnel on the base, and was provided by US citizens who were working there on behalf of a US university. The whole activity was designed as part of the process of maintaining forces and associated civilians on the base by US personnel to serve the needs of the US military authorities”.*

Again, the emphasis is Professor Sarooshi’s.

31. In my judgement, the role of Motor Pool Supervisor was designed and evolved to primarily serve the ongoing presence of the US Mission at the Annex, as well as the needs and activities of a range of personnel based there or who visit the Annex in connection with the work of the Mission, including ensuring amongst other things that its diplomatic officers are able to travel on diplomatic business without undue difficulty or impediment. This can include taking diplomatic officers to foreign embassies when they need to attend in person to secure the requisite visa for travel to a third country, and collecting and checking documentation to support their travel arrangements. I do not agree with Ms Arya’s summary description of the Claimant’s duties as noted at paragraph 27 above. In my judgement, the Motor Pool Supervisor duties extend well beyond those of a fleet supervisor. The logistical demands and challenges associated with the role, specifically ensuring that those who are based at or visit the Annex are in the right place at the right time, are not be understated. The point is well illustrated by the Claimant’s Employee Performance Report for the period 1 February 2022 to 15 July 2022 (pages 357 to 366), in which his Rating Supervisor, Anne Hayes noted that the Annex transportation requirements averaged over 3,000 movements per annum. She wrote,

*“We are an extremely busy post providing transportation support to several hundred officers and dependents and an additional several hundred visitors a year. Often the requirements change at a moment’s notice or new requirements are provided on short notice. ... His attention to detail, strong organizational and strategic thinking skills, ensure that every transportation requirement is fulfilled.” (page 363)*

In my judgement and so described, the Claimant’s responsibilities cannot be said to have been acts “of a private law character such as anyone with the necessary resources might do” (Lord Sumption in Benkharbouche). It is apparent on the evidence that the Claimant was a manager in all but title, with the authority and discretion one might expect of someone operating at that level. The Employee Performance Report just referred to is one of a number of documents that speaks to this. Indeed, I note that at page 365, Ms Hayes described the Claimant as a solid manager and leader who willingly imparted knowledge and pointed out where improvements in performance could be made. I can well understand why

she went on to describe him as a critical member of the Annex team (page 365).

32. As I see it, the role of Motor Pool Supervisor is an intrinsic part of the US Mission's integrated logistics and supply chain in the UK, without which the Annex would be unable to operate effectively. Amongst other things, the Claimant was responsible for ensuring that the necessary people, assets and supplies were on site at RAF Croughton to deliver and support the various functions of the US Mission that are performed from that site, including building, engineering, IT and other no doubt sensitive projects which the US deems essential to its ongoing mission. In this regard the Claimant worked closely with US Embassy management to ensure that Annex transportation and logistics requirements were fulfilled. It does not matter that the role was not to conduct or lead diplomatic communications or to be responsible for the safety and essential security of individuals being transported. The actions and initiatives the Claimant took during the pandemic, but also in addressing perceived shortcomings in systems and processes evidences to me how embedded the role was within the US Mission: the Claimant brought matters to the prompt attention of management and worked proactively to provide and implement solutions to these issues, all the while managing a budget as well as a team of drivers and ensuring their awareness of and compliance with applicable US Government policy and procedure. That evidences to me that the role was of systemic importance to the US Mission and sufficiently close to the governmental or sovereign functions of the US Mission that his employment could be said to be the exercise of sovereign authority rather than, as the title might otherwise imply 'petit fonctionnaire'.
33. I have referred above to the functions listed in Article 3 of VCDR. The Driver Familiarisation Training course is an example of one aspect of the Claimant's duties that was closely related to the essential functions of a diplomatic mission listed in the Convention, namely protecting the interests of the US and its nationals in the UK and promoting friendly relations between the two countries by taking steps to ensure that diplomatic officers and other members of the US Mission, and their adult dependents, were familiarised with road traffic issues in the UK so as to mitigate the risk of them injuring others and/or damaging property. In any event it was another aspect of the Claimant's role that evidences its systemic importance.
34. Finally, it does not matter if certain of the Claimant's tasks may arguably have been collateral to the exercise of sovereign authority or of a private law character - I specifically have in mind here some of the more basic driving and vehicle maintenance tasks he may have personally undertaken rather than have overseen and managed, including cleaning his vehicle - because as Bourne J implicitly accepted in The Royal Embassy of Saudi Arabia (Cultural Bureau) v Alhayali [2023] EAT 149, it is not necessary that all of a claimant's tasks should meet the Section 16(1)(aa)(i) test. It is sufficient if some of the activities pass the test throughout a claimant's period of employment. I am amply satisfied that at the very least, and

considered in context, the entirety of the Motor Pool Supervisor elements of the Claimant's role represented the exercise of sovereign authority. That being the case it is not necessary for me to go on to consider the matter in the alternative under s.16(1)(aa)(ii) of SIA 1978.

35. As the Tribunal does not have jurisdiction to hear the claim it will be dismissed.

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Employment Judge Tynan

Date: 07 November 2024.....

Sent to the parties on:  
14 November 2024

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For the Tribunal Office.

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