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EMPLOYMENT TRIBUNALS

Claimant ***Respondent***

Mr H Kahn ` **AND** **VisitDenmark**

PRELIMINARY HEARING

HELD AT: **London Central** **ON:** 10, 11 April and 29 May 2019

BEFORE: Employment Judge Walker (Sitting alone)

Representation:

For Claimant: Mr E Wojciechowski, Solicitor
For Respondent: Mr P Luckhurst, of Counsel

JUDGMENT

The Respondent's assertion of State Immunity is rejected and, accordingly, the Tribunal has jurisdiction to consider the Claimant's claims.

REASONS

Background

1. The Tribunal held this Preliminary Hearing in order to consider issues, which were identified at a previous Preliminary Hearing on 28 January 2019. The essence of the matter was to consider whether the Respondent was entitled to claim State Immunity, so that the claim could not be pursued in this Tribunal.

2. The issues identified in the Order made on 28 January 2019 which were taken from the Respondent's submissions made on 12 February 2016, when

the Respondent confirmed that it did not submit the jurisdiction, were as follows:

(1) Whether the Respondent qualifies for immunity under the State Immunity Act s.14, as it may not be a government department

(2) Whether the State was immune on the basis that the Claimant had been habitually a resident outside the UK when the contract was made

(3) Whether the immunity remains because the parties to the contract agreed that it does. On this point, the Respondent says that the contract imposes exclusive jurisdiction over the contract on the Copenhagen City Court while the Claimant cites s.4(4) of the State Immunity Act in opposition to this.

Other issues were no longer relevant, as the Claimant no longer pursued the question of personal injury claim and both parties accepted the Claimant was not a member of a mission.

Evidence

3. I heard evidence from the Claimant himself on his own behalf and from Mr Olsen, the managing director of the Respondent. I was provided with a bundle of documents, which the parties had agreed. Additional documents were added to the bundle on the morning of the first day by agreement. I was also supplied with a bundle of authorities and additional authorities.

4. The issues were clarified to some extent in the course of the hearing and I will set them out in greater detail.

Issues and the Legislation

5. The parties accepted by the stage of this hearing that the Respondent was not a department or indeed the government of the state of Denmark. It conceded that it amounted to a separate entity. However, s.14(2) of the State Immunity Act 1978 provides:

> "A separate entity is immune from the jurisdiction of the Courts of United Kingdom if, and only if –
>
> (a) the proceedings relate to anything done by it in the exercise of sovereign authority: and

> (b) the circumstances are such that a State (…) would have been so immune.

6. The Respondent said that it was not necessary for me to look at paragraph (b) in any particular context. The question was, at this stage, whether the proceedings related to anything done by the Respondent in the exercise of sovereign authority. If I concluded that they did not, the Respondent would not have the benefit of State Immunity and that would be that.

7. However, if I concluded that the Respondent did have the benefit of State Immunity by virtue of s.14(2) I would then have to consider s.4 of the State Immunity Act. Subsection 4(1) provides;

> "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."

8. Section 4(1) would clearly apply to this situation but there are exceptions to it in subsection 2. Two exceptions were considered relevant to this situation. The first exception is in s.4(2)(b) which provides;

> "at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there'.

9. In relation to this point, the Respondent referred to the initial contract entered into between an entity generally referred to as "VisitDenmark" and the Claimant in 1999 at which time the Claimant was not a national of the United Kingdom nor was he resident there. The Claimant says that contract is not relevant. The Claimant entered into a total of three contracts with this entity or its successor, so there were two subsequent contracts with the Respondent. The Claimant relies on the third of those contracts and specifically argues that it stands alone and separately from the earlier ones. That last contract was, he says, in operation when he was dismissed and that the Tribunal must look at that contract which, he says, replaced the previous contract in full. The Respondent says it was merely an amended version of the prior contracts. Therefore, the question that arises is what is the status of the third contract? Is it an amendment to an original contract, which is ongoing, or is a standalone contract under which the Claimant is entitled to bring his claim, so that at that time it was entered into, he was not a national of the United Kingdom but was habitually resident here?

9. The second exception is in s.4(2)(c). S4(2)(c) provides:

> "the parties to the contract have otherwise agreed in writing."

Put in simple terms, this exception applies where the parties to the contract have agreed in writing that the exemption to State Immunity should not apply. On that point the Respondent says that there is a jurisdictional clause providing that the Courts of the City of Copenhagen have jurisdiction and the Respondent argues that meets the requirements of sub section 2(c). The Claimant says that that does not go far enough to amount to a sufficient agreement in writing. I have to decide which of these positions is correct.

10. Additionally, the Claimant relies on subsection 4(4) which provides;

> "subsection 4(2)(c) above does not exclude the application of this section where the law of the United Kingdom requires the proceedings to be brought before a Court of the United Kingdom."

On that point the Respondent says the law of the United Kingdom does not require the proceedings in question to be brought before a Court of the United Kingdom and that is not the effect of private international law. The Claimant says in practice it is the implication of the situation and its effect and that unfair dismissal proceedings must be brought before the Tribunals in the United Kingdom. Again, I have to decide which of them is correct.

11. There was an additional question of the application of human rights law and access to the Courts as provided in the case of Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs [2017] ICR 1327. The Claimant says more generally that he would be penalised so that he would have no access to the Courts and thus to a judicial remedy if he were precluded from pursuing his claim and this is a breach of his human rights. The Respondent denies this. Again, the issue is which position is correct.

Facts

12. The Claimant was initially employed by an entity called "Danmarks Turistrads kontor". The parties referred to the employer as VisitDenmark, but in practice, the translation supplied to me translates the name 'Danmarks Turistrads kontor' as Danish Tourist Board. The contract took effect from 1 November 1999. Because later a new entity was created, I shall refer to the original employer as DT. There was a written contract signed on 27 August 1999 by both parties, which I shall refer to as ("the First Contract").

13. At the time the Claimant was resident in Denmark. The Claimant is not a UK citizen, neither is he a Danish citizen. He is a citizen of Norway. The contract provided for the Claimant to work for DT at its offices in London as the

market manager. There was no jurisdiction clause in that contract. The Claimant moved to the United Kingdom to undertake this role and I understand that at all relevant times thereafter he was resident in the United Kingdom.

14. A second contract was entered into by the parties dated 23 August 2000 ("the Second Contract"). That contract included three clauses that are of relevance. I have cited the translations which were supplied to me.

Clause 1 of the contract provided;

> "This employment contract replaces the employment contract of 27 August 1999 between the parties".

Clause 2 provided;

> "Since 1 November 1999 the market manager has been employed with DT as market manager for England".

15. As I have noted, in both the First and Second Contracts, the Respondent was identified in the Danish versions as "Danmarks Turistrads kontor".

16. Clause 20 of the Second Contract provided as follows:

> "This employment contract is governed by and subject to Danish Law, including the Danish Salaried Employees Act (funktionaerloven) and the Danish Holiday Act (ferieloven).
>
> Apart from what follows from applicable law, the provisions of this employment contract plus the agreement of 26 November 1999 in the form of an email signed by the Market Manager, subject: "Premium Lease", are an exhaustive statement of the terms and conditions which govern the employment. Thus, there are no collective agreements, regulations or other general or specific agreements which apply to the employment relationship.
>
> The parties have agreed that the Copenhagen City Court – and the usual appeals procedure – will be the proper venue for any disputes arising out of this employment contract."

17. This was followed by a third contract, which is dated 29 October 2001, ("the Third Contract"). Again, the employer is the Danish Tourist Board. The contract includes at clause 1 the provision;

> "This employment contract replaces the employment contract of 27 June 2000 and any prior amendments between the parties".

18. Both Clause 2 and clause 20 were as before, but some other terms were different.

19. In 2010 the Danish Government enacted an act called the VisitDenmark Act. I have been supplied with an English translation of that Act together with a translation of notes to the Bill. The notes were explanatory notes, I understand, intended to explain the need for this legislation and the contents of the Bill. I have no doubt they properly reflect both the purpose of the Act and its contents. So far as I am aware, the Bill became the VisitDenmark Act, with no relevant changes.

20. The notes to the Bill were helpful in that they explain the position prior to the Act and the need for the new entity. The notes explain that the original VisitDenmark, (which I must assume was DT), was the national tourism organisation in Denmark. It was originally organised as a commercial foundation, subject to supervision by the Minister for Economic and Business Affairs. I should note that it seems that both the Minister and the Ministry have had their name altered from time to time, but essentially, I understand that they remain the same entity of government.

21. The original VisitDenmark entity was charged with the performance of various tasks associated with the international marketing and branding of Danish tourism and development of tourism products and experiences, as well as regulatory tasks associated with the Danish Government's tourism promotion efforts. This foundation was to be dissolved.

22. The Bill proposed setting up a new VisitDenmark as a special public administrative body. The stated objective of the Bill was to establish a more coherent and effective tourism promotion set up in Denmark. The notes explained that the new VisitDenmark was to focus its efforts on marketing and branding Danish tourism abroad with a view to attracting greater numbers of tourists who will increase revenues in the tourism industry. In addition, the intention was for the new VisitDenmark to have a relatively small and very business led board of directors. The Bill proposed to increase the involvement of and strengthen collaboration with the tourism industry. This was to be achieved partly by setting up an advisory nomination committee on which the industry and others would be represented to recommend candidates for the new VisitDenmark board of directors for final approval by the Minister. It was also partly to be achieved by ensuring that the new VisitDenmark would be able to develop and participate in partnerships with tourism industry and other central players concerning specific marketing and branding activities.

23. The new arrangements were also to involve a clearer allocation of roles and responsibilities between the public-sector tourism players in Denmark at the national, regional and municipal level as well as a strengthened coordination of the public-sector tourism promotion effort across sectors. It was expressly stated;

> "In future the regulatory tasks associated with the government's tourism promotion effort will be performed by the Ministry of Economic and Business Affairs."

24. The explanatory notes to the Bill set out the background and explained in more detail how there had been a report prepared which showed four major challenges in relation to tourism promotion. The new Act was a response to those challenges. One of those challenges was that the previous entity had a very broad portfolio of activities, engaging in regulatory activities as well as marketing activities. Therefore, there was a recommendation about a clearer allocation of roles including that the new VisitDenmark should be focused on international marketing and branding activities and that the governmental tasks relating to product and experiential development should be performed by regional and municipal players in future.

25. In order to deal with the four problems, the Act proposed a new structure for a new VisitDenmark which was to be a special public administrative body established by law. The intention was to allow for efficient pursuit of its objectives and a more flexible framework for incorporating the tourism industry's participation. The choice of a special public administrative body was because this would allow for close governmental management and control of tourism funds and would allow for public insight. As an independent body in the government administration, the special public administrative body would be subject to government administration law.

26. The notes explained that as a starting point, the status of the new VisitDenmark would be that of a public law body for public procurement purposes, as it would be an independent legal person set up especially for the purpose of accommodating the needs of the general public, and because the State would appoint its Board of Directors. At the same time, the major part of its operations would be financed by the State.

27. In consequence of the establishment of the new VisitDenmark, the previous entity was to be dissolved and the assets and liabilities of the foundation were to transfer to the new VisitDenmark with a view to being continued within the framework provided in the Act.

28. Under the heading “Objects and activities of new VisitDenmark” the objects of the new VistDenmark were identified as “to promote Denmark as a tourist destination and thereby create economic growth in the Danish tourism industry”. It continued “the New VisitDenmark will concentrate its efforts particularly on activities relating to the international marketing of Danish tourism products and experiences as well as the branding of Denmark as a tourist destination, including amongst other things activities required to develop new markets and maintain established markets”. It also said “VisitDenmark must be able to guide and advise other Danish tourism players as to the needs and motives of guests as part of its product and experiential development activities. VisitDenmark will also be able to engage in the development of branding and marketing activities including for instance the development of new tools or methods”.

29. The explanation about the objects and activities proposed for the new VisitDenmark also made a clear statement that the new VisitDenmark was no longer the carry out certain functions of a governmental nature. These were to be transferred back to the Ministry. The new VisitDenmark was no longer to be allowed to perform tasks concerning the development of tourism and products and experiences as those were public sector tasks that would be performed at the regional and municipal level in future. In addition, the new VisitDenmark was not to perform a number of regulatory tasks any longer, including among other things tasks relating to the servicing of the Minister, political coordination and the effort to ensure favourable framework conditions for the tourism industry. The notes also explain that a minor part of the annual VisitDenmark basic grant would be transferred to the Ministry of Economic and Business Affairs, precisely because in future the Ministry would perform some of the tasks currently performed by VisitDenmark.

30. It also stated;

> “Notwithstanding the above, VisitDenmark may participate in Nordic, EU and OECD Tourism working parties with a view to providing input on matters relating to Denmark and gathering international data and experience. VisitDenmark will also participate in international cooperation to improve methods to document the importance of tourism and the effects of tourism promotion initiatives. However, participation in more politically-oriented international meetings and negotiations will be handled by the Ministry of Economic and Business Affairs.”

31. Under the heading “Management of new VisitDenmark” the structure of the new VisitDenmark was set out. It was to involve a board of directors and an executive board. The Board of Directors would be the supreme governing

body and would be responsible for the overall management. The Board would employ an executive board to manage the day to day activities. The Minister was to set the number of Board members and the intention was that they would be appointed in their personal capacity by the Minister. The Bill explained that the Act did not provide for a government representative on the Board. Instead the Minister was to lay down the Articles of Association and any subsequent amendments were to be made by the Minister. This was to secure government influence. The Minister would have the power the remove Board members before the end of his or her term in some instances, for example if they had committed a criminal offence or acted contrary to the Articles of Association. The Act also provided for an advisory nomination committee charged with giving recommendations to the Minister on the composition of Board, except for the Chairman.

32. In practice, it seems the Act did achieve the intentions described in the notes to the Bill. Furthermore, those intentions were reflected in the detail of the Articles of Association for the new entity.

33. Under the heading "Legal Personality and Status" it recorded;

> "VisitDenmark is a special and public administrative body, which means a public law body which, although not a part of the administrative hierarchy of government, is subject to supervision by the Ministry of Economic and Business Affairs."
>
> As an independent body in the public administration, VisitDenmark is subject to public administration law, including the provisions of [*a list of Acts*], the general principles of administrative law as well as the EU public procurement and state subsidy rules. There is no recourse to the Ministry of Economic and Business Affairs."

33. The Act provided that the funding was to come from funds allocated in the Finance Act to the VisitDenmark activities and other funds that may be provided VisitDenmark by the parties involved. The Minister for Economic and Business Affairs would set goals and targets for its activities each year. If VisitDenmark was wound up, VisitDenmark's assets would accrue to the State and the State would also take over all rights and obligations of VisitDenmark. In addition, the Act provided that the Minister of Economic and Business Affairs may at any time request any information about VisitDenmark's activities deemed necessary by the Minister for the supervision purposes. The financial statements had to be audited by the State authorised public accountant who were registered accountants and subsequently submitted to the Minister for Economic and Business Affairs.

34. There was to be an annual public service agreement concluded with the Ministry of Economic and Business Affairs.

35. The activities which VisitDenmark was to undertake were also set out in the Articles. The Articles expressly provided;

> "VisitDenmark will not perform any regulatory tasks including servicing of the Minister, political coordination and participation in politically oriented international meetings as well as the effort to ensure favourable framework conditions for the tourism industry. If so requested by the Ministry of Economic and Business `affairs, however, VisitDenmark will provide knowledge, analysis and statistics as well as be in charge of the international cooperation on tourism knowledge and statistics in the EU, OECD, etc., see the annual public service agreement concluded with the Ministry of Economic and Business Affairs."

36. VisitDenmark was not intended to generate a profit. Its assets were to be kept separate from the assets of the State. Financially it was an independent entity liable for its own obligations and was to control its own finances within the scope of the applicable legislation, various agreements and its Articles. Under s.9 headed "Authority to bind VisitDenmark", the Articles provided;

> "VisitDenmark's liability cannot exceed the amount of its own funds. The members of VisitDenmark Board of Directors are not personally liable for the obligations of VisitDenmark."

37. Under the heading "Supervision" it provided;

> "VisitDenmark is subject to supervision by the Minister for Economic and Business Affairs. VisitDenmark must at all times, without undue delay, provide the information deemed necessary by the Minister for Economic and Business Affairs for supervision purposes.
>
> The Minister must be kept informed of VisitDenmark's activities of major financial or political importance, including events causing major deviations from anticipated financial results already announced, material changes to VisitDenmark's strategy or decisions of major strategic scope."

38. When the employing entity changes in this sort of manner, there is usually a transfer which falls within the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") and the Acquired Rights Directive. However, there is no record, after the incorporation of VisitDenmark as a

special administrative public body, of any communication with employees about the position. Specifically, no communication was shown to me of any communication with the Claimant, nor was any new contract issued. In fact, no one could explain what had happened. Rather there was a general assumption that TUPE applied and the effect was that the Claimant's employment transferred to the current Respondent by operation of law and that in all other respects his contractual rights remain the same.

39. I raised the question as to whether this was the case because regulation 3(5) of the TUPE regulations provides that an administrative reorganisation of public administrative authorities or the transfer of administrative to functions between public administrative authorities is not a relevant transfer. However, the general assumption was that this was not the case and that rather, Regulation 3(4) of TUPE applied on the basis this a public undertaking engaged in economic activities, but not for gain.

40. Mr Olsen gave evidence about the day to day activities of the Respondent. I was told that the UK office of Respondent operated from the same address as the Danish Embassy with the same name, door and canteen but no access to the diplomatic parts of the building in which the Danish Embassy staff worked. It was accepted by the Respondent that this was of no significance as in the past the office had been elsewhere in London and other offices in other countries were not in the Embassy premises. Clearly this was purely a matter of convenience, and not indicative of anything more.

41. Mr Olsen said he spoke regularly to the Minister and he thought his PA spoke daily about some matters regarding press releases. He accepted that the Minister acted like a sponsor and regulator. He described going to Australia to participate in discussions regarding tourism there when the Minister did not have time to go. He also gave a presentation to Chinese officials as part of an effort to encourage Chinese airlines to fly to Copenhagen directly.

42. He explained that the Respondent undertook statistical analysis in order to evaluate potential tourist opportunities and was asked to participate in a working party group for the OECD.

43. The Board and the Minister all considered the budget. There was a process whereby the budget was prepared and considered. Salary increases were reviewed by both the Board, and the Minister, although the Minister reviewed categories rather than individual salaries.

44. A very large part of the funding for Visit Denmark did come from the Danish State. My attention was drawn to a letter in the bundle sent from the

Finance Ministry to the Ministry for Business and Growth, as it was then called, dated 31 August 2010, which referred to the Act of 15 June 2010 which created VisitDenmark, and referenced the fact that under the Budget Order, it was a requirement that in circumstances where there was a finance grant amounting to Danish Krone of one million or more, and where it is expected that the grant will continuously cover half or more of the relevant institution's ordinary operating costs, the Ministry of Finance were required to determine or agree salaries for the relevant institution staff, unless the Ministry of Finance personal directorate decides or approves otherwise.

45. The translation of the letter recorded the Ministry of Finance personal directorate consenting to the staff not being transferred to salary and employment terms determined and agreed by the Ministry of Finance, but as a condition the Ministry for Business and Growth, jointly with personal directorate, had to supervise the development in salaries for the VisitDenmark staff and ensure they were reasonably balanced, relative to the development of levels applicable within the State in order that no terms and conditions were to be offered which materially exceed what is ordinarily offered within State. There was nothing further following that up in the bundle.

46. I was also given an unofficial translation of a note dated 1 March 2019 by the Ministry of Business for Growth on the judicial status of VisitDenmark. That note addressed the statutory framework, the fact that VisitDenmark is an independent organisation within the state administration and referred to its supervision. It described the fact that it was an independent public administration entity, which enables close governmental management and control with the funds available for tourism and public oversight with its activities and said it was consequently a public administration law organisation subject to the Ministry's supervision. It referred to the finances provided to it by the State and said it has the characteristics of a public service enterprise for the benefit of society as a whole. It also explained that it was subject to certain acts applicable to State administration, including the Freedom of Information Act and Public Procurement Act.

47. Mr Olsen made it clear that he regarded it as important for the Respondent to follow public procurement rules and to ensure that business contracts were allocated in that fashion.

48. I was given some information about the Claimant's dismissal but as I made clear to the parties, where there is a possibility that that might need to be examined by another Court, or indeed by this Tribunal, in the future, it is important that I say the minimum necessary about it in case any statements I make appear to be findings of fact which cause difficulties for any future hearing.

Submissions

49. Both parties made lengthy submissions. I was given submissions in writing and oral submissions.

Respondent's Submissions

50. I was reminded by the Respondent that the State Immunity Act of 1978 was enacted in order to effectively ratify the European Convention on State Immunity. It was pointed out that a number of the provisions in the Act reflected the European Convention. The European Convention had been followed by a further United Nations Convention on Jurisdictional Immunities of State and their Properties, dated 2004. This had been adopted by the General Assembly of the United Nations, but was not yet in force and had not be ratified by the United Kingdom.

51. There was however a Regulation of the European Parliament and Council of 17 June 2008 on the Law Applicable to Contractual Obligations, which was referred to as Rome One and a further Regulation of the European Parliament and Council of 12 December 2012 on the Jurisdiction and Recognition of Enforcement of Judgments in Civil and Commercial Matters, which was referred to as Rome Two.

52. I was told that for certain reasons Denmark was a party to Rome One, but not to Rome Two, although the United Kingdom was a party to Rome Two. It was suggested that in some respects this would inform and assist me in interpreting the State Immunity Act.

53. It was drawn to my attention that a Commentary on the United Nations Convention on Jurisdictional Immunities of States and their Property 2004, edited by Roger O'Keefe and Christian Tams had made reference to an ILC commentary and as I was given an extract from their article. That article referred to Article 2(1)(b)(iii) of the Convention, which provided:

> "For the purposes of the present convention, "State" means ..
> (iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State."

The article referred to the ILC commentary being remarkably reticent in relation to this and stating that the concept of agencies or instrumentality of the State could theoretically include state enterprises or other entities established

by the state performing commercial transactions. It went on to say that the provision would also embrace in certain circumstances the central bank, state utilities, state tourism boards, state commodity boards, sovereign wealth funds, and the like – entities enjoying legal personalities separate from this state, established for a specific purpose and retaining some connection with it.

54. The gist of the Respondent's submission was to consider what type of body the Respondent was, and to suggest that the language was one of public functions. It was suggested that this would not be narrowly construed, but a state entity may be performing public functions in a much broader range of matters. I was referred to the Kuwait Airways Corporation v Iraqi Airways Co HL [1995] case and the case of Benkharbouche v Embassy of the Republic of Sudan [2017] ICR 1327. I was referred to various foreign authorities and in particularly to the cases of Perrini v Academie du France, Muller v United States of America, Canada v Cargnello and Mohammed Salem El Hadad v United Arab Emirates and the Embassy of the United Arab Emirates decided on 27 July 2007. I was reminded of the reference to Lord Wilberforce's judgment, which required the Tribunal to look at the entirety of the facts.

55. The Respondent accepted there was a distinction between what is termed jura imperii and jura gestioni. The Respondent submitted the exercise of public powers in pursuing the public good counted as a state function, so that public functions would fall into the jura imperii. In this case the Respondent argued that it was a public entity, which carried out research and analysis to assist the Minister in public policy formulation. Moreover, I was told although it could be sued, or be sued in its own right, ultimately the liabilities fell on the State. Further, I was reminded of the list of its activities, which the Respondent submitted, included various public activities. I was told that this was not a private sector marketing company. The government provided 100% of the funding for its core costs and an unofficial translation of a note dated 1 March 2019 by the Ministry of Business for Growth on the judicial status of VisitDenmark had identified the fact that it was an independent public administration entity which enables close governmental management and control with the funds available for tourism and public oversight with its activities. It was submitted that it was consequently a public administration organisation subject to the Ministry's supervision. A large part of VisitDenmark's activities are based on state finance via the finance act and it has the characteristics of a public service enterprise for the benefit of society as a whole. In the event of dissolution, its assets belonged to the State and the State assumed its assets and liabilities.

56. The Respondent referred me to Mr Olsen's evidence and a number of matters which he identified he had to deal with, including regular meetings with

the Ministry, his secretary being in daily contact in relation to press releases, the Respondent representing Denmark in the OECD working group on tourism, sometimes standing in on State visits to Australia, participating in negotiations with the Chinese regarding direct flights, and analysis of tourism and reports to the Ministry, an estimate of performance for the next year and regular reporting on specific analysis when asked to do so. All staff were expected to behave as public sector employees with regard to travel costs and public sector legislation was relevant to the Respondent which did not make a profit for itself.

57. The Respondent said that an establishment of such an entity was one only a State would do and while the Respondent did engage in marketing activities, it was promoting Denmark as a country, to try to drive economic growth, so its function went beyond marketing. Overall the Respondent's submission was that the Respondent engaged in actions which were those of a sovereign authority and therefore s.14 applied and State Immunity was applicable.

58. The Respondent then moved on to deal with the exemptions in s.4(2) and said that both s.4(2) (b) and (c) were relevant. In relation to the contracts, the Respondent argued that each of the contracts treated employment as continuing. They were in the nature of amendments to the position and not distinct and separate contracts, which could be taken alone.

59. In the circumstances the Respondent argued that Benkharbouche pointed out the difference of treatment between discrimination claims, which are rights which arise from European law and other rights of a national nature which do not have the same protection.

60. In relation to section 4(2)(c), the Respondent said that Copenhagen was clearly identified as the venue for disputes and the jurisdiction clause should be construed widely and generously. The Claimant could not argue this was not a jurisdiction clause. The Respondent said that the State Immunity Act was passed so the UK could ratify the European Convention on State Immunity and therefore could not provide a lesser entitlement than the Convention itself otherwise the UK would be in breach of that Convention.

61. As far as the suggestion the Claimant could disapply s.4(4) of the State Immunity Act, the Respondent argued that it was possible for the Claimant to bring a claim in Denmark and he was entitled under private international law to do so.

62. I raised a question about this and whether there had been any undertaking on part of the Respondent to reassure the Claimant on this point and over the lunch break the Respondent drew up an undertaking for the

Claimant with the possibility of a stay of these proceedings and the Respondent undertaking that if the Claimant brings a claim in the Copenhagen City Court, the Respondent will not oppose the Claimant evoking the United Kingdom's statutory rights under the Employment Rights Act 1996 or the Equality Act 2010 pursuant to article 6 of the 1980 Convention on the Law applicable to Contractual Obligations ("the Rome Convention"). In the event the Claimant was concerned about that and so we proceeded.

63. The Respondent spent some time explaining the European regime and the international conventions.

64. In relation to s.4(4) of the State Immunity Act, the Respondent said that the UK law envisaged that claims could be brought in three places being firstly where the employee worked, secondly where the employer was based and thirdly where the parties agreed. The Respondent submitted that there is no bar to a claim, particularly where the Claimant could submit to arbitration, and he could always do that. The Respondent did accept, however, that there was no suggestion that any arbitration proceedings were envisaged or agreed in this particular case.

65. In relation to Benkharbouche, the Respondent accepted this held that s.4(2)(c) was contrary to certain fundamental rights, but the Respondent argued that the Claimant would not be deprived of those rights as he could bring those claims in the Danish courts. The Respondent referred to the fact that the Danish law would be familiar with age discrimination and in relation to unfair dismissal they had a similar right not to be unreasonably dismissed. The Respondent considered that the Claimant would be able to rely on s.98 of the Employment Rights Act 1996 in the Danish courts. In contrast the Respondent would have difficulties in that if it had to appear in the English tribunal, it would have to prepare translations for lots of documents, it would have the problem of dealing with unfamiliar legislation in an unfamiliar locality and having to bring its witnesses over to the UK.

Claimant's Submissions

66. The Claimant pointed out that the Respondent accepted that it was a separate entity and that what we were concerned with under the State Immunity Act was s.14(2).

67. The Claimant submitted that there was nothing done by the Respondent which was in the exercise of sovereign authority. The Respondent was supervised by the government, but was not part of it. The Claimant suggested that supervision was quite minimal.

68. The intention was that in creating a new entity it was not to be part of the government. The duties of the original VisitDenmark had been split. VisitDenmark was not the Danish state tourist board, that was a different entity.

69. Mr Kahn's employment was of a private law character and not inherently governmental. His employment and dismissal were both acts of a private law character. The cases which the Respondent had referred to were different and not informative in this situation.

70. In particular, both Canada case and Muller case and El Hadad were related to consular employment. The Perrini v Academie du France case did relate to a different entity, but could also be seen in a different light.

71. As regards s.42(b) the Claimant relied on the contract (which I have identified as the Third Contract) being that of 29 October 2001. The importance of that contract was at the time it was entered into the Claimant was habitually resident in the UK and therefore that contract fell outside s.42(b). The issue of whether or not that contract could be seen to be a contract in its own right or whether it was effectively an amendment of an earlier contract was challenged by the Claimant. The Claimant said that the wording of the contract was very clear and that this replaced previous contracts and no other contract formed part of it and, in those circumstances, it stood alone and should be viewed on its own.

72. In relation to the situation in 2010, the Claimant had not believed he worked for a public organisation, rather that TUPE applied, although he had not been given any information about it.

73. In relation to s4 (2)(c), there was a choice of jurisdiction clause, but it was not sufficiently clear that it overrode the provisions of the State Immunity Act. The Claimant said that a clause which deprived the Claimant of the ability to bring claims in the UK would have to be sufficiently clear for him to understand that he was not getting any protection under local statutory legislation and the clause relied on by the Respondent did not do that.

74. In relation to the case of Duarte, it was submitted by the Claimant that the words relied on where the Respondent were a passing reference by the Judge and that he had made an incorrect interpretation of the mandatory rules. The case was a case about restrictive covenants and not about the statutory legislation. The Claimant could not bring an unfair dismissal claim in Denmark as there was no similar legislation. The reference to unreasonable dismissals provided a remedy of few months' pay and very little else had a very different impact to the unfair dismissal legislation. Moreover, because the Claimant had not worked in Denmark, and had not been living there, it was quite likely he

would not be able to raise a claim. Regardless of the Respondent's undertaking, it was the Claimant's belief that he would have significant difficulty in bringing any claim within Denmark at the Copenhagen City Court. Therefore, if the Claimant was not entitled to proceed with the claim in Denmark, and was not entitled to bring the claim in the UK, he would be denied a claim entirely. He had already been paid notice pay but in terms of his claims for discrimination and his claim for unfair dismissal he would find himself in the position outlined, where the Human Rights Act should apply to show that he was being denied the opportunity of a trial or a hearing. He regarded it, in his case as necessary to interpret the position in the same way. He considered that the legislation was such that the law required unfair dismissal to be brought in the Tribunal in the UK and that claim had to be brought under the English jurisdiction.

The Law

75. I have set out the statutory provisions, which are applicable, in the section of this judgement dealing with the issues and legislation.

76. A key issue is what is the meaning of section 14(2)(a) and in particular what is meant by "the proceedings relate to anything done by it in the exercise of sovereign authority".

77. Lord Sumption, in the case of Benkharbouche v The Embassy of the Republic of Sudan [2017] UK SC62U, described the development of the law on state immunity and he explains the ambit of sovereign authority in terms of the development of that law. On several occasions in that judgment he explains that there is a distinction between acts of a state which are protected under international law, and acts which are not, and those would fall into two categories, being act of jura imperii and act of jura gestioni.

78. Lord Sumption explains in that judgment that the rule of customary international law is that States are entitled to immunity only in respect of acts done in the exercise of sovereign authority. That is, of course, reflected in the section in question, and again in Article 2 of the United Nations Convention, and the commentary on that convention by Roger O'Keefe and Christian Tams. As the commentary records; "An agency or instrumentality of the State or other entity however, unlike a constituent unit or subdivision, does not necessarily act in the exercise of governmental authority in all circumstances, nor is it necessarily entitled in all circumstances to do so."

79. Lord Sumption explains that State immunity was developed during the 19th and 20th centuries, primarily by municipal courts. Before the age of state trading organisations, there were few occasions for testing the limits of State

Immunity. States rarely did acts in peace time within the territorially of other States, other than conduct diplomatic relations. However, there was a gradual change. The main reason for this was the growing significance of state trading organisations in international trade. Lord Sumption cites the Tate Letter addressed to the legal advisor to the State Department to the Acting Attorney General of the United States government on 19 May 1952 in which it said; "The widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." The resultant limitation on State Immunity was subsequently referred to as the restrictive doctrine. Lord Sumption explains how the restrictive doctrine was slowly generally adopted across the western world.

80. Lord Sumption then reaches the question of the application to contracts of employment and says that, as a matter of customary international law, if the employment claim arises out of an inherently sovereign or governmental act of the foreign state, the latter is immune. It is not always easy to determine which aspects of the facts giving rise to the claim are decisive of its correct categorisation and the courts have understandably avoided over precise prescription. He then cites Lord Wilberforce's statement in the case of The I Congreso, which requires the Court to:

> "consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity."

81. Lord Sumption continues explaining:

> "In the great majority of cases arising from contract, including employment cases, the categorisation 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."

82. He also said; "The result is that the State Immunity Act 1978 can be regarded as giving effect to customary international law only so far as it distinguishes between exercises of sovereign authority and acts of a private law character, and requires immunity to be confirmed on the former, but not the latter. There is no basis in customary international law for the application of state immunity in an employment context to acts of a private law character."

83. The judgement concluded that s.4(2)(b) of the State Immunity Act 1978, under which immunity depended on the nationality and residence of the claimant at the date of the employment contract and which drew no distinction between sovereign and private acts, was not justified by any binding principal of international law and that section 16(1), which extended state immunity to the claims of any employee of the diplomatic mission, irrespective of whether the relevant act was in exercise of sovereign authority, could not be justified by reference to any rule of customary international law. Lord Sumption concluded saying;

> "the result is that sections 4(2)(b) and 16(1)(a) of the State Immunity Act 1978 will not apply to claims derived from EU law for discrimination, harassment and breach of the Working Time Regulations 1998".

84. The overall judgement concluded that other claims such as unfair dismissal were barred by those sections of the Act, but were found to be incompatible with Article 6 of the Human Rights Convention and also in the case of s.4(2)(b) with Article 6 read with Article 14 of the Convention. In consequence, only the EU claims could proceed.

85. The case of Kuwait Airways Corporation v Iraqi Airways Co (HL) 1 WLR 1147 addressed the meaning of section 14(2) in relation to a company which was not an entity of the state, being a national airline. Parts of Lord Wilberforce's judgement from I Congreso del Partido were cited including a reference to the ultimate test of what constitutes an act jure imperii, saying it;

> "is not just that the purpose or motive of the act is to serve the purposes of the state but that the act is of its own character a governmental act, as opposed to an act which any private citizen can perform."

And later continuing;

> "It follows that, in the case of acts done by a separate entity, it is not enough that the separate entity should have acted on the directions of the state, because such an act need not posses the character of a governmental act. To attract immunity under section 14(2), therefore what is done by the separate entity must be something which possesses that character."

Conclusion

Section 14(2) – Does the Respondent have the protection of state immunity?

86. The first issue was whether s.14(2) was engaged and in particular whether the Respondent, as a separate entity, was immune from the

jurisdiction of the Courts to the United Kingdom because the proceedings related to anything done by it in the exercise of sovereign authority.

87. The Respondent has asked me to consider the activities of the Respondent entity and suggests that the nature of it's day to day business amounted to the exercise of sovereign authority and thus it fall within the category of jura imperii as opposed to jura gestioni. The Claimant says it was not acting in such a manner. The Respondent's written submissions included an examination of the functions which the Claimant was employed to perform. It was noted that he was effectively the most senior person at the UK office, responsible for staff and budgets as well as the formulation of strategy of the Respondent's activities in the United Kingdom according to the Respondent. However, it was the general activities of the Respondent, as described by Mr Olsen, that the Respondent relied upon as bringing the Respondent within the ambit of state immunity.

88. I have noted that the mere possibility of amounting to an entity of a State does not necessarily grant immunity in all cases. It is a question of the extent to which the entity is actually performing acts in the exercise of Sovereign authority of the State that is relevant as to whether the immunity actually applies to the situation in question. As Roger O'Keefe and Christian Trams comment, the provision would embrace state tourism boards in certain circumstances, but they make it clear that an agency or instrumentality of the State or other entity, unlike a constituent unit or subdivision, does not necessarily act in the exercise of governmental authority in all circumstances, nor is it necessarily entitled in all circumstances to do so.

89. I remind myself of the words of Lord Wilberforce which require me to consider the whole context in which the claim against the state is made. Importantly, he also said it is not just that the motive or purpose is to serve the purposes of the state. He also said it is not enough that the separate entity should have acted on the directions of the state.

90. I accept that Mr Olsen and his immediate staff were closely involved with the Ministry for Business and Growth, or the Ministry for Business and Development as it was formerly called. I accept that Mr Olsen was involved with the working party of the OECD, but this was envisaged by the VisitDenmark Act. I note that he attended in place of the Minister at a meeting in Australia and also gave a presentation to Chinese officials to encourage them to institute direct flights to Denmark. However, none of those activities described by Mr Olsen are activities that only a state can, or would do.

91. The explanatory notes to the VistDenmark Act make it clear, however, that the objectives of the new VisitDenmark, while being to promote Denmark as a tourist destination and thereby create growth in the Danish tourism industry, were not to be governmental. The Ministry's role was contemplated by the enacting legislation and the Articles and was supervisory. It largely derived from its financial interest in the operation of the Respondent, together with its general interest in the promotion of tourism as an industry in Denmark. For state immunity to apply, that is not enough. To paraphrase Lord Wilberforce, what is done by the separate entity must be something which possesses the character of a governmental act as opposed to an act which any private citizen can perform.

92. I have noted the fact that the Respondent's original functions had been reviewed and changed to an extent, by the VisitDenmark Act, which clearly set out to remove the regulatory, or governmental functions, (which might possibly have been some limited exercise of sovereign authority), and pass those functions back to the Ministry. To that extent, it seems clear that the intention and consequence of the Act was that since December 2010, the Respondent was only carrying out activities in the nature of jura gestioni and not activities which fell within the classification of sovereign authority. Moreover, there was no evidence before me to show that the Claimant was ever significantly engaged in the activities which might have been regulatory.

93. The Respondent, in the written submissions, says the Respondent's purpose was to promote growth in the Danish economy and that was something only a State would do. The Respondent refers to the reference in the commentary by O'Keefe and Tams, which I have already referred to, but as I have noted, that reference to state tourism boards was not a general suggestion they would be covered but that they could be in certain circumstances.

94. Lord Sumption makes clear that, as the concepts behind the legislation developed, governments around the world had recognised that the activities of sovereign States have developed well beyond those original activities which were thought properly to engage sovereign immunity, now state immunity. As such Lord Sumption records, there was a move, in which a distinction was made between activities which should be protected by State Immunity and those which should not, so that ordinary citizens could properly enter into contracts with the State and have recourse to the Courts.

95. The activities of many States are mostly growing, and many States take increasingly active interest in many areas of the economy in their own countries and the interaction between different countries. They do that in multiple ways, not just through direct governmental activity. They sponsor

other entities, which are often referred to in the UK as quangos. They provide money to charities. They do a great deal of other activities.

96. The case law repeatedly refers to the distinction which has to be drawn between the activities of the State, which are matters of sovereign authority, where the history of sovereign authority quite rightly protects those activities from litigation in other countries, and on the other hand, other activities where the entity, particularly an independent separate entity, must be capable of answering in a local Court. The distinction which flows through all of the cases is that the sovereign immunity, or state immunity arises, when there is something that only a State could do, as for example was the case when an airline was used to deport individuals. The deportation was an act of the State.

97. The Respondent referred to the Italian cases of Canada v Cargnello Decision number 4017/1998 and Perrini v Academie de France, Decision number 5126/1994, by way of examples when similar situations had been held to be protected by sovereign immunity. Neither case is binding on me and both depend on their own facts. I do not believe they are relevant to the particular case in question. In Cargnello, the individual worked for the General Consulate of Canada in Milan and despite arguing that his functions fell outside the range of duties which should be protected, it was held that the functions in question were contemplated as consular functions by the Italian legislation enacting Article 5 of the Vienna Convention on Consulate Relations 1963. In Perrini, the individual worked for the Academie Francaise, which was an institution which the Italian government had formally agreed to recognise as an establishment of high culture. In this case, the Italian courts clearly took into consideration the Franco-Italian Cultural agreement which had been implemented into law. There is nothing of that kind in this case. Furthermore the decision in Benkharbouche shows the Supreme Court takes a slightly different approach in any event.

98. In this case, I must consider if the Respondent's activities are those of a State. Liaison with various entities with a view to the promotion of Denmark as a locality for tourism, and the analysis of various statistics, is not an activity which only a State could do. Attending at certain meetings such as the meeting with Chinese officials to try to persuade them to introduce direct flights, is again, not an activity which only a State would do. A State would be likely to have an interest in the outcome but other players could well do the same thing. This is effectively acknowledged by O'Keefe and Tams in that they refer to State tourism boards being potentially covered by state immunity in certain circumstances, but it is clear they do not mean such an entity would be covered as a matter of routine. I do not accept that the promotion of growth in an industry is something only a State would do, or that it is inherently a sovereign act. Promotion of tourism can be done by other entities, such as a

trade organisation or indeed a commercial airline. A trade organisation may or may not receive government funds, but its activities are going to involve much the same activities as the Respondent, involving an analysis of the industry and of the opportunities and an analysis of where it is possible to expand or promote it, together with some proposals or initiatives to do the same. The fact that the Respondent received some, or even most, of its funding direct from the Danish government (not all) and that the Danish government took an active interest in it and supervised it, does not alter the fact that its activities were primarily private in character, and capable of being carried out by a private entity. In all the circumstances the Respondent's assertion of state immunity must fail.

99. I have been asked to go beyond that and to consider the position on the rest of the legislation namely s.4(2)(b) and 4(c) and the implications of s.44 in case I am wrong in my first findings. In the light of this finding, it is not necessary for me to make any further determination, but as requested I have considered the remaining issues, although I have not determined all of them, as it is not necessary for me to do so and I am not satisfied that it is reasonable to expect me to do so, as I explain below.

<u>Which Contract applied at the time and was it an amendment or a stand-alone contract so that section 4(2)(b) was engaged?</u>

100. Section 4(2)(b) arises where there is immunity in the first instance, which is removed by s.4(1) because of the fact the proceedings relate to a contract of employment and the work is to be wholly or part performed in the United Kingdom. However, immunity is effectively reinstated where, at the time when the contract was made, the individual was neither a national of the United Kingdom or habitually resident there.

101. The Claimant argues this applies to him because the third contract was a stand-alone contract which replaced the previous contracts and meets the criteria. The Claimant's argument is that the second and third contracts entirely replace the previous contract and that because, by the time of the third contract, if not before, the Claimant was resident habitually in the United Kingdom this section cannot apply to him. He relies on the word "replaced" in the translation from the original. The Respondent says this is a nonsense and that the contracts are a series of amendments and the date of entry into the first contract is the relevant date at which time the parties agree the Claimant was neither a national of the United Kingdom nor habitually resident there.

102. I have given this argument careful thought because the word "replaced" is similar to the word "substitute". It is common for English contracts to include clauses that substitute a new version of the contract for the old. Those words

operate in practice, not to create an entirely new contract, but rather to amend the terms of the original contract so that the new document is the only source of reference, rather than the old combined with the new. However, I also bear in mind that the reason for this is that the statutory provisions in the Employment Rights Act 1996, which provide continuity of employment, render the implications of any new contract largely irrelevant. They mean that in practice, the new contract operates only as an amendment. It is therefore highly attractive to an English employment lawyer to view the series of contracts as amounting to a series of variations. That should not, however, be a reason for ignoring the legal implications of a new contract, if there is one. Indeed, that may be to muddle the impact of the continuity provisions of the Employment Rights Act with the reality, which is that the parties chose to enter into a new contract. The contract which was terminated was the third contract. That contract was made as a full contract setting out all of its terms and specifically intended to be a stand-alone contract. It was entered into when the Claimant was habitually resident in the United Kingdom, as the parties agree. In the circumstances I am satisfied that the Third Contract must be considered as the contract for the purposes of subsection 4(2)(b and that its provisions do not apply to re-instate immunity.

103. However, I note that the proper interpretation of the contract falls to be determined under Danish law. I was given no information about the implications, under Danish law, of the key wording, so my interpretation is based on my experience of English law and my assumption that the statute would view the contract in the same way it might view any series of contracts in another commercial sphere. If Danish law was to envisage a different interpretation, my assessment could be wrong.

Was there a written agreement not to litigate in the UK which meets the criteria for section 4(2)(c)?

104. The next question is whether s 4(2)(c) applies. This is another exception to section 4(1) which provides that 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. The third exception is that the parties to the contract have otherwise agreed in writing.

105. The Claimant disputes the Respondent's argument that the choice of law clause at clause 20, and the provision requiring Copenhagen City Court to be the proper venue for any disputes arising out of this employment contract, are sufficient to remove the exception from State Immunity with regard to contracts of employment. The Claimant says the clause is not sufficiently clear and cannot be held to have this effect. The Respondent says it does and the

Respondent relies upon the European convention on State Immunity and the explanatory notes.

106. I remind myself that the relevant provision in the contract reads as follows;

> "The parties have agreed that the Copenhagen City Court – and the usual appeals procedure – will be the proper venue for any disputes arising out of this employment contract."

107. The Claimant's argument is based on the general expectation in employment law, that clauses which impact on an individual, and on their rights, should be clearly explained so that an individual could understand them. Wording which is phrased in such a vague manner as to be beyond the comprehension of an ordinary individual, is often invalid, particularly where the contract may not otherwise have the effect it might at first reading be thought to have.

108. The Respondent has referred to the explanatory note to the European Convention on State Immunity which states that paragraph 2 subparagraph c of Article 5 enables a contracting state to invoke immunity where the contract of employment contains a clause in writing providing for the settlement of disputes by a court other than that of the state. It also says that say exclusive jurisdiction is not exclusive in terms of the state's laws if resort may be had to arbitration. The Claimant says this commentary is not binding.

109. My role is to interpret the facts of this case in the light of the State Immunity Act and with the benefit of guidance in case law. The wording of the State Immunity Act is such that the parties have to have agreed in writing otherwise than the requirement that the employer is immune as regards proceedings relating to a contract of employment. The Claimant would have understood at the time when the contract was entered into that normally any disputes arising out of the contract would be resolved in the Denmark City Court. However, the clause did not set out that the Respondent, was to have the benefit of immunity, regardless of the provisions of clause 4(1) or that the Copenhagen City Court was to have exclusive jurisdiction.

110. I have carefully considered this position. In the circumstances in question, the clause did not go so far as to amount to an agreement otherwise, meaning an agreement that the state would be immune regardless of the fact that the proceedings relate to a contract of employment and the work was to be performed in the United Kingdom. I have taken account of the Respondent's submissions about the effect of the European Convention and the purpose of the State Immunity Act. I have read the case of Duarte v The Black and Decker

Corporation and Black and Decker Europe [2007] EWHC 2720 QB. The commentary is non-binding as the Claimant says. The wording in Duarte was obiter and the main thrust of the case was about restrictive covenants. In all the circumstances, I must look at the ordinary and natural meaning of the words. I do not think that clause 20 is clear enough to meet the requirement of subsection 4(2)(c). It does not amount to an agreement to reinstate the immunity which was removed by section 4(1).

Section 4(4) – Requirement for proceedings to be brought before a court in the United Kingdom

111. I am asked to look at s.4(4) of the Act. This says that s.4(2)(c) does not exclude the application of the general exclusion on employment cases where the law of the United Kingdom requires the proceedings to be brought before a Court in the United Kingdom. I have found that section 4(2)(c) is not applicable in this case, but if I am wrong in that, section 4(4) could still apply to entitle the Claimant to pursue his claim.

112. I am faced with two opposing arguments. The Respondent says that if this subsection were to have the effect of excluding employment tribunal claims, i.e. claims for which the only forum provided is the Employment Tribunal, it would have very limited effect. I am also told that as arbitration is an option, the clause cannot have that effect.

113. First, I have to consider whether section 4(4) appears to be engaged in that I have to ask myself if the law of the United Kingdom requires the proceedings to be brought before a court of the United Kingdom.

114. The claims in question are first unfair dismissal and secondly age discrimination. Both are claims which arise under the statutory provisions of the relevant acts and both expressly confer jurisdiction on the Employment Tribunals and, in some circumstances, the county courts.

115. I have to disagree with the Respondent's assertion that if section 4(4) bore the meaning asserted by the Claimant, section 4(2)(c) would be of little or no effect, because there are clearly claims which fall outside the Employment Tribunal's jurisdiction, such as restrictive covenant claims.

116. Additionally, this subsection recognises there could be some claims which can only be brought in the courts of the United Kingdom and the question which arises in my mind is the opposite of the question raised by the Respondent. If this was not to refer to matters such as employment tribunal claims, what could it possibly refer to?

117. There was no expert evidence before me that the Claimant's claims could be brought in the Danish courts. Without that, I cannot assume the Respondent is right. I understand the Respondent's submissions about the effect of the various Conventions. However, my view is that this question should be left to one side, as it is not necessary to determine it, but if it becomes necessary, the parties must attend with expert evidence to explain whether it is the case that the Copenhagen City Court would accept the Claimant's claims and apply the relevant legislation to them. Without that, I would have to assume that the section is specifically addressing the mandatory provisions of English statutory employment law including unfair dismissal and discrimination in employment, which have been raised in these proceedings.

Human Rights law – would the Claimant be left with no access to a court if he is not allowed to bring his claim in this tribunal

118. This issue raises similar questions to the previous one. On the face of it, and following Benkharbouche, it would seem so. The Respondent says the Claimant would be able to go to the Copenhagen City Court. The Claimant says he doubts it. Without expert evidence on the point, I cannot decide it.

Generally

119. Finally, the Respondent says it would be disadvantaged by having to come to the Employment Tribunal in the UK as so many documents would need translation and the Danish witnesses would have to come to London. I reject that. The Respondent has already shown it can translate key documents. Additionally, the Tribunal has facilities for evidence to be given by video.

120. Since the Tribunal has jurisdiction, the matter will be listed for a Preliminary Hearing at which case management directions can be given for the future conduct of the matter.

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Employment Judge Walker

Dated: 11 June 2019

Judgment and Reasons sent to the parties on:

12 June 2019
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For the Tribunal Office