

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 152  
5624567

BETWEEN           PATIENCE KOMLA  
Applicant

AND                   THE SOUTH AFRICAN HIGH  
COMMISSIONER TO NEW  
ZEALAND  
Respondent

Member of Authority:     Trish MacKinnon

Representatives:         David Balfour, Advocate for Applicant  
Peter Cullen and Calum Cartwright, Counsel for  
Respondent

Investigation Meeting:    On the papers

Submissions Received:    5 August and 16 September 2016, from Applicant  
31 August 2016, from Respondent

Determination:            14 December 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Patience Komla claims to have been unjustifiably disadvantaged in her employment and unjustifiably dismissed. She asks the Authority to investigate and determine her personal grievances. Ms Komla initially cited as respondent “*The South African High Commission AND/OR Mrs N M Laillie (High Commissioner)*”.

[2] The respondent protested the Authority’s jurisdiction and invoked the doctrines of sovereign immunity and diplomatic immunity with respect to Ms Komla’s claims. It asked the Authority to strike out Ms Komla's claims.

[3] In the course of a telephone conference with the Authority Ms Komla, who was a Senior Domestic Worker employed at the South African High Commissioner's residence, agreed her employer was the South African High Commissioner to New Zealand (the High Commissioner). That being so, no issue arose as to sovereign immunity. It was agreed the issues of the Authority's jurisdiction and the applicability of diplomatic immunity would be dealt with as a preliminary issue by way of submissions from the parties.

[4] The Ministry of Foreign Affairs and Trade (MFAT) filed, independently of the parties, two memoranda in the Authority. These relayed communications it had received from the High Commission of the Republic of South Africa (the High Commission). The communications concerned the status of the High Commissioner as its accredited head of mission and a "*diplomatic agent*". They also conveyed the High Commission's view regarding the application of the *Vienna Convention on Diplomatic Relations*<sup>1</sup> to the High Commissioner.

[5] Ms Komla, through her representative, has expressed concern at MFAT's intervention, which Mr Balfour has referred to as an "*intrusive irrelevance*". I disagree with that description and regard the memoranda, which were copied to the parties, as having been provided by MFAT to assist the Authority in its consideration of the unusual circumstances of this matter and I thank MFAT for them.

### **Relevant law**

[6] If Ms Komla's claims proceed, her employer's actions will be considered under s.103A of the Employment Relations Act 2000 (the Act).

[7] The issue of whether diplomatic immunity applies entails considerations including the relevance of certain Articles of the *Vienna Convention on Diplomatic Relations* which I have referred to above (the Convention). This is incorporated into New Zealand law by virtue of s.5 and Schedule 1 of the Diplomatic Privileges and Immunities Act 1968. The specific provision invoked by Ms Komla is the exemption to diplomatic immunity contained in Article 31(1) of the Convention, the relevant part of which provides as follows:

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<sup>1</sup> The Convention is an international treaty that defines the framework for diplomatic relations between independent countries

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.<sup>2</sup> He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
  - (a) ...
  - (b) ...
  - (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

### **The employment agreement**

[8] Ms Komla signed an individual employment agreement (IEA) in which the employer is stated to be "*The High Commissioner, Ms N M Lallie*". The IEA is on letterhead of the High Commission. A number of its provisions contain reference to "*local labour laws*", including "*Probation Period*", "*Vacation Leave*" and "*sick leave*". The "*work week*" provision refers to a maximum 40 hour, five day work week set out in the Minimum Wage Act.

### **Does diplomatic immunity apply?**

[9] Through her advocate, Mr Balfour, Ms Komla submits her employment at the South African High Commission was a commercial relationship between herself and the High Commissioner. In her view, that relationship did not relate to the "*official functions*" of the High Commissioner or the High Commission. Accordingly, she submits Article 31(1)(c) of the Convention applies and her employer cannot claim diplomatic immunity.

[10] She also contends that an investigation of her employment dispute poses no risk to the official functions of the High Commissioner or the High Commission or the sovereignty of the Republic of South Africa by way of disclosure of information or protocols protected by the Convention.

[11] Ms Komla submits the wording of the IEA she and the High Commissioner agreed supports her position. Of particular importance, she submits, is the undertaking in the IEA to comply with "*local labour laws*". In her view, only the Authority or New Zealand Courts can determine whether there have been breaches of local labour laws with respect to her employment.

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<sup>2</sup> The "*receiving*" State is the state in which the diplomatic agent is stationed

[12] She submits the 1995 Court of Appeal judgment in *Governor of Pitcairn, Henderson, Ducie, and Oeno Islands v Sutton*<sup>3</sup> should be distinguished. In that case the work performed by Ms Sutton, a typist/clerk employed in the Auckland office of the Governor of Pitcairn and its associated islands, was held by the Court to be "*close to the heart of the administrative process*" and it found her employment attracted sovereign immunity.

[13] Ms Komla further submits the Republic of South Africa has formally waived sovereign immunity on the matter and, that being so, diplomatic immunity for the High Commissioner has also been waived. Her reasoning is that diplomatic immunity derives from sovereign immunity and the waiving of sovereign immunity must therefore also waive diplomatic immunity. In Ms Komla's view, the result is that the Authority has jurisdiction to hear and determine her claims.

[14] In support of submissions on behalf of Ms Komla, Mr Balfour has referred me to three cases heard in the last six years by the European Court of Human Rights. In his view, they demonstrate that absolute sovereign immunity no longer applies in situations where employees do not perform functions that are closely related to the exercise of governmental authority.

[15] Mr Balfour also referred me to a case heard in the Employment Appeals Tribunal of Ireland where the Tribunal found the three applicants' positions of nanny/domestic help fell outside those covered by immunity. He likens Ms Komla's situation to those of the three applicants and reiterates that her duties were far removed from matters relating to governmental authority or the exercise of sovereign or diplomatic duties.

[16] Responding to Mr Balfour's submissions, counsel for the High Commissioner submits diplomatic immunity does apply with respect to Ms Komla's claims against the High Commissioner. He rejects the notion that her employment relationship with the High Commissioner was a commercial activity outside the High Commissioner's official functions. In Mr Cullen's submission the employment relationship between them was a private activity incidental to the daily life of a diplomat and was not outside her official functions.

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<sup>3</sup> [1994] 2 ERNZ 492 (CA)

[17] Counsel also rejects Mr Balfour's assertion that a waiver of sovereign immunity will, by implication, result in a waiver of diplomatic immunity. He submits there is no legal authority for such an assertion and it is inconsistent with wider jurisprudence on diplomatic immunity.

[18] Mr Cullen referred me to the leading case on diplomatic immunity, the English Court of Appeal judgment *Reyes & Suryadi v Al-Malki*<sup>4</sup>. Two domestic workers who had been employed by a Saudi Arabian diplomatic agent and his wife, claimed racial discrimination, harassment and failure to pay minimum wages against their former employers. They were successful in the Employment Tribunal where it was held that the exception to diplomatic immunity under Article 31(1)(c) of the Convention applied. The Employment Appeal Tribunal overturned the Tribunal's decision and upheld Mr Al-Malki's claim to diplomatic immunity.

[19] That finding was endorsed by the Court of Appeal, which considered whether a contract of employment between a diplomat and a domestic worker for the provision of domestic services at the diplomat's official residence was a "*commercial activity*". It examined the ordinary meaning of the words and their context as well as the object and purpose of the exemption from diplomatic immunity.

[20] It also took into account the words "*outside his official functions*" in Article 31(1)(c), finding that the employment of a domestic servant at a mission was "*an activity which is incidental to the daily life of a diplomatic agent and enables him to perform his official functions*"<sup>5</sup>. The Court concluded that a diplomatic agent was not deprived of immunity from civil suit by a person employed at his official residence to carry out domestic duties.

[21] Mr Cullen referred me also to a leading United States Court of Appeals case, concerning a domestic worker in a Jordanian diplomat's home, in which a similar conclusion was reached with regard to the complaints made by the employee arising from the employment relationship.<sup>6</sup> The Court in that instance found that, when the term "*commercial activity*" was examined in context, it did not apply to transactions

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<sup>4</sup> [2015] EWCA Civ 32

<sup>5</sup> n4 at [29]

<sup>6</sup> *Tabion v Mufti* 73F 3d, 535, (4<sup>th</sup> Cir, 1996), 107 ILR 452 (*Tabion*)

incidental to daily life "*but rather relates only to trade or business activity engaged in for personal profit.*"<sup>7</sup>

[22] The Court described "*day-to-day living services such as dry cleaning or domestic help*" as being incidental to daily life and therefore "*not meant to be treated as outside a diplomat's official functions*". That led to the Court's conclusion that "*diplomats are to be immune from disputes arising out of them.*"<sup>8</sup>

[23] There has been little judicial consideration in New Zealand of what constitutes commercial activity or of what activities might fall outside a diplomatic agent's official functions. In one case the High Court considered an appeal from a diplomat against interim orders granted by the Family Court. It held it was not open to the Family Court to grant the interim order involved orders. The High Court stated:

Diplomatic immunity is an important aspect of the international relations between sovereign states, and a fundamental element of the arrangements under which diplomats serve in countries which may have legal systems quite different from their own. Their immunity from those legal systems must be respected by host nations.<sup>9</sup>  
(Footnotes omitted)

[24] In the *Governor of Pitcairn* judgment, which was concerned with sovereign rather than diplomatic immunity, the Court said the focus must be "*on the particular contractual relationship and responsibilities and their termination*".<sup>10</sup> Where, as in that case, the mission or agency was "*engaged exclusively in the performance of the sovereign functions of the State*" the Court said it was necessary to examine whether the particular employment and its termination were "*insufficiently associated with the exercise of that governmental authority to attract immunity.*" The Court added the following obiter comment:

Cleaners and others engaged to maintain the physical fabric may be able to make such a claim depending on whether their work brings them into a sufficient association with the sovereign functioning of the office...Domestic staff, who are often in a position of trust and confidence, may find it harder to establish a sufficient separation.<sup>11</sup>

[25] Ms Komla's job title was that of Senior Domestic Worker in the SAHC's household. Although detailed information was not provided to me about her duties, it

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<sup>7</sup> n6 at [6]

<sup>8</sup> n6 at [7]

<sup>9</sup> MAGB v GQC [2015] NZHC 1595 at [21]

<sup>10</sup> n3 at 503 per Richardson J

<sup>11</sup> n3 at 504 per Richardson J

is not immediately clear to me that she would fit within the "*cleaners and others...*" category of employee identified by the Court of Appeal as potentially being able to claim an exemption to the normal diplomatic immunity available to her employer.

[26] I have considered Mr Balfour's submissions with regard to the references in Ms Komla's employment agreement to "*local labour laws*". Those references appear in relation to the probation period, "*vacation leave*", sick leave, hours of work and termination benefits at the end of the employer's term of office. I note there is no such reference in the "*Separation Notice*" clause of the employment agreement, which provides for 24 hours' notice in specified circumstances including "*termination of service as a result of misconduct or incapacity*".

[27] I also note the employment agreement does not contain all the terms required under s.65(2)(a) of the Act. A significant omission is the requirement for "*a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 in section 114 within which a personal grievance must be raised*". That omission is likely to be deliberate in my view.

[28] I not accept that the inclusion of some references to local labour laws in Ms Komla's employment agreement denotes an intention by the High Commissioner to waive diplomatic immunity in the event of an employment issue arising between the parties. It is equally likely those provisions were referenced for the purpose of ensuring Ms Komla was broadly in step with local workers in specified areas of employment such as the amount of holiday and sick leave she would receive.

[29] Nor am I persuaded by Mr Balfour's submission that Ms Komla's employment was a "*commercial relationship*" with the High Commissioner. I prefer the approach taken in *Reyes*<sup>12</sup>, which I have referred to above, in which the employment relationship was regarded as incidental to the daily life of a diplomatic agent enabling him to perform his functions.

[30] I find more persuasive the submission made by Mr Cullen following his canvassing of a number of international cases some, but not all of which I have

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<sup>12</sup>

referred to, as well as Denza's commentary on the Convention<sup>13</sup>. He submits the ordinary meaning of "*commercial activity*" is activity conducted by a diplomat on their own accord for profit, and not activity incidental to the daily life of the diplomat. I accept that submission and also accept his submission that the ordinary meaning is consistent with the object and purpose of Article 31(1)(c) of the Convention.

[31] I do not accept Mr Balfour's submission, which was an assertion unsupported by reference to jurisprudence or case law, that the absence of a claim of sovereign immunity by the High Commission results in the High Commissioner having no claim to diplomatic immunity. As I have noted above, Ms Komla accepted in the course of a telephone conference with the Authority that her employer was the High Commissioner, not the High Commission.

[32] It was therefore not necessary for a claim of sovereign immunity to be investigated as it would have been if Ms Komla had insisted her employer was the High Commission. As succinctly noted in submissions for the High Commissioner "*Sovereign immunity attaches to the actions of a state. Diplomatic immunity attaches to the actions of a diplomat*". The issue for investigation was whether the exception to diplomatic immunity of Article 31(1)(c) was relevant to the High Commissioner's situation. If it was, she would be deprived of the diplomatic immunity she had as the Republic of South Africa's accredited diplomatic agent in New Zealand.

[33] For the reasons given above, I find the exception under Article 31(1)(c) does not apply to the High Commissioner. She therefore has diplomatic immunity with respect to Ms Komla's claims against her.

[34] Mr Cullen seeks, on the High Commissioner's behalf, that the proceedings brought by Ms Komla be struck out. The Authority has the power to dismiss proceedings, having heard from the applicant, where they have no prospect of success<sup>14</sup>. In this instance I have heard from Ms Komla on the preliminary issue of diplomatic immunity rather than on the substantive claims. However, on the basis that her claims have no prospect of success, given the High Commissioner's immunity, I am satisfied it is appropriate to dismiss her claims without further investigation.

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<sup>13</sup> Eileen Denza *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4<sup>th</sup> edition, Oxford University Press, Oxford, 2016)

<sup>14</sup> AFT v BCM [2015] NZEmpC 234 at [47]

**Determination**

[35] I find the South African High Commissioner to New Zealand has diplomatic immunity in respect of the claims made against her by Ms Komla. I am unable to investigate those claims and dismiss them without further investigation.

**Costs**

[36] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority