

DIPLOMAT

FEBRUARY/MARCH 2014 £10

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EU LAW MAY BE ERODING STATE AND DIPLOMATIC IMMUNITY IN THE UK

Peter Finding, an associate in the employment team at commercial law firm Burges Salmon, considers the implications

THE EXTENT TO WHICH NATION STATES and diplomatic agents can enjoy immunity from legal proceedings has been called into question by two recent cases where staff employed locally in the UK have sued the foreign state or diplomat employing them in the UK courts. The judgments suggest that foreign states may no longer be immune from certain claims, as rights to a fair trial under EU law override the state immunity afforded by UK legislation. In contrast, it appears that diplomatic immunity does still extend to protect individual consular staff from similar claims, at least for now.

STATE IMMUNITY

State immunity protects nation states from being sued in the courts of other states. It is based on the principle that all sovereign states are equal and, therefore, one state should not be allowed to judge another via its court system. This immunity does not just apply to nation states and their emanations, but can also extend to organisations, including private companies, carrying out sovereign functions in another state – a permanent trade mission, for instance. The immunity, however, will not apply to disputes arising from purely commercial transactions.

The position is slightly nuanced in the UK. Here, the State Immunity Act 1978 purports to carve out certain exceptions to the principle of state immunity. One such exception relates to employment claims between a foreign state and an individual. Historically, under the State Immunity Act, a state would be immune from employment claims where the individual was a 'member of the mission'. Immunity was also possible depending on certain criteria relating to where the employment contract was made, where the work was performed, and the individual's nationality.

However, this exception has been substantially eroded by a recent decision by the Employment Appeal Tribunal, meaning that it will be harder for states to assert immunity from suit.

DIPLOMATIC IMMUNITY

Diplomatic immunity protects diplomatic agents from being the subject of criminal and civil proceedings in the host nation. It arises from the Vienna Convention, which is incorporated into UK law by the Diplomatic Privileges Act 1964. Like state immunity, diplomatic immunity will not protect against civil claims where an individual is engaging in purely commercial transactions that are not linked to his official functions.

Diplomatic immunity will also protect against certain employment law claims (except where the employment does not relate to the diplomat's official function, for example where domestic staff are employed by a diplomat personally at a second, private, residence).

RECENT LEGAL DEVELOPMENTS

The scope of the immunities has been tested in two recent employment law cases. The first, the joined case of *Benkharbouche v Embassy of The Republic of Sudan* and *Janah v Libya*, involved a cook at the Sudanese Embassy and a member of domestic staff at the Libyan Embassy (both in London), who brought claims against their respective employers alleging discrimination, unfair dismissal and unpaid wages. The tribunals at first instance accepted Sudan and Libya's arguments that they were immune from the claims under the State Immunity Act primarily on the basis that the individuals were members of their respective missions.

However, on appeal, the Employment Appeal Tribunal (EAT) allowed the claims to succeed. The claimants argued that their right to a fair trial under both the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Freedoms (EU Charter) should trump the principle of state immunity. The EAT rejected the argument relating to the ECHR. Crucially, though, it accepted that the right to a fair trial under the EU Charter did take priority over state immunity.

The ECHR is enshrined in UK law by the Human Rights Act 1998. This demands that courts must interpret UK legislation, so far as is possible, in line with the ECHR. The judge concluded that it was not possible to interpret the State Immunity Act so that it was in line with the ECHR – to do so would involve directly contradicting the purpose of the legislation, and so this part of the claimants' argument failed.

However, the EU Charter also provides that individuals have the right to a fair trial. This EU law is entirely separate from the ECHR. The supremacy of EU law over UK law has been widely discussed by the UK courts and is a complex issue when it comes to claims involving private individuals. In general terms, the courts must prioritise EU law where it conflicts with UK law. As such, the judge concluded that

the State Immunity Act should be set aside in favour of the claimants' rights to a fair trial under EU law. The claims were, therefore, allowed to proceed.

The second recent case, *Al-Malki & Al-Malki v Reyes & Suryadi*, involved two domestic staff who worked at the official diplomatic residence of a diplomat at the Saudi Arabian embassy. They brought discrimination, harassment and other employment claims against the diplomat and his wife. The claimants appealed when a tribunal held that the diplomat and his wife enjoyed diplomatic immunity. On appeal, the claimants also argued that this was a breach of their rights to a fair trial under the ECHR and that the employment of domestic staff was a commercial activity and so not protected by immunity. However, the judge held that the employment of ancillary staff was part of a diplomat's official functions and that diplomatic immunity did extend to protect the diplomat, despite the claimants' rights under the ECHR. The claims were not allowed to proceed.

FUTURE DEVELOPMENTS

Both cases have been appealed and will be heard by the Court of Appeal this spring. It is worth noting that the *Al-Malki* case (regarding diplomatic immunity) did not consider the impact of the EU Charter – the law which allowed the claims to succeed in *Benkharbouche*. It is likely that the Court of Appeal will consider this issue, and that diplomatic immunity may be weakened in the same way as state immunity.

PRACTICAL CONSIDERATIONS

In the meantime, nation states and diplomatic missions should be aware that they may be subject to civil claims in circumstances where immunity may previously have provided protection. These may not only be limited to employment law claims but could extend to any right derived from EU law, such as certain intellectual property rights.

It is worth noting that a claimant would only be able to rely on the EU Charter to trump immunity where the right asserted derives from EU law. In the employment law context, for instance, unfair dismissal claims would not be affected, as this right is a creation purely of UK legislation.

Diplomatic and commercial missions should therefore consider whether their current practices comply with applicable law. In the employment context this would encompass various issues, including ensuring that employees are entitled to annual leave and rest breaks in line with legislation, that men and women who do similar work are paid equally, and that staff do not suffer discrimination or harassment. It would, therefore, be prudent to review policies and procedures following the recent rulings.

Diplomatic and commercial missions can also reduce the risk of successful claims by ensuring that, wherever possible, they are protected by state and/or diplomatic immunity. For instance, it may be possible to protect immunity by structuring employees' roles such that the employer is considered to be carrying out an official, rather than a commercial, activity.

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