

IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO.: 6/4-587/19

BETWEEN

SUBRAMANIAM A/L LETCHIMANAN

AND

EMBASSY OF THE UNITED STATES OF AMERICA

AWARD NO.: 1022 OF 2023

Before : Y.A. Tuan Amrik Singh - Chairman (Sitting Alone)

Venue : Industrial Court Malaysia, Kuala Lumpur

Date of Reference : 19.04.2019

Dates of Mention : 24.05.2019, 17.06.2019, 20.06.2019, 09.07.2019, 14.08.2019, 10.09.2019, 09.10.2019, 14.01.2020, 08.04.2021, 27.07.2022, 15.09.2022, 27.10.2022, 11.11.2022 & 09.02.2023

Dates of Hearing : 16.02.2023 & 17.02.2023

**Representation : Mr. Rangunath Kesavan with Mr Tai Yong Fung
Messrs. Kesavan
Counsel for the Claimant**

**Mr. Amardeep Singh Toor with Ms. Summer Chong Yue Han
Messrs. Lee Hishamuddin Allen & Gledhill
Counsel for the Company**

REFERENCE:

This is a reference made under section 20(3) of the Industrial Relations Act 1967 (the Act) arising out of the dismissal of **Subramaniam A/L Letchimanan** (hereinafter referred to as "*the Claimant*") by **Embassy of the United States of America** (hereinafter referred to as "*US Embassy*") on 4th April 2008.

AWARD

Preliminary Facts

- [1] As a Sovereign State, the United States of America established a diplomatic mission, the US Embassy in Malaysia located at 376, Jalan Tun Razak, 50400 Kuala Lumpur.

- [2] The Claimant, a citizen of his home Country, Malaysia, commenced employment with the US Embassy on 20.09.1998 as a security guard known as Local Guard Force (LGF) which is one of the components of the US Embassy's security system to act as the first line of security and protection at the US Embassy.

- [3]** The Claimant was terminated from his employment with the US Embassy on 04.04.2008 and subsequently filed a representation under s 20(1) of the Act with the Director General of Industrial Relations ('DGIR') at Kuala Lumpur on 23.05.2008.
- [4]** After a long lapse of time, some ten (10) years later from the date of the Claimant's dismissal, his representation was referred by the Human Resources Minister to the Industrial Court for adjudication by a reference dated 22.04.2019.
- [5]** Strongly relying on its immunity as a foreign state, the US Embassy filed an application for judicial review and was allowed by the High Court on 08.01.2020. The High Court held that the US Embassy in exercise of its sovereign authority, is immune from the jurisdiction of the Industrial Court by virtue of the doctrine of restrictive immunity.
- [6]** The victory of the US Embassy in her judicial review application at the High Court was then challenged by the Claimant and the Honourable Minister in the Court of Appeal which allowed the appeal and held that the issue of the dismissal of the Claimant as a security guard that involves the exercise of a sovereign act would depend on the finding of facts with respect to the nature of the

Claimant's employment and is best undertaken by the Industrial Court.

[7] The Court of Appeal's decision was appealed by the US Embassy to the Federal Court and was dismissed, bringing the case to the forefront of the corridors of the Industrial Court.

Brief Facts

[8] The Claimant signed the "U.S Department of State Agreement with Foreign National for Personal Services (Guard)" on 28.09.1998 containing the terms of his employment with the US Embassy ("the Employment Contract"). By virtue of the Employment contract, the Claimant was recruited in the position of guard providing the first line of security and protection. At the time of his dismissal, the Claimant held the same position and his last drawn basic salary was RM2,000.00 a month.

[9] As a member of the LGF, the Claimant provided the first line of security and protection to the US Embassy. The other components of the security system consists of the Royal Malaysia Police (RMP) that provides the second line of security and the third line of security

is the United States' very own Marine Security Guards (MSG) assigned to the Embassy.

The Claimant's Pleaded Case

[10] On 04.04.2008, almost 10 years into his service with the US Embassy, the Claimant received a phone call from the Assistant Shift Commander, one Mr. Darshan Singh who verbally informed the Claimant that his service as a security guard had been terminated. No reason for the termination was given. On 07.04.2008, when the Claimant went back to work, at the guard house of the US Embassy, one Mr. Segaran, an Assistant Guard Commander greeted the Claimant to demand for the equipment and his access card was confiscated by another officer, the Assistant Regional Security Officer. Shortly thereafter, the Claimant was met by the Assistant Admin Manager, one Mr. Yow Yuen Thiam ("Mr. Yow") who told the Claimant that his job as a security guard had been terminated with immediate effect. Despite asking for the reason of his sudden termination, no reason was given to the Claimant.

[11] On 08.04.2008, the Claimant had again gone to meet Mr. Yow to seek the reason for his dismissal but was told that he did not know what the reason was. This prompted the Claimant to issue a letter to the Embassy to seek for an explanation for his dismissal but was met with no reply.

[12] On 04.04.2008, Mr. Eugene Kim, the Assistant Regional Security Officer at that time (COW 2) issued an unclassified Memorandum” titled “*Request for Separation for Cause – Guard Subramaniam Letchimanan Local Guard Force (LGF)*” to Mr. Robert Kuntz, the Management Counsellor containing the following allegations:

- (i) that the Claimant had continuously disregarded the Local Guard Force policies and procedures;
- (ii) that the Claimant had purportedly taken sick leave on 02.04.2008 without giving any notice prior to his work shift;
and
- (iii) that the Claimant was reprimanded for similar infractions on 22.12.2004 and 31.01.2005.

[13] Subsequently, on 09.04.2008, Mr. Yow had sent an email to Mr. Robert Kuntz containing several acts of misconducts against the

Claimant. The Claimant was not informed of any of the reasons mentioned in the Memorandum and/or email at the time or prior to his dismissal. He knew of the contents of the Memorandum and/or the email for the first time when the US Embassy exhibited the email in the affidavit in support of the application for judicial review proceedings in the High Court.

[14] The email is reproduced herein below for ease of reference.

This email is UNCLASSIFIED _____
From: Yow, Yuen Thiam
Sent: Wednesday, April 09, 2008 10:11 AM
To: Kuntz, Robert R
Cc: Suppiah, Shangeeta X; Bateman-John, Adrian Subject:
RE: Subramaniam

Rob,

Info as requested;

DOB : 06/18/98
EOD : 09/20/98

Date of event :

08/21/99	Counseled by FN supervisor for failing to attend training
12/13/99	Recommended by ARSO and R\$O for termination for negligence in operating the delta barrier causing damage to employee's vehicle - termination was not carried out after the case was reviewed by the then Management Counselor and the DCM
10/12/04	Counseled for unacceptable behavior
12/19/04	Counseled for absence from duty when the employee was expected to report for work after attending to a family emergency
01/08/05	Counseled for absence from duty without proper notification
02/20/07	Counseled for failure to properly carry out rover guard duty
03/02/07	Record of failure to properly carry out rover guard duty
03/04/07	Counseled for failure to properly carry out rover guard duty
04/06/07	Counseled for reporting late to work
04/17/07	Counseled for failure to follow standing instructions
06.01/07	Counseled for negligence in operating the delta barrier resulting in damage to embassy official vehicle
07/27/07	Counseled for failure to properly carry out rover guard duty
04/02/08	Failure to provide advance notice for being unable to report for duty because of illness

[15] The Claimant contends that the documents alleging his purported misconducts were afterthoughts. The Claimant denied the allegations stated in the memorandum as he had given a copy of the medical certificate on 02.04.2008 at 7.25p.m. which was prior to his night shift duty to one Mr. Prakash, the Assistant Chief Commander. The Claimant contends that Mr. Prakash had notified his superior and recorded the Claimant's sick leave in a logbook and allowed him to go on sick leave.

[16] The Claimant contends that his dismissal was unlawful and without just cause or excuse and is tainted with bad faith on reasons:

- (a) that no written notice and/or written explanation for his dismissal was received by the Claimant;
- (b) no domestic inquiry was carried out against the Claimant,
- (c) the Claimant was informed of his dismissal by a phone call on 04.04.2008 and verbally on 07.04.2008 when the Claimant went to work,
- (d) no explanation was given to the Claimant's letter received by the USA Embassy on 08.04.2008,

- (e) no opportunity was given to the Claimant to rebut any allegations or misunderstanding made against him which caused the US Embassy to dismiss him as a security guard,
- (f) the US Embassy failed to comply with the terms of the Claimant's employment contract, employee handbook and/or the standard industrial practice in dismissing the Claimant.

[17] The Claimant prays that the Claimant be reinstated to his former position without any loss of benefits (monetary or otherwise) together with arrears of salary and if it is not appropriate to be granted so, the Claimant be compensated for the unlawful dismissal from 07.04.2008 until the date of this award.

The United States Embassy's Case

[18] In its statement in reply, the US Embassy asserts that her Statement in Reply is solely for the purpose of asserting the facts and the grounds for the applicability of the doctrine of sovereign immunity and is immune from the jurisdiction of this Court with regard to the Claimant's section 20 claim.

[19] It is the pleaded case of the US Embassy that, without submitting to the jurisdiction of the Industrial Court to hear and decide on the merits of the Claimant's section 20 claim, sovereign immunity applied to the said claim.

[20] The functions of the US Embassy which established a diplomatic mission includes representing the United States in Malaysia, protecting the interests of the United States and of her nationals within the limits permitted by international law in Malaysia, negotiating with the Government of Malaysia, ascertaining by all lawful means conditions and development in Malaysia to report thereon to the Government of the United States and promoting friendly relations between the United States and Malaysia.

[21] The employment of staff, the exercise of disciplinary authority over them, their tenure and cessation of employment on the ground of *inter alia* of misconduct and/or reinstatement after being dismissed by the US Embassy constitute the internal management of the US Embassy in Kuala Lumpur.

[22] The Employment Contract signed by the Claimant on 28.09.1998 was supplemented by a document titled “Conditions of Employment (Guard Services Only)” issued to the Claimant on 26.01.2002.

[23] The LGF is a specifically constituted uniformed security force established for the US Embassy to carry out specific security functions both during their normal course of duty and emergency. They are trained in procedures and protocols specific to the US Embassy’s security and protection and are required to attend further training as required. They are armed with batons and are authorised to use force when necessary, consistent with the United States’ Department policies and LGF duties. The Assistant Regional Security Officer serves as the chain of command for the unit.

[24] The LGF acts as an early warning signal to the MSG on duty in Malaysia and alerts them to situations in which unauthorised or dangerous persons may attempt to enter the Embassy compound. The LGF works with the RMP by regularly interacting and exchanging information with police officers of the RMP specifically assigned to the USA Embassy protection.

[25] The US Embassy contends that the Claimant's undisputed basic functions as a guard of the LGF were as follows:

- (a) perform protective guard services to safeguard all employees, visitors, property and equipment of the United States' Government from violent attacks, demonstrations, intruders and theft;
- (b) conduct inspections focusing on access control at all the United States' Government facilities and residences; and
- (c) respond to routine and emergency occurrences at the United States' Government facilities and residences to eliminate any situation which threatens the safety or security of her employees, facilities or residences.

[26] The duties of the Claimant as a member of the LGF included:

- (i) providing early warnings of impending danger to the US Embassy's employees and assisting local law enforcement authorities, such as the RMP;
- (ii) detecting, recording and reporting incidences or occurrences of hostile surveillance directed against the US Embassy's facilities and employees;

- (iii) making and maintaining the proper log entries for visitors and other persons who enter the Embassy's facilities, issuing visitors' passes, screening all visitors thoroughly, physically searching visitors and packages/briefcases, and operation of a Walk through Metal Detector.
- (iv) conducting rover duties and immediately report any unusual incident to their chain of command;
- (v) patrolling the grounds of the Embassy's compound, Ambassador's residence or other residences on a regular scheduled basis utilising a watchman's clock and key stations to verify performance.
- (vi) controlling vehicle access to the compound, performing vehicular searches at all location at the Embassy, conduct screening tests on all packages, including a thorough bomb search to ensure any packages or other materials in their possession do not contain weapons, explosives, or other items prohibited from entry into the mission.
- (v) maintaining order in waiting lines as visitors wait to enter the Embassy and escorting visitors.
- (vi) monitoring and properly utilizing all security alarm systems and CCTV equipment and to be prepared of all activation procedures, respond to all alarm activations as necessary

and interact with local law enforcement authorities and Embassy employees to ensure appropriate response to residential alarms in the event of a fire, bomb threat or hostile action.

[27] The Claimant was dismissed for misconducts, particulars of which were stated in the Unclassified Memorandum dated 04.04.2008 and the email correspondence between Mr. Robert Kuntz and Mr. Yow Yuen Thiam dated 08.04.2008 and 09.04.2008.

[28] It was pleaded that the US Embassy is immune from the jurisdiction of the Industrial Court in respect of the Claimant's Section 20 Claim on one or the other or both the bases. The first is the relevant act upon which the Claimant's section 20 claim was based considered in its whole context ie. firstly it arose from the act of the US Embassy dismissing him for misconduct; (b) his dismissal was without just cause or excuse and (c) he seek for reinstatement to his former position as security guard. The second basis is that the nature of the functions that the Claimant had been employed to perform.

[29] The US Embassy further pleaded that the act of the US Embassy is fundamentally a dispute directly arising out of an act within the sphere of governmental or sovereign activity undertaken in the course of the exercise of the United States' prerogative as a sovereign state and is not a dispute which arose out of the trading or commercial activity. Adjudication of the Claimant's unfair dismissal claim would entail an inquiry into and audit of the United States's use of the managerial prerogative as well as a determination of whether or not the United States ought to have continued to employ the Claimant. The US Embassy contends that this Court would need to investigate and make these determination in order to determine whether the Claimant's dismissal was justified or not. This Court will have to inquire into and determine whether the Claimant had the disciplinary rules, procedures and protocols of the management of discipline of staff of the Embassy, the standard of conduct and behaviour expected of staff of the US Embassy all of which are matters within the governmental authority.

[30] With regard to the first basis, on the applicability of sovereign immunity, US Embassy relied on Article 11 para 2 (c) of the United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004.

[31] The US Embassy is also immune under the second basis namely for the following reasons:

- (a) the maintenance of the security of a diplomatic mission is an inherently governmental or sovereign act and not a trading or commercial activity;
- (b) the Claimant, as the US Embassy's LGF was employed to perform security duties and functions are necessarily engaged and involved in such governmental or sovereign activity;
- (c) the duties and functions of the LGF by their very nature undertaken in the interest of the United States as a sovereign state;
- (d) these responsibilities and their duties and functions fall squarely within the core functions of the Embassy articulated in Article 3(1) and Article 22 of the Vienna Convention on Diplomatic Relations 1961 respectively; The Embassy also relied on Article 11 para 2 (c).

[32] It was pleaded that the Claimant's prayer for relief must fail as the merits of his section 20 claim is not within the jurisdiction of this Court and that it is settled law that the question whether sovereign

immunity applies to the Claimant's claim under section 20 of the Act should be decided in *limine litis* as a preliminary issue at the very outset.

[33] The US Embassy asserts that the Claimant's claim is de hors the jurisdiction of this Industrial Court as the doctrine of restrictive sovereignty applies.

[34] The Court Of Appeal in allowing the Claimant's appeal (see **Subramaniam a/l Letchimanan v The United States of America and another appeal [2021] 5 MLJ 612**) and set aside the High Court decision held that the nature of the Claimant's job and his dismissal were question of fact that had to be decided by the Industrial Court and it was for the Industrial Court to decide whether the restrictive doctrine of sovereign immunity applies in the case and consequently, whether or not the Industrial Court had jurisdiction to determine the Claimant's claim by virtue of the Minister's reference. The Federal Court affirm the Court Of Appeal's decision.

[35] In view of the decision of the Court Of Appeal and the Federal Court, the primary issue to be determined in this case is :

- (i) Whether the restrictive sovereign immunity enjoys by the USA Embassy applies to the Claimant's case.

[36] If this Court finds that the doctrine of sovereign immunity does apply to the US Embassy in the Claimant's case, then the Industrial Court would no longer need to proceed any further with the issue whether the dismissal of the Claimant was without just cause or excuse. However, if the Court concludes that the US Embassy has no immunity, the Court would proceed to determine whether the dismissal was with or without just cause or excuse.

[37] The Court of Appeal in Subramaniam's case (*supra*) had the opportunity to address whether the principle of restrictive immunity applied in the context of the dismissal (*of the same Claimant*) in its judgment when the Claimant appealed to the Court of Appeal against the High Court decision that decided in favour of the United States of America that the doctrine of sovereign immunity was applicable. Lee Swee Seng JCA in the Court Of Appeal judgment reported as ***Subramaniam a/l Letchimanan v The United States of America and another appeal [2021] 5 MLJ 627*** stated that in Malaysia it is the doctrine of restrictive immunity rather than absolute immunity that applies as settled by the Supreme Court

case of *Commonwealth of Australia v Midford (Malaysia) Sdn Bhd* [1990] 1 MLJ 475. (See also *Hii Yii Ann v Deputy Commissioner of taxation of the Commonwealth of Australia* [2018] 7 MLJ 393)

[38] The Court of Appeal further expounded on the application on the doctrine itself when it held that :

“[43]in the case of restrictive immunity, it is not all acts of the sovereign foreign state that is immune from legal action but only those acts that are primarily and peculiarly governmental or diplomatic in nature and character, or for example touching as it is on the legislative or international transactions of a foreign government, or the policy of its Executive”.

[39] The doctrine of absolute immunity has been supplanted by restrictive immunity as it was seen to be no longer appropriate for a State to avail itself of absolute immunity from adjudication where it acts in a similar position to a private entity.

[40] The limit of the applicability of the restrictive immunity was expounded by the Court of Appeal in its judgment in Subramaniam's case (*supra*) where it has been stated that:

“[48] Actions of foreign State that are of a pure commercial or private law nature are not immune from legal challenge by those parties affected by it, for it does not offend the dignity of the foreign State and indeed it behoves all foreign States to comply with the law of the jurisdiction of the receiving State as promoting and not undermining the rule of law and the due deference granted to each other's legal system which may well differ between one State and another though the norms of justice, fairness and reasonableness are universal”.

[41] In the application of restrictive immunity doctrine, a distinction is drawn between acts *jure imperii* and acts *jure gestionis*. In the former, the acts must be of a governmental or sovereign nature which no private person would ordinarily perform whereas in the latter, the acts could be equally performed by private persons. This distinction between acts *jure imperii* and acts *jure gestionis* has been gradually applied into the area of employment with regard to contracts of employment where an individual (private person) sues

a foreign State that employed the individual to exercise certain functions within the territory or jurisdiction of the State of the forum.

[42] This distinction which the restrictive immunity is based on was affirmed by the Court of Appeal in the Subramaniam's case (supra) where the following was stated :

"[52] We agree with learned counsel for the workman that, in essence, the restrictive doctrine of sovereign immunity is a judicial recognition that there are certain private acts of a State are such that by the very nature of the act itself, the state's dignity will not be challenged even when the very act is subjected to review or adjudication by a local court.

[54] Here the act of dismissal of a security guard has to be considered by the Industrial Court as to whether it is an act falling within an act of sovereignty or government act of the State such that for the Industrial Court to adjudicate it would be an inference with its sovereign function.

Continuing, in para [55] of the judgment, the Court of Appeal stated as follows:

“[55] In summary then the nature of the dispute is employment and the applicable law is that of private law particularly that of employment law which is very much contract law and the relationship between the parties is that of an employer-employee. On the surface at least, the act of dismissal is bereft of the element of legislative or international transactions of a foreign government or the policy of its executive.

[56] Whatever it is, the evidence could only be more properly adduced at the Industrial Court where the matter would be heard and parties may cross-examine each other on the exact nature of the workman’s employment and the act of dismissal. What we have in the judicial review application are averments which are being contradicted by the workman with respect to the nature of his employment or even the act of his dismissal as falling within or more in the nature of a private employment contract and an alleged breach of its terms and the applicability of the IRA to determine whether the dismissal is for a just cause and excuse”.

[43] Therefore, it is settled law that whether the US Embassy is entitled to immunity, would depend primarily on the exact nature of the

Claimant's employment and the act of his dismissal which falls squarely within the consideration of the Industrial Court.

[44] The Federal Court in dismissing the US Embassy's appeal held that:

“(2)Whether or not the restrictive doctrine of immunity applied depended on the facts and circumstances of a given case. The IC had the duty to carry out a fact-finding to determine if the immunity applied to exclude its jurisdiction.”

“(3)Whether immunity applied in the present case depended largely on the determination and findings of facts of the precise nature, duties and job scope of the R2. The IC was the proper forum to decide that issue as well as the issue of R2's dismissal. The appellant ought to lead evidence as to whether what R2 performed had anything to do with functions related to the exercise of sovereignty of the appellants.”

[45] Without a proper evaluation and examination in relation to the employment relationship of the Claimant with the Embassy, the duties and functions of the Claimant, and the act of dismissal, it

remain unclear and unsubstantiated if the US Embassy is immune from the Claimant's action.

The Court's Direction

[46] For the US Embassy, two witnesses gave evidence. They are Christopher George Pixley (COW 1) First Secretary, Counsellor for Management Affairs of the US Embassy in Kuala Lumpur and Eugene Kim (COW 2), Supervisory Special Agent with the US Department of State.

[47] At the outset, Mr. Amardeep Singh, learned counsel for US Embassy intimated to this Court that in this proceedings, the US Embassy is only to participate on the question of her sovereign immunity and not on the merits of the case. No witnesses statement was filed by the US Embassy. However, US Embassy's counsel consented to the witnesses to be cross examined on the affidavit evidence of COW 1 (affirmed on 20.01.2023) and COW 2 (affirmed on 23.12.2022) filed in support of a Notice of Application by the US Embassy to strike off the Claimant's section 20 case. The US Embassy's counsel further brought the Court's attention to the Diplomatic Notes issued separately under the name of COW1 and

COW 2 which was relied to record the refusal to answer questions post on merits. The Diplomatic Notes indicate that COW 1 and COW 2 accredited as a Diplomatic Agents in Malaysia are not obliged to give evidence as witnesses and the United States expressly waives its immunity as for COW 1 and COW 2 for the limited purpose of permitting each of them to provide affidavits and to testify before the Courts of Malaysia regarding their knowledge related to this matter on only the issue of sovereign immunity.

[48] The Diplomatic Notes further stipulate that the United States is not waiving the testimonial immunity of COW 1 and COW 2 for the purpose of allowing them to answer questions regarding the merits of the Claimant's employment termination claim.

[49] That said, the Court had on 09.02.2023, during the case management, informed the parties that the Court shall hear the Claimant's case on merits as well as the US Embassy's application to strike off the matter on the dates fixed for the trial on 16.02.2023 and 17.02.2023 and parties were required to complete the filing of their respective affidavits. This approach was taken by this Court after a brief persuasive oral submission made by the counsels to impress the Court to accept one's approach over the other. The US

Embassy's counsel (Mr. Lim Heng Seng) requested the Court to have the application on the issue of sovereign immunity be heard and determined first before proceeding to hear the proceedings on merits. The Claimant's counsel on the other hand requested the Court to hear the application and the merits of the case simultaneously. The Court decided in favour of the Claimant's counsel on reasons that to this Court, proceeding to hear the merits of the case would put a finality at the Industrial Court stage, at least. On the other hand, to prioritize and have the Notice of Application heard first, would result in another long wait for the Claimant to have his claim heard on merits at the Industrial Court, in the event decision of the Application goes on multiple appeal. Hearing the application first and adjourning the trial until all avenues to appeal against the decision of the Application has been exhausted be it in favour of the Claimant or the US Embassy is definitely not in conformity with section 29(g) of the Act which stipulates as follows:

29. Power of the Court.

The Court may, in any proceedings before it -

- (g) generally direct and do all such things as are necessary or expedient for the expeditious determination of the matter before it.

Evaluation And Findings

[50] The Learned counsel for the Claimant submitted that the Claimant's job scope as an entry level security guard was to merely provide basic protective guard services at the US Embassy.

[51] The Claimant testimony was that he worked 4 days a week with no fixed working shift. His morning shift was from 7.00 a.m. to 7.00 p.m. while his night shift was from 7.00p.m. to 7.00 a.m. His shifts were determined by his Superiors and he would only be informed of his work schedule for a particular week after the schedule is posted on a notice board on weekly basis.

[52] The job scope of the Claimant involved guard mounting, recording the details of visitors and vehicles entering the Embassy and rover duties. During his shift, the Claimant will be assigned to different locations in the Embassy such as the gate entrance, parking lot or either rover duties in rotation every 2 hours.

[53] The Claimant testified that his duties at the gate entrance of the Embassy was to take down the details of the visitors and the number plates of vehicles in a physical logbook kept at the gate

entrance. On rover duties, the Claimant was required to go to the consulates' residence to carry out security checks. If at anytime, the gate to the consulate's residence is found to be left open, he will have to inform the consulate residing there and make an entry in the logbook kept at the post box of the residence. If there has been a break in at any residences, the Claimant was required to report the break in incident to his supervisors. He is not allowed to enter the residences at any time.

[54] The Claimant in his cross examination, agreed that part of his duties was to scan visitors and their bags to ensure no unauthorised or prohibited items are brought into the Embassy, such as weapons, to look for danger towards any employees of the Embassy. The Claimant stated that in doing so, he had to inform the shift commander so that the shift commander can take corrective measures and if necessary, such reporting to be done quickly and accurately. He further agreed that part of his duties further involves controlling vehicles and screening them using metal detectors and conduct screening test on all packages entering the Embassy. The Claimant agreed that all the functions he performed are not common of a security functions performed on a private property. The Claimant agreed that the security functions he performed at the

US Embassy is far more stringent than the security functions performed on any private property due to higher risk faced by the Embassy compared to any private property. He agreed that all the stringent measures described to him was of paramount importance to the United States and her Embassy. He agreed that the United States relied on him to carry out his security functions correctly and to his best abilities, the role in which he played was to protect the U.S. mission in Malaysia. When asked if the safety of the U.S mission in Malaysia will be jeopardized if the sovereignty of the U.S in Malaysia is affected, the Claimant said that he does not know. He then agreed that the U.S and its embassy placed a degree of trust and confidence on him to carry out his functions and his role which included bomb searches scanning for weapons in bags was an important role to ensure the safety of the employees of the Embassy. When asked by the learned counsel for the US Embassy that part of his job as the LGF was to protect the U.S citizens that are stationed in the Embassy, the Claimant answered that he only protect outside the compound. He further said that his reporting on any hostile surveillance are done either through phone calls or radios. He admitted that he was aware where the MSG were stationed and they are the last line of defence. He also agreed that he is aware how many LGF will be stationed at the entrance and

parking lots of the Embassy and which vehicles are allowed entry to the Embassy, the information of which is given to him on trust and confidence that he will not misuse them. He agreed that there is a degree of confidentiality to the information he had.

[55] The US Embassy's first witness, Christopher George Pixley (COW 1) in his evidence during cross examination stated that the Claimant, as a regular guard does not have access to correspondences between the United States and Kuala Lumpur. He claimed that some of the LGF are given email address but was not sure in the case of the Claimant.

[56] He further gave a brief explanation on the role of the 3rd line of security in the US Embassy, consisting of American citizens from the U.S. Marines who are stationed in the Embassy's compound and had wide access to the grounds of the Embassy. COW 1 agreed with the suggestion that there are different level of responsibilities between the LGF and the U.S. Marines. COW 1 also said that he don't think that the Claimant as the LGF had access to correspondences between the US Embassy in Kuala Lumpur and Washington. He disagreed that that the U.S. Marines have a greater responsible role to play in the security and protection of the

Embassy because the Marines are not posted at the initial point of entry and represent the very last core of defense. When asked if to dismiss the Claimant on grounds of misconduct and to not keep him in employment and in declining to reinstate him is a matter concerning the internal decision making and operations of her Embassy in Malaysia an exercise which is the prerogative of the United States as a sovereign state and the same exercise applies to every staff employed by the Embassy, COW 1 claimed that it applied also to a maid, cleaner, gardener, cook and driver and it does not matter if it is a menial job or a more complex job like the LGF's. To subsequent questions, COW 1 said that the rover duty entails doing inspection of the outer premises and the compound of any U.S. Embassy property and LGF do walk around the grounds, trying to identify vulnerabilities and trained to identify bombs. COW 1 claimed that he do not know if the Claimant was not authorised to enter the premises.

[57] The Embassy's second witness, Eugene Kim (COW 2) in his cross examination explained that his primary duties as the Assistant Regional Security Officer includes investigations, law enforcement liaison and security manager to the USA Embassy. COW 2 asserts that the LGF programme was his portfolio. He agreed that above

the security guard is the Assistant Shift Commander who is of Malaysian citizen and above the Assistant Shift Commander, is the Shift Commander who is also a Malaysian. COW 2 was involved in the hiring process of the LGF by posting advertisement. He agreed that the Claimant is trained on the job as he continue working but could not remember the actual details.

[58] COW 2 agreed that the Claimant is trained on the job as he continue working. He admitted that he would not know exactly if the Claimant had ever performed a supervisory role in his guard shift. As regard to whether the Claimant was given any access to the Ambassador's residence, COW 2 stated that generally no access is given but it depends on the circumstances and within the Embassy and Ambassador's offices, no access is granted to the Claimant. The Claimant also had no access to any diplomatic correspondence between Washington and Kuala Lumpur and neither has he been involved in meetings involving the Ambassador. COW 2 further said that the Claimant does not attend any security briefings with the Ambassador in relation to the US Embassy.

[59] In regard to the Employment Contract of the Claimant, COW 2 in his evidence stated that he does not know why no confidential clause was stipulated in the Employment Contract.

[60] He knows that the US Embassy had contributed EPF and Socso payments for the Claimant.

[61] In his re examination, COW 2 explained that the security clearance for LGF is carried out by the Foreign Service National Investigator who will contact the Royal Malaysia Police to determine if the Claimant had any kind of criminal record and once that is ascertained, the Investigator will interview friends or neighbours of the Claimant to determine the Claimant's suitability such as whether he gambles, untrustworthy or spendthrift. COW 2 explained that to determine his trustworthiness is significant because any LGF or employee of the USA Embassy should be trustworthy due to the expectation on them to maintain strict confidence in the people who visit the Embassy and the Ambassador and any kind of sensitive information.

[62] When asked to explain the significance of the Claimant's role in the structure of the LGF, COW 2 said that LGF controls access to the Embassy grounds, where they screen all visitors, ensure that no one without invitation will be able to get in the Embassy and interacts with the RMP.

[63] COW 2 further explained that if the LGF see 'anything', the LGF cannot make an arrest or put handcuffs on anyone outside the Embassy grounds and if someone is perceived to be a threat or causing a disruption, the LGF need to go and talk to the RMP. On the internal side, the LGF is responsible for the security of that area and they work closely under the direction of the Marine Security Guards to apprehend any unauthorised person in the Embassy ground itself.

[64] Based on the evidence of the Claimant, COW 1 and COW 2, it is the finding of fact by this Court that the Claimant's role did not involve verbal or written communication with any of the management team or officials of the Embassy on official reasons or anything related thereto and was not required to be involved in any official correspondences, meetings or discussions with any of the Embassy's officials or in house staff. The Claimant was not required

to communicate with higher level personnel by using electronic devices or by written correspondences. In fact, no any electronic devices such as laptop or mobile was afforded to the Claimant for purposes of carrying out his functions at the US Embassy.

[65] The Claimant was employed as a low ranking security guard and there is no evidence that his duties involve consular duties.

[66] The Claimant's Employment Contract with the US Embassy itself lends credence to the evidence he adduced in relation to his role and duties as the LGF. This Court agrees with the submission by the learned counsel for the Claimant that the Employment Contract does not contain any confidentiality clause to prevent the Claimant from disclosing any sensitive and/or confidential information which may affect the dignity of the United States or her Embassy for that matter. In other words, the nature of his employment had been so fashioned that it would not allow him to gain or possibly gain access to any confidential or classified information that the US Embassy would not expect of him even though he had access to the general compound of the Embassy in particular the specific locations where he had mounted guard over a period of 10 years while performance his functions.

[67] It is the Court's considered view that the Claimant only had access to pass the consulates' residences when involved in roving patrols and at other times was designated to specific locations to guard. When carrying out his duties as a security guard, the Claimant had to strictly comply with his shift schedule and the guard at the locations he was assigned too.

The Embassy's submission

[68] The learned counsel for the Embassy had referred to several authorities in support of their submission that the doctrine of restrictive sovereign immunity applies to the Claimant's claim in the Industrial Court. Some of the authorities are referred hereinafter. The case of ***Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor [1990] 1 MLJ 475*** was referred to where the apex Supreme Court held that restrictive sovereign immunity applied as :

“the acts of the two Australian customs officers considered in the whole context of this case could not be classified as ‘trading or commercial’.”

[69] It must be noted that in Midford's case (*supra*) the acts of the two Australian customs officers 'were that they had exercised the functions of the Australia Customs and it was then concluded that it could not be classed as *acta jure gestionis*, ie commercial in accordance with the acceptable international standards and were therefore *acta jure imperil*.

[70] With due respect to the learned counsel for the US Embassy, it is not difficult to comprehend that the nature of the Australian customs officers job functions are in no way similar to the functions and role the Claimant performed as a security guard as their role was purely one of governmental act.

[71] Learned counsel for the Embassy next refer this Court to the case of ***Benkhabrouche v Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs and others intervening) Janah v Libya (Secretary of State for Foreign and Commonwealth Affairs and other intervening) [2019] AC 777*** ("Benkharbouche") to submit that Benkharbouche is an explicit acknowledgment that beyond the consideration of the nature of the functions of an employee, the nature of the claim must be considered and may well be determinative in this regard. It was

further submitted that governmental and sovereign authority of a sovereign state with regard to the disciplinary management of her security staff and the unacceptability of investigations by the courts of a host country into disciplinary decisions made is a primary consideration in determining whether sovereign immunity applies to the Claimant's section 20 claim.

[72] With due respect, I find it difficult to accept the learned counsel's submission. It is undisputed that the Claimant was dismissed due to alleged misconduct. To claim that it would require the Court's investigation into the Embassy's disciplinary decisions is simply far fetched. The US Embassy had the option of relying on the governing Employment Act 1955 partly and/or established principles decided in Industrial Relations cases and not necessarily divulge her disciplinary management and decisions of her staff in so far as common breaches of employment terms and conditions are concerned. The claim by the Claimant would not bring into question the legislative and governmental transactions of the US which would offend the dignity of the United States. In fact, the US Embassy did not adduce evidence from which it could be inferred that any enquiry into the misconducts of the Claimant concerns the dissemination of confidential information of the sovereign state. To

get the Claimant to agree that he possessed some confidential information is not sufficient and to simply fit the Claimant's case into other precedents does not support the US Embassy's assertions that investigations by the Court into disciplinary decisions would offend her dignity.

[73] In fact in Benkharbouche's case, the Supreme Court held, in summary form, that :

"a.

b.

c. The employment of purely domestic staff in a diplomatic mission was not an inherently sovereign act and could not be other than a private act". (see pp 116-117 USA Bundle of Authorities Voume 3)

[74] The learned counsel for the Embassy had also referred this Court to more recent cases of ***Mrs A Webster v United States of America and Miss C Wright v United States of America [2022] EAT 92*** in which I find that the following paragraphs (United States BOA Volume 2 page 208) are equally important:

“12. The common law doctrine of state immunity was considered in **Holland v Lampen-Wolfe** [2000] 1 WLR 1573 in which Lord Clyde held at 1579 F to G:

“In relation to the common law as it has now developed the distinction has to be made between claims arising out of **acts done in the exercise of a state’s sovereign authority** and **claims not so arising**, that is **typically claims arising out of commercial transactions such as might be undertaken by private individuals.**”

“13. He went on to state at 1580 F to G

The situation in any particular case where the question of state immunity arises at common law has to be one of the **analysis of the particular facts against the whole context in which they have occurred. There is little if anything to be gained by trying to fit the case into a particular precedent or to devise categories of situations which may or may not fall on the one side of the line or the other. It is the nature and character of the activity on which the claim is based which has to be studied rather than the motive or purpose of it. The solution will turn upon an assessment of the particular facts. The line**

between sovereign and non sovereign state activities may sometimes be clear, but in other cases may well be difficult to draw. [emphasis added].

[75] The case of Benkharbouche was also cited in Webster and C Wright's case (see US Bundle Volume 2 page 210-211) where Lord Sumption considered how to assess whether the employment of a person is subject to state immunity :

*“54 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.***

55. *The Vienna Convention on Diplomatic Relations divides the staff of a diplomatic mission into three broad categories:*

- (i) diplomatic agents, ie the head of mission and the diplomatic staff;*
- (ii) administrative and technical staff; and*
- (iii) staff in the domestic service of the mission Diplomatic agents participate in the functions of a diplomatic mission defined in*

article 3, principally representing the sending state, protecting the interests of the sending state and its nationals, negotiating with the government of the receiving state, ascertaining and reporting on developments in the receiving state and promoting friendly relations with the receiving state.

*These functions are inherently governmental. They are exercises of sovereign authority. Every aspect of the employment of a diplomatic agent is therefore likely to be an exercise of sovereign authority. The role of technical and administrative staff is by comparison essential ancillary and supportive. It may well be that the employment of some of them might also be exercises of sovereign authority if their functions are sufficiently close to the governmental functions of the mission. Cypher clerks might arguably be an example. Certain confidential secretarial staff might be another: see **Governer of Pitcairn v Sutton [1995] 1 NZLR 426** (New Zealand Court of Appeal). However **I find it difficult to conceive of cases where the employment of purely domestic staff of a diplomatic mission could be anything other than an act jure gestionis. The employment of such staff is not inherently governmental. It is an act of a private law character***

*such as anyone with the necessary resources might do.
[emphasis added]”*

[76] Lord Sumption held that the test for state immunity in respect of the employment of a person depends on the relationship between the parties that arises from the state’s sovereign act in employing the individual was consistent with the approach of the European Court of Human Rights and held that: (See USA Bundle of Authority Vol 2 p. 212 – 213) :

*“56. the test applied by the Strasbourg court was whether the functions for which the applicant was employed called for a personal involvement in the diplomatic or political operations of the mission, or only in such activities as might be carried on by private person. In Mahamdia v People’s Democratic Republic of Algeria (Case C-154/11) [2013] ICR 1, paras 55-57 the Court of Justice of the European Union applied the same test, holding that the state is not immune “where the functions carried out by the employee do not fall within the exercise of public powers”. The principle now applied in all circuits that have addressed the question is that **a state is immune as regards proceedings relating to a contract of***

employment only of the act of employing the plaintiff is to be regarded as an exercise of sovereign authority having regard to his or her participation in the diplomatic functions of the mission. In Park v Shin [2002] 313 F3d 1138, 1145 , paras 12-14, it was held that “the act of hiring a domestic servant is not an inherently public act that only a government could perform”, even if her functions include serving at diplomatic entertainments. A very similar principle has been consistently applied in recent decisions of the French Cour de Cassation: see Barrandon v United States of America [1998] 116 ILR 622; Coco v State of America [1996] 113 ILR 491 and Saigniev Embassy of Japan [1997] 113 ILR 492. In the last named case, at p 493, the court observed that the employee, a caretaker at the premises of the mission, had not had “any special responsibility for the performance of the public service of the embassy. [emphasis added]”

[77] This Court, finds that based on the foregoing reasons, the USA’s counsel’s submission is misconceived in law and in fact.

[78] The case of **John Greene v United States Government case no. UD289/2014** (See USA Bundle Volume 3) referred to by the US

Embassy's learned counsel seem quite similar to our case in that the claimant in that case claimed that his position was a 'low level grade' Security Guard and received on the job training when he commenced employment with the respondent. The evidence disclosed that the Claimant's daily job involved access control, vehicle checks, questioning of persons presenting at the premises, use of x ray machines and metal detectors, roving patrols, alarm monitoring and knowledge of certain access codes on all US facilities, including residences and he was furnished with a list of guests attending at facilities and liaised with the Gardai on the duty at the Embassy. The Tribunal decided that the provision of security at an Embassy and Ambassador's residence constitutes part of a foreign State's exercise of Governmental authority. The Tribunal further stated that the Claimant's day to day duties as "first line of defence" is an important and integral part of the US Government's security system and cannot therefore be considered as merely "functional and low level". Hence, the Tribunal found that the doctrine of Restrictive State Immunity applies and the Tribunal has no jurisdiction to hear the claim.

[79] I find that the nature of employment of the claimant in *John Greene's* case (above) to be distinguishable with the present case

in that in John Greene, the claimant had governmental authority in discharging his responsibilities whereby he was responsible to screen visitors and personnel at the Ambassador's residence from time to time and had knowledge of certain access code on all US facilities, including residences and further he was furnished with a list of guests attending at facilities, entitled to question visitors and liaised with the Gardai on duty at the Embassy of which all put together that does not augur well with a low level grade Security Guard. In our case, it was not apparent from the evidence whether the Claimant had the authority to question visitors and liaise with RMP or the local law enforcement authorities and the US Embassy employees. Such evidence was lacking and was not put to the Claimant. The Claimant had no access to any facilities in the US Embassy's compound. There is clear distinction of authority between the job scope of the Claimant in the present case and *John Greene's* case.

[80] The case of ***Anonymous v United States Government civil motion 1137/10*** referred by the US Embassy's learned counsel is far different from the present case as the claimant in that case served as a security investigator and coordinator at the General Consulate of the United States in Jerusalem wherein his

involvement amongst others includes conducting investigation of Consulate employees in cases where suspicions were raised against them, handling of security arrangements for diplomats visiting the West bank, daily reporting on the security situation in the Gaza Strip and West Bank. Looking at the facts, I do not think this case to be of any helpful to the US Embassy.

[81] The next case referred by the US Embassy in its written submission in support of the argument that the restrictive immunity should apply to the Claimant's claim is the case of **Bjorn Engh Sostrand v United States of America** (Oslo District Court 2015); (Borgating Court of Appeal 2015); (Supreme Court of Norway 2016).

[82] Again this case cannot be said to have clear parallels to our case because in that case, it was acknowledged that the claimant would be bound by confidentiality clauses in his employment contract and secondly, the claimant, due to good evaluation of his performance was promoted to Team Supervisor which denotes that he had performed a supervisory role in his position.

[83] The case of **Thomas van Schoten v United States of America** referred to in the US Embassy's Bundle of Authority is in regard to a

claimant in the position of part time “Security Investigator”. His duties involves the performance of regular personnel safety checks, analyses as well as the creation of security reports about security threats, the coordination and support of the personal security team, the creation of status reports with regard to terrorism, police and security matters, the operational support during regular exercises, security briefings and the training of new local team members and the claimant was also the contact person for public authorities such as the Bavarian police, the Regional Criminal Investigation Office and the federal police of the airport as well as the other security agencies. He created security instructions and briefing for protection and defence of the team members and managed access control for the real properties of the U.S. government.

[84] In Thomas van Schoten’s case, the Court held that “his functional correlation of his work responsibility with sovereign activity is sufficiently established – to his task of maintaining contact with German security authorities. The fact that the claimant in Thomas van Schoten’s case created security instructions and briefing for protection and defence cannot be considered as being of a type analogues to the nature of employment of the Claimant in the present case.

[85] Another case is **Luzana Alvare Mitre v United States** at page 240-269 at USA bundle of authorities volume 3, the facts are that the claimant worked as a security guard with the activity of surveillance in the interior of the building for the Embassy for which she was provided with a mobile phone and a scanner in a work shift. Her duties are to keep safety of the perimeter of the Consulate, as well as the safety of the employees working thereat, being in charge of raising alerts to her colleagues and supervisors of any suspicious activity and also responsible to maintain sensible information confined as confidential within the Consulate's premises. Again, the nature of employment of the claimant and the job scope in this case has no similarity with the Claimant's in the present case in that the claimant, Luzana Alvare Mitre was stationed in the interior of the Embassy building, maintain confidential information and was put in charge of raising alerts to her colleagues. Her line of work is identical to that of the last line of defence, the Marines stationed inside the Embassy in the present case.

[86] The Claimant in this case, though had been in employment for almost 10 years, was maintained in the same position and was never promoted to a higher position or given any additional duties which can be considered as having a closer affiliation with the

government of the US or her Embassy. He is not responsible to maintain any confidential information throughout his employment and no significant or special governmental authority was entrusted in him for him to carry out his duties as he was not given access to the offices, facilities and residences within the Embassy compound. The fact that the Claimant had to contact his superior in the event of any emergency or incident shows that the functions performed by the Claimant was clearly of a subordinate character and had no role in the governmental administration. There is no nexus between him and the government to begin with.

[87] The Court further finds that the operating the metal detector and bomb scanning equipment was just part of the job of the Claimant as the security guard to ensure safety of the US Embassy's employees and properties. The fact that the Claimant had never been involved with similar security functions before he was employed as a member of the LGF with the US Embassy suggest that any private person with a good behaviour record can be taught to handle such equipment which require no rigorous training.

[88] From the evidence elicited, there was no evidence of special training, that had been given to the Claimant despite being a

member of the LGF and the scope of his work only required him to get on job training. The Claimant was not permitted to handle any situations which he perceived to be danger and was only required to report to his superior as quickly and accurately if necessary. It therefore, cannot be considered that the Claimant had performed a governmental act as the degree of his involvement as the security guard is simply basic, bare minimal and menial in nature and can be perform by any private person. He was not given any access into the consulates' residences in situations of there being any intrusion and could only inform his superiors should that occur. In terms of trust and confidence, to claim that a high level of trust and confidence is required of him does not augur well with his position as he was not employed based on previous accreditation but because of his interest to take on the job as a security guard and had a record of good character with a reasonable qualification.

[89] In his cross examination, though the Claimant admitted that there is a degree of confidentiality to the information he had. Nevertheless, it cannot be presumed that the confidential information he possess will be of any relevant to the issues of his dismissal claim as he is not privy to any confidential information of the Embassy and if disclosed in the proceedings will affect the dignity of the United

States. It is common for any foreign embassy to have stringent checks on visitors to prevent unauthorised entry and from his role as a member of the LGF, the role he performed at the US Embassy was limited to being out of the main buildings in the Embassy compound. Therefore, although the Claimant admitted to have confidential information, the act of his dismissal was so plain that it did not bother the US Embassy to have him to agree to any terms and conditions to protect the dignity of the US Embassy.

The Employment Contract.

Evidence on Attachments A, B and C of the Employment Contract.

[90] In his examination in chief, the Claimant gave evidence on attachments A, B and/or C of his Employment Contract with the US Embassy and asserted that he was never given any of the attachments. In regard to the same attachments to the Employment Contract, COW 1 testified that he did not why the attachments A, B or C was not produce in Court and state that oftentimes the Embassy do not provide all the documents because of the need to preserve “the internal deliberations” for the employees of the Embassy and for the Embassy herself.

[91] Attachment A, B and C were referred to in the Employment Contract but none were produced and included in either party's bundle of documents. The learned counsel for the Claimant urged the Court to draw an adverse inference against US Embassy for failure to produce the complete Employment contract and Attachment B which outlines the duties of the Claimant. To this Court, these attachment would have shed some light on the nature of the Claimant's relationship or employment with his employers or at the very least, negate the claim of sovereign immunity of the US Embassy. It cannot be denied that Attachment A, B and C was material to the facts of this case and would have lend credence to the issue of sovereign immunity.

[92] Adverse inference is also drawn when there is deliberate withholding of the material evidence and no reasonable explanation is given for the failure to produce the material evidence.

[93] It has been admitted by COW 1 that oftentimes not all documents are provided due to the need to preserve the "internal deliberations" for the employees and themselves as part of their sovereign immunity. It is therefore clear, that the US Embassy could have produced the attachments but instead had deliberately withhold

them and this led this Court to draw an adverse inference under **s 114(g) of the Evidence Act 1950** against the US Embassy for the failure by the US Embassy to produce the attachments.

[94] As for the failure to call Mr. Darshan Singh, Mr. Prakash and Mr. Yow as witnesses or even to call either one of them at least, I find that again, with no explanation given on why any of them could not be called to testify, this Court draws adverse inference against the US Embassy.

[95] This Court is in agreement with the submission of the learned counsel for the Claimant that the Claimant's job scope and duties do not fall within an act of sovereignty or government act.

[96] The Court finds that the Employment Contract of the Claimant did not contain any provision which stipulates its connection with political or diplomatic function despite the public character of the US Embassy.

[97] The Claimant's role and duties as the LGF that stems from the employment contract with the Embassy does not transcend into governmental activities carried out at the Embassy.

[98] It is in evidence that the US Embassy had contributed to statutory contributions to the Claimant during his employment. The Court finds that the payments of statutory contribution made to the Claimant by the US Embassy and the salary that was paid to him in Malaysian Ringgit is an additional indication that the nature of employment of the Claimant to be an ordinary trading or commercial *acta jure gestionis*. There is also no indication that the Claimant received similar benefits as that received by the American employees which could bring this Court to a different conclusion.

[99] The Employment Contract itself did not provide a clear indication on the law applicable to the Claimant and the US Embassy should there be a dispute between them. There was a total disregard to the Claimant's right of appeal when he had written seeking for an explanation of his dismissal. The Claimant cannot be left to ponder which legal system is applicable for him to seek redress for his dismissal when no response was advanced by the US Embassy at the time of his dismissal.

[100] The additional point here is of course, the Claimant being a Malaysian citizen enjoys the rights under the laws of his home Country. In this case, no documentary evidence was produced to

prove that no claims or proceedings can be brought before the Malaysian Court due to the sovereign immunity of the US Embassy which in turn entails the Claimant to treat the Employment Contract as commercial in nature.

[101] The Claimant's Employment Contract is a contract of manual employment that created a bond of private nature and law, where the Claimant had not performed a public or a sovereign act and had no connection with diplomatic functions.

[102] In conclusion, the restrictive immunity does not apply in this case and the US Embassy is not immune from the Court's jurisdiction.

[103] That said, the two fold function of the Industrial Court on a reference under s 20 shall be considered in determining the conclusion of the Claimant's claim that is firstly to determine whether the misconduct complained of by the employer has been established and secondly whether the proven misconduct constitute just cause or excuse for the dismissal. **(See *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn. Bhd. & Another Appeal*, [1995] 3 CLJ 344) [1995] 2 MLJ 753). (*Milan Auto Sdn. Bhd. v Wong Seh Yen* [1995] 4 CLJ 449).**

[104] As for the burden and standard of proof in regard to Industrial Relations cases under s20(3) of the Act, the onus or burden of proof lies on the employer and is based on a standard of proof on the balance of probabilities as laid down by the Court Of Appeal in **Telekom Malaysia Kawasan Utara v Krishnan Kutty Sanguni Nair & Anor [2002] 1 MELR 4; [2002] 1 MLRA 188; [2002] 3 MLJ 129; [2002] 3 CLJ 314; [2002] 3 AMR 2898**

[105] Clear directions were given to the parties that the Claimant's case will be heard on merits on the date fixed for the trial together with the Notice of Application to strike off the Claimant' claim filed by the US Embassy.

[106] Despite the directives given, the US Embassy relied on the doctrine of restrictive sovereign immunity to state that the US Embassy is immune from the jurisdiction of the Industrial Court and maintain her position not to participate on the merits of the case and that the Court, therefore cannot exercised its jurisdiction and/or it has no jurisdiction to hear the Claimant's claim under s 20(3) of the IRA against the Embassy.

[107] However, following the stand taken by the US Embassy not to submit to the jurisdiction of the Industrial Court to hear and decide the merits of the Claimant's claim, all that was pleaded in paragraph 14 of the Statement In Reply was that the particulars of misconducts are to be found in the two aforesaid contemporaneous documents. In fact, the learned counsel for the US Embassy, have made it clear to this Court from the outset that the US Embassy will not be participating in the merits of the case. At the trial, no evidence of any of the alleged misconducts of the Claimant was adduced before the Court.

[108] As the burden of proof lies on the US Embassy, evidence must be adduced to convince that the Claimant committed the misconducts complaint of for which he has been dismissed.

[109] In this case, the US Embassy did not refer and adduce evidence of any misconducts allegedly committed by the Claimant. This Court finds that as the employer, the US Embassy has failed to prove the reason or reasons for the Claimant's termination and had therefore failed to discharge her burden on the balance of probabilities to prove that the Claimant's dismissal was with just cause or excuse.

[110] It is the contention of the US Embassy that the Claimant was dismissed from his employment for misconduct. It is worthwhile to state here again that the particulars of the misconduct of the Claimant found in the Unclassified Memorandum and the email correspondence were not disclosed to the Claimant for him to answer or provide any explanation and was only disclosed later in the judicial review proceedings. Additionally, it is important to note that the US Embassy terminated the Claimant's service without issuing him a show cause letter and without holding a domestic inquiry in which he would have been given the opportunity to answer to the charges made against him. Neither was there any reasons given to the Claimant in writing or in verbal. No evidence was adduced on records on behalf of the US Embassy to rebut the Claimant's claim of unfair dismissal. Without any rebuttal evidence from the US Embassy, is sufficient for the Court to hold that the Claimant's dismissal was without just cause or excuse.

[111] In conclusion, based on the circumstances of the present case in its entirety and the evidence adduced by both parties in totality in the proceedings and upon hearing the testimonies of the witnesses and perusing the written submissions and their respective

supporting authorities, the Court is of the considered view that US Embassy had dismissed the Claimant without just cause or excuse.

[112] This now brings this Court to the question of remedy. It is apparent that it would not be proper for this Court to order for a reinstatement considering the fact that the employer is a sovereign diplomatic mission and any order for a reinstatement would definitely embroil parties into unnecessary litigation and that is not what this Court, a creature of the Act, intended to do but instead to resolve disputes between employers and employees. The only recourse to the Claimant here is to award a monetary award.

[113] In the case of *Koperasi Serbaguna Sanya Bhd (Sabah) v Dr, James Alfred (Sabah) & Anor* [2000] 1 MLRA 483; [2000] 4 MLJ 87; [2000] 3 CLJ 758; [2000] 3 AMR 3493 the Court Of Appeal at p.766 held that:

“ there is the usual award for the arrears of wages or back wages as it is sometimes called. It is to compensate the workman for the period that he has been unemployed because of the unjustified act of dismissal and second there is an award of compensation in lieu of reinstatement”.

[114] The Claimant commenced his employment on 20.09.1998 and was dismissed on 04.04.2008. where he had worked for 9 years and 6 months and was not employed for 3 years after his dismissal.

[115] The Court hereby makes the following orders:

(a) Backwages

RM2,000.00 x 24 months = RM48,000.00

(b) Compensation In Lieu of Reinstatement ie one month salary for every completed year of service

RM2,000.00 x 9 months = RM18,000.00

In total = **RM66,000.00**

Final Order

[116] It is this Court's order that Embassy of The United States Of America pays the Claimant a sum of Ringgit Malaysia Sixty Six

Thousand (RM66,000.00) only less statutory deductions (if any)
within 30 days from the date of this Award.

HANDED DOWN AND DATED THIS 27TH DAY OF APRIL 2023

-Signed-

(AMRIK SINGH)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR