



**Center for
Global Legal Challenges**

YALE LAW SCHOOL

**State Practice on Sovereign Immunity in Employment Disputes Involving
Embassy and Consular Staff**

A Report of the Center for Global Legal Challenges¹

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I. Introduction

This report identifies and analyzes foreign case law and statutes on sovereign immunity in employment disputes brought by dismissed embassy and consular staff from twenty-seven countries and two international courts. State practice remains quite diverse, and it is not possible to identify one clear, specific majority test for whether foreign States are immune in such disputes. However, several recent trends exist, with state practice in Europe in particular starting to coalesce around a common approach. The findings of this report must be considered with the limitations of the research in mind. The vast majority of case law surveyed in this report is from Europe and English-speaking countries. Only a handful of translated decisions or statutes from Latin America, Africa, and Asia could be found, and significantly, this report does not include any decisions from China or Brazil.

II. Key Findings

1. **All but one country has adopted a restrictive theory of immunity in employment disputes.** Of the countries with decisions or statutes identified, only Romania still applies an absolute theory of immunity with regard to employment disputes with embassy and consular employees.
2. **Twelve countries (ten in Europe and two outside Europe) and two international courts place significant emphasis on the duties and status of the dismissed employee bringing an employment claim in determining on a case-by-case basis whether a foreign State is immune.** These countries include Italy, Portugal, France, Finland, Switzerland, Belgium, Germany, Ireland, the Netherlands, Norway, New Zealand and Sri Lanka, as well as the European Court of Human Rights (“ECHR”) and the European Court of Justice (“ECJ”). In general, if the employee performed duties connected to the sovereign or governmental activities of the foreign State, then the courts in these countries will not exercise jurisdiction over the dispute. If not, then the courts will exercise jurisdiction over the claim. Three of these countries also consider factors—such as the nationality or residency status of the employee, or the nature of the claim—in addition to the employee’s duties.
3. **Six countries—Botswana, the Czech Republic, Spain, Austria, Poland, Colombia and Argentina—have held that foreign States are not immune in employment disputes involving dismissed embassy or consular employees because employment contracts are a matter of private law.** It should be noted, however, that almost every case included below involved low-level embassy or consular employees. Thus, although the courts stated their holdings broadly, it is not clear whether these courts would necessarily adopt a similar approach if faced with a claim by a high-level embassy or consular employee. The one exception is Austria, in which a court allowed the former Head of the Visa Section of the French Consulate to sue for breach of contract.
4. **Only three countries bar all employment claims by embassy and consular employees.** In addition to Romania, South Africa and Pakistan have legislatively barred all claims relating to employment contracts by any member of an embassy or consulate.

The United Kingdom's State Immunity Act also bars all claims by members of the mission or consular post as defined in the Vienna Convention on Diplomatic Relations ("VCDR") and the Vienna Convention on Consular Relations ("VCCR"). However, a 2015 decision by the Court of Appeal held that barring all claims by service staff is not required by state practice and thus violates Article 6(1) of the European Convention on Human Rights. Thus, the United Kingdom no longer falls within this category.

5. **Five countries—the United Kingdom, Australia, Singapore, Israel, and Japan—employ a mixture of categorical rules for state immunity in employment disputes based on the type of position the employee held (diplomat or consular officer, administrative and technical staff, or service staff), and/or the employee's nationality and residency status.** The combined effect of these provisions is to permit many low-level staff to bring claims against foreign States, either because service staff are permitted to sue (Australia permits claims by all service staff, and the United Kingdom likely will permit claims by service staff who do not perform duties connected to the sovereign functions of the foreign State), or because foreign States are likely to recruit only their own nationals to perform high-level positions and are more likely to recruit locally for low-level positions (and Singapore, Israel and Japan provide that foreign States are immune only when the employee is a national of the foreign State and not a resident (or a citizen) of the forum State).
6. **Five countries explicitly bar all claims by administrative and technical staff.** In addition to Romania, South Africa and Pakistan, the United Kingdom and Australia bar such claims. However, permanent residents in Australia are permitted to sue if they had that status when the employment contract was concluded.
7. **Eight of the ten countries that have considered employment disputes involving security issues held that the foreign State was immune because of the security aspect of the dispute, or have legislation suggesting that they would hold foreign States immune in such cases.**
8. **Nine countries consider the nature of the dismissed employee's claim in determining whether to grant immunity to a foreign State in employment disputes.** All but one country that has specifically addressed the issue of reinstatement will not exercise jurisdiction over a claim for reinstatement (or the relevant immunity legislation bars such relief). Additionally, Italy, Switzerland and Canada will not exercise jurisdiction over claims that require inquiry into the internal organization of an embassy or consulate, but will exercise jurisdiction over the financial consequences of dismissals.

Overall Takeaway – In the majority of countries surveyed (twenty-three), as well as in the ECHR and ECJ, courts will exercise jurisdiction over at least some claims by dismissed low-level embassy or consular employees. This includes the twelve countries that permit claims by employees who do not perform duties related to governmental or sovereign functions, the six countries that consider employment to be a matter of private law, and the five countries that employ a mixture of categorical rules for state immunity based on the type of position the employee held and/or the employee's nationality and residency status.

The remainder of this report proceeds as follows. Section III sets forth case law from countries that consider the duties and status of the dismissed employee bringing an employment claim in determining whether a foreign State is immune. Section IV analyzes the practice of countries that have held that all employment contracts are a matter of private law. In Section V, state practice from the three countries that bar employment claims by all embassy and consular staff is set forth. Section VI considers the approaches of the five countries that employ a mixture of categorical rules for immunity in employment disputes based on the type of position the employee held and/or the employee's nationality and residency status. Canada's case law is analyzed separately in Section VII because it is not uniform and difficult to categorize. Section VIII addresses case law on employment disputes with a security dimension. Finally, Section IX summarizes the case law and legislation of countries that consider the nature of the remedy requested as a relevant factor in determining whether to grant immunity to a foreign State.

III. Case-by-Case Approach to Sovereign Immunity Based Entirely or in Part on the Duties and Status of the Dismissed Employee

Twelve countries (and two international courts) place significant emphasis on the duties and status of the dismissed employee bringing an employment claim in determining on a case-by-case basis whether a foreign State is immune in an employment dispute. These countries include ten in Europe and two outside of Europe. The European Court of Justice and the European Court of Human Rights also focus on the duties and status of employees in evaluating the immunity of foreign States. Three of these countries (Italy, Switzerland, and the Netherlands) also consider other factors in conjunction with the employee's duties to determine whether the foreign State is immune, including whether there are territorial connections to the forum State, the nature of the employee's claim, and the employee's nationality and residency status. Overall, however, there is "a clear trend in [the] direction" of countries using "a test for State immunity in employment claims which focuses predominantly on the role and functions of the employee."²

In general, if the employee performed duties connected to the sovereign or governmental activities of the foreign State, then the courts in these countries will not exercise jurisdiction over the dispute. If not, then the courts will exercise jurisdiction over the claim. In other words, "[s]tate practice, both in European countries and elsewhere, is now converging around the idea that State immunity should only be imposed where the employee is engaged in duties that implicate the foreign State's sovereignty. Employees in routine and generic roles, by contrast, should be entitled to seek redress."³

It is difficult to distill a common test for whether an employee performed functions related to sovereign or governmental activity. Common factors considered include whether the employee occupied a position of trust or performed confidential duties; the seniority of the employee; and whether the employee participated in the diplomatic or representative mission of the embassy or consulate. Italy, Finland and New Zealand have employed broad definitions of

² Richard Garnett, *State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?*, 64 I.C.L.Q. 783, 784 (2015).

³ *Id.* at 785.

duties related to sovereign or governmental activities. In contrast, Portugal, Switzerland, Belgium, France, the Netherlands, and Norway use narrower definitions of duties related to sovereign or governmental activities. It is difficult to categorize where Germany, Ireland and Sri Lanka fall on this continuum given either the few cases on point, or in the case of Ireland, recently changing case law. An appendix is included at the end of this report laying out state practice on whether particular positions are connected to governmental or sovereign activity.

- **Italy**

Italian courts will exercise jurisdiction over employment disputes involving an employee who performed “auxiliary duties” not connected to the sovereign functions of the foreign State.⁴ Italian courts broadly define non-auxiliary duties. For example, as documented in the table below, courts have held that secretaries and telephone operators perform non-auxiliary duties because they perform “tasks which are based on trust.”⁵ As discussed below in Section IX below, Italian courts will also exercise jurisdiction over any case—regardless of the employee’s duties or seniority—in which the employee requests only pecuniary remedies that will not “interfere in practice with the functioning of the foreign public-law entity.”⁶ In more recent decisions, the Court of Cassation has focused more on the nature of the claim as the decisive factor in whether to grant immunity, rather than on the nature of the employee’s duties.

Position	TEST: Did the employee perform auxiliary duties unconnected to the sovereign functions of the foreign State?	Citation
Porter at the embassy	No – It is not entirely clear if this case was decided on the basis of whether the employee performed auxiliary duties, or solely on the basis of the nature of the remedy requested (reinstatement). While no translated copy of the decision could be found, the summary from ILDC notes that the court characterized the duties of a porter as demanding “discretion and [as] related to the security of the Embassy,” which might imply that a porter’s duties are not merely auxiliary. (para. H4)	<i>Brazil v. De Vianna Dos Campos Riscado</i> , Preliminary Order on Jurisdiction, No. 1981 (Sup. Ct. Cass. 2012), ILDC 2037 (IT 2012)
Unspecified, but the court noted that he worked for the Honorary Consul and was “tasked with helping with consular functions”	No	<i>Vespignani v. Bianchi</i> , Final Appeal on a Preliminary Question, No. 13711 (Sup. Ct. Cass. 2004), ILDC 556 (IT 2004)

⁴ See, e.g., *Brazil v. De Vianna Dos Campos Riscado*, Preliminary Order on Jurisdiction, No. 1981 (Sup. Ct. Cass. 2012), ILDC 2037 (IT 2012).

⁵ *United States of America v. Lo Gatto*, 114 I.L.R. 555, 557 (Sup. Ct. of Cass. 1995).

⁶ *Norwegian Embassy v. Quattri*, 114 I.L.R. 525, 529 (Sup. Ct. Cass. 1991).

(para. 2)		
Commercial officer at the consulate	No	<i>Canada v. Cargnello</i> , 114 I.L.R. 559 (Sup. Ct. Cass. 1998)
Clerk and then telephonist at the consulate	No – “[T]he duties of a telephone operator in embassies and consulates of foreign States fall within those tasks which are based on trust and belong to the public organization of the office itself.” (557)	<i>United States of America v. Lo Gatto</i> , 114 I.L.R. 555 (Sup. Ct. Cass. 1995)
Driver and interpreter at the embassy	Yes	<i>Zambian Embassy v. Sendanayake</i> , 114 I.L.R. 532 (Sup. Ct. Cass. 1992)
Secretary and administrative officer in the commercial office of the embassy	No – “Her duties were those of secretary and technical-administrative officer, in other words duties not merely of an auxiliary nature but closely connected with the public-law activities of an official agency of a foreign State.” (531)	<i>Norwegian Embassy v. Quattri</i> , 114 I.L.R. 525 (Sup. Ct. Cass. 1991)
Secretary and telephonist for the Jana Information Agency	No – her duties as secretary and telephonist “clearly denote a position of trust within the organization, inasmuch as they are directly bound up with the work of its officials and also inevitably involve access in practice to information concerning the agency’s official activities and business It may accordingly be concluded that there was an objective internal link, both immediate and direct, between the employment relationship and the institutional aims of the Jana Agency.” (522)	<i>Libyan Arab Jamahiriya v. Trobbiani</i> , 114 I.L.R. 520 (Sup. Ct. Cass. 1990)
Translator and Russian-language announcer employed by Vatican Radio	No – “Certainly in Italian law translating is not in itself an activity which would confer a public nature to the job. It consists in the mechanical repetition of things said or written by others in another language, as in the case of so-called simultaneous translators But in the case at issue the decisive element is that the lady was employed as an announcer in Russian, a function that is directly and closely linked to the exercise of the Church’s ‘mission in the world.’” (123)	<i>Special Representative of the Vatican v. Pieciukiewicz</i> , 78 I.L.R. 120 (Sup. Ct. Cass. 1982)

- **Portugal**

The Portuguese Supreme Court has held that state practice “demonstrates that foreign States are generally denied immunity in cases where the dispute concerns an employee

performing subordinate functions whereas, on the other hand, it is frequently granted where the person concerned performs more senior functions.”⁷ The Supreme Court explained that this factor functions as a proxy for whether the employee’s employment is properly considered a sovereign act (*jure imperii*).⁸

In determining whether an employee performed subordinate or senior functions, the Supreme Court rejected the test of whether the employees’ activities were “necessary for the proper and normal functioning of the Embassy” as “so broad that it would ultimately cover all personnel” in an embassy.⁹ Rather, the Supreme Court held that factors to consider are whether the employee “h[e]ld any position of authority within the organization of the public service of the defendant State” or “perform[ed] any representative functions.”¹⁰ The Supreme Court added that “it is necessary to examine whether the legal regime applicable to the employment relationship is substantially different from that which would apply to any other employee performing the same functions for a private individual.”¹¹ If the duties of the employee are similar to those that a private individual could be expected to perform, that is an additional reason to find that the employee performed subordinate functions.¹²

Position	TEST: Did the employee perform subordinate functions?	Citation
Catering assistant and cleaner at the embassy and Ambassador’s residence	Yes	<i>X v. Israel</i> , 127 I.L.R. 310 (Sup. Ct. 2002)
Secretary at the embassy	Yes	<i>AA v. Austrian Embassy</i> , Final Decision on Jurisdiction, No. 05S3279 (Sup. Ct. 2007), ILDC 826 (PT 2007)
Driver at the embassy	Yes	<i>A v. Islamic Republic of Pakistan</i> , (Ct. App. 2004), <i>cited in</i> Richard

⁷ *X v. Israel*, 127 I.L.R. 310, 311–12 (Sup. Ct. 2002). This decision marks a break from an earlier decision by the Portuguese Supreme Court, *Brazilian Embassy Employee Case*, 116 I.L.R. 625 (Sup. Ct. 1984). In that case, the Supreme Court held that Brazil was immune in a case brought by a dismissed administrative employee of its embassy seeking damages for unfair dismissal and arrears of salary. *Id.* at 625. The Supreme Court did not analyze whether the employee performed subordinate versus more senior functions. Rather, it held that Brazil was immune because the employee’s “activity must . . . be recognized as forming a necessary part of the performance of the public functions of the diplomatic mission which are, in turn, part of the sovereign public purposes of the sending State,” without analyzing or specifying the particular duties of the employee. *Id.* at 633.

⁸ *X v. Israel*, 127 I.L.R. at 312 (“The justification for this distinction is based on the fact that only employment contracts concluded with a person of a higher grade are really capable of being linked with the exercise of public authority (*jure imperii*) and thereby to enjoy such immunity.”).

⁹ *Id.* at 313–14.

¹⁰ *Id.*

¹¹ *Id.* at 314.

¹² *Id.* (explaining that “[t]he subordinate employment relationship between the claimant [a cleaner and caterer] and the defendant State is governed by Portuguese law in identical terms to relationships normally entered into in relation to contracts for the performance of domestic services (cleaning and the preparation of meals) concluded with any private individual”).

		Garnett, <i>State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?</i> , 64 I.C.L.Q. 783, 799 n.71 (2015)
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- **France**

The Cour de Cassation has held that foreign States are immune in employment cases only when the employee bringing the claim had “special responsibility for the performance of the public service of the Embassy” or consulate.¹³ Unfortunately, given the brevity of French opinions, the Court of Cassation has not set forth key factors that determine whether an employee had special responsibility.

Position	TEST: Did the employee have special responsibility for the performance of public service activities of the mission/consulate?	Citation
Nurse and medical secretary at the embassy	No	<i>Barrandon v. United States of America</i> , 116 I.L.R. 622 (Ct. Cass. 1998)
Caretaker at the embassy	No	<i>Saignie v. Embassy of Japan</i> , 113 I.L.R. 492 (Ct. Cass. 1997)
Assistant in the press section of the embassy	No – He was “merely required to collect, formulate and transmit information and documentation of interest to the State of Argentina.” (492)	<i>Coco v. State of Argentina</i> , 113 I.L.R. 491 (Ct. Cass. 1996)

- **Finland**

In *Heusala v. Turkey*, the Finnish Supreme Court held that Article 32 of the 1972 European Convention on State Immunity indicates that a foreign State is immune in employment disputes when the employee’s duties “were meant to serve the official duties” of the mission because “[e]ntering into a contract with [such an employee] . . . [is] a part of [the foreign State’s] activity governed by public law.”¹⁴ As the table below demonstrates, Finnish courts have interpreted this test quite broadly, holding that a chauffeur as well as a secretary and translator at the embassy performed duties meant to serve the mission’s official duties.

Position	TEST: Were the employee’s duties meant to serve the official duties of the mission?	Citation
Chauffeur	Yes	<i>Ricardo v. Republic of Venezuela</i> (Dst.

¹³ *Saignie v. Embassy of Japan*, 113 I.L.R. 492, 493 (Ct. Cass. 1997).

¹⁴ *Heusala v. Turkey*, Appeal Judgment, KKO:1993:120 (Sup. Ct. 1993), ILDC 576 (FI 1993), para. 11.

		Ct. Helsinki 2000), <i>cited in</i> Richard Garnett, <i>State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?</i> , 64 I.C.L.Q. 783, 801 n.77 (2015)
Secretary and translator at the embassy	Yes – The employee’s “duties were meant to serve the official duties of a member of the diplomatic staff of Turkey’s mission in Finland” and thus the employee’s “contract of employment was . . . closely related to Turkey’s exercise of governmental authority.” (para. 11)	<i>Heusala v. Turkey</i> , Appeal Judgment, KKO:1993:120 (Sup. Ct. 1993), ILDC 576 (FI 1993)

- **Switzerland**

Swiss courts will exercise jurisdiction over employment disputes involving subordinate employees in embassies or consulates, but not over disputes involving employees in senior, decision-making positions, provided two additional criteria are met.¹⁵ First, the employee must have some territorial connection to Switzerland.¹⁶ Second, the nature of the employee’s claim must not “require an intrusion into the internal life of a diplomatic or consular mission or an examination of its staff policy” (see Section IX below).¹⁷

Swiss courts focus on the employee’s duties and role in determining whether or not to designate an employee’s position as subordinate. For example, in *R v. Republic of Iraq*, the Federal Tribunal held that, although a “borderline case,” a translator/interpreter is a subordinate position because such an individual “d[oes] not normally participate in the formulation of the policies of his employer, but [is] exclusively responsible for rendering as faithfully as possible the meaning of what he read or heard.”¹⁸ The Tribunal added that the fact that a translator/interpreter’s activities were “of a markedly confidential nature . . . was not a decisive element” because “many other persons working in the service of the sending State are required to perform confidential tasks or to take account of information of that nature, even though they occupy subordinate posts such as secretaries, typists, archivists, drivers, members of the security service, etc.”¹⁹ One decision by the Geneva Labour Court was identified in which the court held

¹⁵ See, e.g., *S v. India*, 82 I.L.R. 13, 19 (Fed. Trib. 1984) (“Whilst it is true that the sending State has a certain interest in seeing that legal disputes involving the members of its missions with relatively senior functions are not subject to the jurisdiction of foreign courts, the situation is quite different in respect of junior employees.”).

¹⁶ See, e.g., *M v. Arab Republic of Egypt*, 116 I.L.R. 656, 662 (Fed. Trib. 1994) (“It is also necessary to establish that the relationship in question has certain links with Swiss territory . . . that is to say that it arose there, must be performed there, or at least that the debtor performed certain acts such as to make it a place of performance of the contract.”); see also *R v. Republic of Iraq*, 116 I.L.R. 664, 668 (Fed. Trib. 1994) (“In this case, the plaintiff has lived in Switzerland since 1983 and was recruited and hired in Geneva, the city in which he performed his activities. The relationship with Switzerland is therefore not open to question.”).

¹⁷ See, e.g., *X v. United States of America*, 116 I.L.R. 668, 675 (Labour Ct. Geneva 1995).

¹⁸ 116 I.L.R. 664, 667 (Fed. Trib. 1994).

¹⁹ *Id.*

that *all* administrative and technical staff, as well as service staff, hold subordinate positions.²⁰ However, no decision by a higher court could be identified applying a similar categorical rule.

Position	TEST: Did the employee hold a subordinate position?	Citation
Telephonist/receptionist in the consular section of the Permanent Mission	Yes – “The plaintiff had no power of decision and had a power of execution only where there was a precedent.” (672)	<i>X v. United States of America</i> , 116 I.L.R. 668 (Labour Ct. Geneva 1995)
Driver at the Permanent Mission	Yes	<i>Nicoud v. United States of America</i> , 116 I.L.R. 650 (Labour Ct. Geneva 1994)
Chauffeur at the Permanent Mission	Yes – “The tasks performed by a chauffeur do not in practice involve the exercise of sovereign powers. The situation of a chauffeur is equivalent to that of porters, gardeners, kitchen workers.” (662)	<i>M v. Arab Republic of Egypt</i> , 116 I.L.R. 656 (Fed. Trib. 1994)
Translator/interpreter at the Permanent Mission	Yes	<i>R v. Republic of Iraq</i> , 116 I.L.R. 664 (Fed. Trib. 1994)
Telephonist at the Permanent Mission	Yes	<i>Landano v. United States of America</i> , 116 I.L.R. 636 (Labour Ct. Geneva 1987)
Radio-telegraph operator at the embassy	Yes	<i>S v. India</i> , 82 I.L.R. 13, 19–20 (Fed. Trib. 1984)

• Belgium

Belgium considers Article 11 of the UN Convention on Jurisdictional Immunities to be “the written embodiment of an international custom.”²¹ As described in the 2015 decision *Van Averbek v. United States*, Belgian courts consider the employee’s job duties to be “[t]he most relevant criteria” in determining “whether the dismissal of a Belgian worker occupied at an embassy constitutes as [sic] a sovereign act, implementing governmental authority of a foreign State, or, on the contrary, is a management act not distinguishable from the normal exercise of an employer’s rights.”²² Belgian courts will grant immunity “only when the worker concerned carries out or participates strictly in missions that stem from governmental authority, including diplomatic or consular missions.”²³ This approach is consistent with several earlier decisions of

²⁰ *X v. United States of America*, 116 I.L.R. at 670–71 (stating that “a sending State should not be able to rely on its jurisdictional immunity where the proceedings have been brought against it by a locally recruited member of the administrative, technical or service staff of its diplomatic or consular mission” because “[t]he Federal Tribunal considers that such employees do not perform an activity closely linked to the exercise of the public sovereignty of the employer State”).

²¹ *Van Averbek v. United States*, No. 12/15.954/A, at 9 (Francophone Labor Trib. Brussels 2015) (translated copy provided by U.S. Department of State).

²² *Id.*

²³ *Id.* (internal quotation marks omitted); *see also Sawas v. Saudi Arabia*, First Instance Judgment, (Labour Ct. 2007), ILDC 1146 (BE 2007), para. A1 (explaining that “Belgian courts have . . . repeatedly stated that any actions

Belgian courts, which held that immunity is warranted in employment disputes only where the employee's position included an "aspect of an appointment to a public function" or "attributes of public power."²⁴

In *Van Averbek v. United States*, the court noted the following factors in holding that a dismissed computer assistant did not carry out or participate in missions stemming from governmental authority: (1) he "assisted his hierarchically [sic] superiors" who had "responsibility for the administration" of computer networks he worked on; (2) "[h]is principal tasks were to provide technical assistance"; and (3) although he had access to unclassified information, this kind of access "is inherent to the performance of this type of function" and thus "[h]is task was not different from that of any other 'junior' computer assistant in a commercial enterprise or public institution."²⁵

Position	TEST: Did the employee carry out or participate in missions that stem from governmental authority, including diplomatic or consular missions?	Citation
Computer assistant at the embassy	No	<i>Van Averbek v. United States</i> , No. 12/15.954/A (Francophone Labor Trib. Brussels 2015)
Telephone operator and secretary at the embassy	No	<i>Sawas v. Saudi Arabia</i> , First Instance Judgment, (Labour Ct. 2007), ILDC 1146 (BE 2007)
Language teacher in the consular section of the embassy	No**	<i>De Queiroz v. State of Portugal</i> , 115 I.L.R. 430 (Labour Ct. Brussels 1992)
Chauffeur at the embassy	No**	<i>Kingdom of Morocco v. DR</i> , 115 I.L.R. 421 (Labour Ct. Brussels 1989)
Technician at the Cultural and Information Centre of the embassy	No**	<i>François v. State of Canada</i> , 115 I.L.R. 418 (Labour Ct. Brussels 1989)
Chauffeur at the embassy	No – The case concerned "a contract of manual employment." (120)	<i>Rousseau v. Republic of Upper Volta</i> , 82 I.L.R. 118 (Labour Ct. Brussels 1983)

of the state in relation to employment matters of administrative personnel which are not charged with a diplomatic mission are irrelevant to the exercise of public power. Belgian case law, which is based on the interpretation of Articles 1, 3, and 19 of the VCDR, has therefore not considered immunity to apply in those cases" and citing the following cases (Brussels First instance judgment, (1980) *Journal des Tribunaux du Travail* 274, 1 February 1980; Brussels Court of Appeal judgment, (1992) *Chroniques de droit Social* 334, 6 June 1989; Brussels Court of Appeal judgment, RG No 29248, (1997) *Journal des Tribunaux du Travail* 435, 27 November 1996").

²⁴ *Castanheira v. Commercial Office of Portugal*, 82 I.L.R. 100, 103 (Labour Ct. Brussels 1980); *Rousseau v. Republic of Upper Volta*, 82 I.L.R. 118, 120 (Labour Ct. Brussels 1983).

²⁵ *Van Averbek v. United States*, No. 12/15.954/A, at 13 (Francophone Labor Trib. Brussels 2015).

** In these cases, the Labour Court of Brussels did not explicitly analyze the duties and functions of the employee in making its immunity determination. Rather, it simply stated that the employment contract at issue was a matter of private law.²⁶ These cases are nonetheless included for the sake of completeness.

- **Germany**

German courts focus on the duties and status of the employee bringing an employment claim in deciding whether the foreign State is immune. German courts will not exercise jurisdiction over employment disputes where the dismissed employee's "tasks . . . belong[ed] to the core sphere of sovereign activity of the" foreign State.²⁷ Or, as recently described by the European Court of Justice, "[a]ccording to the case-law of the Bundesarbeitsgericht, employment law disputes between embassy employees and the State concerned are within the jurisdiction of the German courts where the employee has not carried out, for the State by which he is employed, activities forming part of the sovereign functions of that State."²⁸ It is difficult to distill a general test for when an employee's duties are related to the core sphere of sovereignty. As documented below, in one decision the court noted that the employee had the authority to issue instructions that must be followed (*Muller v. United States of America*). In the other decision, the court noted that the employee performed duties defined as consular functions in the VCCR (*X v. Argentina*).

Position	TEST: Did the employee perform tasks related to the core sphere of sovereign activity?	Citation
Financial assistant responsible for analysis and budgetary preparation at the consulate general	Yes – "Any person performing a staff function as 'first financial assistant to the managing administrative officials', devising instructions which the management of the Consulate cannot simply ignore, is entrusted with a function which directly relates to the fulfilment [sic] of consular tasks." (518)	<i>Muller v. United States of America</i> , 114 I.L.R. 512 (Reg'l Labour Ct. Hesse 1998)
Consulate administrative and technical staff employee tasked with "the issuing and extension of Argentinian passports, the processing	Yes – "These are basic consular functions as defined in Article 5(d) and (f) of the Vienna Convention on Consular Relations." (506)	<i>X v. Argentina</i> , 114 I.L.R. 502 (Fed. Labour Ct. 1996)

²⁶ See, e.g., *De Queiroz v. State of Portugal*, 115 I.L.R. 430, 434 (Labour Ct. Brussels 1992) ("In this case the contract between the parties is an employment contract establishing relations governed by private law. The respondent did not perform an act of sovereignty and acted as a private person."); *Kingdom of Morocco v. DR*, 115 I.L.R. 421, 422 (Labour Ct. Brussels 1989) ("In this case, the appellant performed an ordinary commercial act."); *François v. State of Canada*, 115 I.L.R. 418, 419 (Labour Ct. Brussels 1989) ("In this case the contract between the parties is a contract of employment which relates to the private administration of the defendant State. It is not a governmental act and its sovereignty is not involved. The State acted merely as an ordinary private person without bringing its public power into play.").

²⁷ *X v. Argentina*, 114 I.L.R. 502, 506 (Fed. Labour Ct. 1996).

²⁸ *Mahamdia v. Algeria* (C-154/11), [2013] I.C.R. 1, para. 32.

of visas and arranging attestations” (503)		
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- **Ireland**

Ireland also focuses on the duties and status of the dismissed employee bringing employment claims in deciding whether a foreign State is immune. In *Canada v. Employment Appeals Tribunal and Burke*, the Irish Supreme Court held that it did not have jurisdiction over an unfair dismissal claim brought by a former chauffeur at the Canadian embassy.²⁹ A majority of the justices justified their decision by noting that a chauffeur’s duties are related to the diplomatic functions or public business of the embassy.³⁰ Thus, although employing a broad definition of duties related to sovereign functions, the court did focus on the duties of the dismissed employee in evaluating immunity, and left open the possibility that some employees might be able to sue.³¹ A recent decision by the Employment Appeals Tribunal (“EAT”) indicates that Irish courts may be moving towards a narrower definition of duties related to sovereign functions. In *Adan v. Embassy of the Republic of Kenya*, the EAT held that it had jurisdiction over an employment dispute between a dismissed embassy cleaner and a foreign State because the employee’s duties did not relate to the public powers of the embassy.³²

Position	TEST: Did the employee perform tasks related to the diplomatic functions or public business of the mission?	Citation
Cleaner in the embassy	No – “The Tribunal is satisfied that the claimant’s functions as a cleaner did not fall ‘within the restricted form of state immunity’ as considered in the Canadian Embassy case nor did her position involve her ‘within the exercise of public powers’ according to the test set out in ‘Mahamdia.’” (3)	<i>Adan v. Embassy of the Republic of Kenya</i> , [2013] 4 JIEC 0508 (Employment App. Trib.)

²⁹ 95 I.L.R. 467 (Sup. Ct. 1992).

³⁰ See, e.g., *id.* at 471 (Hederman, J.) (“The service with which this case is concerned is one related to the exercise of the diplomatic functions of the ambassador in that the notice party’s work was that of driving the Canadian ambassador’s motor car which was provided for the assistance of the ambassador in the performance of his duties. I am satisfied that this falls within the area of sovereign immunity envisaged and adopted by the Constitution.”); *id.* at 481 (O’Flaherty, J.) (“*Prima facie* anything to do with the embassy is within the public domain of the government in question. It may be that this presumption can be rebutted as happened in the Empire of Iran case. I believe that the element of trust and confidentiality that is reposed in the driver of an embassy car creates a bond with his employers that has the effect of involving him in the employing government’s public business organisation and interests. Accordingly, I hold that the doctrine of restrictive state immunity applies to this case.”).

³¹ It should be noted that some commentators describe the *Canada v. Employment Appeals Tribunal and Burke* decision as establishing a blanket rule that foreign States are immune with respect to all employment claims filed by embassy employees, see Garnett, *supra* note 1, at 801 (“In *Burke* a chauffeur was barred from suing on the basis that all employment at missions was considered sovereign.”), as has one Employment Appeals Tribunal decision, *Greene v. Embassy of India*, [2013] 9 JIEC 0301, at 2 (Employment App. Trib.) (“While the Tribunal is fully aware that in normal circumstances the claimant might be entitled to relief under Irish legislation were he not working for an embassy, as embassies have sovereign immunity, the Tribunal has no alternative but to refuse jurisdiction.”).

³² [2013] 4 JIEC 0508 (Employment App. Trib.).

Gardener at the embassy	Yes	<i>Greene v. Embassy of India</i> , [2013] 9 JIEC 0301 (Employment App. Trib.)
Chauffeur at the embassy	Yes	<i>Canada v. Employment Appeals Tribunal and Burke</i> , 95 I.L.R. 467 (Sup. Ct. 1992)

- **The Netherlands**

In two recent decisions, The Hague Court of Appeal considered two factors in determining whether the foreign State in an employment dispute was immune: (1) the duties and role of the dismissed embassy employee, and (2) the nationality and residence of the employee.³³ From these decisions, it appears that the Netherlands will not exercise jurisdiction over an employment dispute between a dismissed employee and a foreign State if (1) the employee performed “diplomatic duties” or “played an essential role for the diplomatic mission,”³⁴ or (2) the employee was not a resident or national of the Netherlands when the employment contract was entered into.³⁵ Conversely, the Netherlands will exercise jurisdiction over an employment dispute only where (1) the employee did not perform “diplomatic duties” or duties essential to the diplomatic mission and (2) the employee was a resident of the Netherlands when the employment contract was entered into.³⁶ It should be noted that these recent decisions are somewhat at odds with a much earlier decision of The Hague Sub-District Court, which held broadly that any employee with “no civil or diplomatic status” can bring employment claims against a foreign State, without considering the duties, nationality or residency status of the employee.³⁷

Position	TEST: Did the employee perform diplomatic duties or play an essential role	Citation
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³³ *Kingdom of Morocco v. H.A.*, LJN No. BB4066, NIPR (2007) No. 302 (Ct. App. The Hague 2007), cited in [2008] 39 NETH. Y. ON INT’L L. 392; *X v. Morocco*, Appeal Judgment, No. 676984 CV EXPL 05-36544 (Ct. App. 2007), ILDC 548 (NL 2007).

³⁴ *Kingdom of Morocco v. H.A.*, [2008] 39 NETH. Y. ON INT’L L. at 396.

³⁵ See *X v. Morocco*, ILDC 548 (NL 2007), para. 7 (holding that Morocco was immune in a wrongful dismissal case brought by a former driver in the Consulate-General because his employment was “a governmental action,” as demonstrated by the fact that he was a Moroccan national, had lived in Morocco when he was first recruited to work in the Moroccan foreign ministry, and he was not a Dutch permanent resident when he was dismissed); *Arias v. Venezuela*, 128 I.L.R. 684, 686–87 (Dist. Ct. The Hague 1998) (Neth.) (holding that Venezuela was immune in a case seeking compensation for unjust dismissal brought by a former secretary in Venezuela’s embassy because the employee “enjoyed the privileges of diplomatic status,” and therefore must not have been a Dutch national or habitually resident in the Netherlands when she entered into her contract).

³⁶ *Kingdom of Morocco v. H.A.*, [2008] 39 NETH. Y. ON INT’L L. at 395–96 (holding that Morocco was not immune in an action for an interim injunction for salary payment by a dismissed embassy secretary because the secretary, while a Moroccan national, was a Dutch resident prior to becoming employed at the embassy, and did not perform “diplomatic duties.”).

³⁷ *MK v. Republic of Turkey*, 94 I.L.R. 350, 353 (Sub-Dst. Ct. The Hague 1985) (holding that a former embassy secretary could sue Turkey to have her dismissal declared void because “[t]he conclusion of a contract of employment with a Dutch clerical worker who has no diplomatic or civil service status was an act which the defendant performed on the same footing as a natural or legal person under private law and that there was therefore no question of a purely governmental act in the present case”).

	for the diplomatic mission?	
Secretary in the embassy	No – She performed duties that are “perfectly ordinary aspects of a secretarial job,” including processing mail and handling embassy correspondence, and the fact that such duties might be confidential is immaterial. (396)	<i>Kingdom of Morocco v. H.A.</i> , LJN No. BB4066, NIPR (2007) No. 302 (Ct. App. The Hague 2007), <i>cited in</i> [2008] 39 NETH. Y. ON INT’L L. 392

- **Norway**

A recent decision of the Oslo District Court considered the functions and duties of the employee bringing an unlawful dismissal claim in determining whether the foreign State was immune.³⁸ However, this decision is in conflict with the Norwegian Supreme Court’s 2004 decision in *A v. B*.³⁹ In that case, a former driver at a foreign State’s embassy in Oslo challenged the lawfulness of his dismissal, seeking reinstatement and compensation.⁴⁰ The Supreme Court held that it did not have jurisdiction over the dispute. Although a fully translated copy could not be obtained, a summary of the decision and excerpts indicate that two factors guided the court’s decision: (1) that the employee had requested reinstatement (discussed in Section IX below); and (2) that the employee had been employed at an embassy. The Supreme Court described as “an adequate description of the state of law” a commentator’s statement that “[a]n employment contract between an embassy and a private person cannot be tried before the courts in the country in which the embassy is situated.”⁴¹ The Supreme Court added that “[t]here can be little doubt overall that the activities at embassies lie in the core area of government jurisdiction, and that clear limitations must consequently apply to the host State to exercise jurisdiction in cases concerning employment and termination of embassy personnel,” and critically, that “[t]he nature of the position held by the person concerned at the embassy cannot be decisive.”⁴² From this decision, therefore, it would appear that a foreign State cannot be sued by *any* embassy employee.

However, in the 2015 decision of the Oslo District Court, the court held that in order to determine whether a particular embassy employee’s employment was an act *jure imperi* or act *jure gestionis*, “the nature and purpose of the work duties [performed by the employee] will clearly be relevant.”⁴³ Pointing to the text of and commentary on Article 11(2)(a) of the UN Convention on Jurisdictional Immunities, the court held that the United States was immune because the security agent bringing the claim performed “functions which were connected with the Embassy’s security, which . . . must be deemed to be of major significance for the Sending State” and he “was hired to perform [his or her] duties as an element in the exercise of governmental authority.”⁴⁴ The court reasoned that the 2004 Supreme Court decision did not bind it because “[t]he Convention text was not adopted by the International Law Commission” at

³⁸ *Sostrand v. United States*, No. 14-111748 TVI-OTIR/05 (Oslo Dst. Ct. 2015) (translated copy provided by U.S. Department of State).

³⁹ *A v. B*, Appeal Decision, No. HR-2004-00462-U (Sup. Ct. 2004), ILDC 23 (NO 2004).

⁴⁰ *Id.*

⁴¹ *Id.* para. 20–21.

⁴² *Id.* para. 25.

⁴³ *Sostrand v. United States*, No. 14-111748 TVI-OTIR/05, at 25.

⁴⁴ *Id.* at 25.

the time of the 2004 case, and “a further evolution has occurred in the direction of stronger restrictions on the opportunity to invoke State immunity in the subsequent years.”⁴⁵

Position	TEST: (1) Did the employee perform functions related to State security and basic interests of the State and (2) was the employee hired to perform these duties as an element in the exercise of governmental authority?	Citation
Security agent	<p>Yes – (1) “The work duties that the Claimant was entrusted with included . . . functions which were connected with the Embassy’s security, which in the Court’s opinion must be deemed to be of major significance for the Sending State.” (26)</p> <p>(2) “The next question is whether the Claimant was hired to perform these duties as an element in the exercise of governmental authority. . . . What otherwise characterises exercise of government authority, is, for example, that there is a right to decide over others without their consent. The Claimant’s duties included the observation of objects with a view to uncover potential security risks to the Embassy. In the Court’s view, this must be deemed an element in the Embassy’s exercise of governmental authority, and not as an element in an activity governed by private law.” (26)</p>	<i>Sostrand v. United States</i> , No. 14-111748 TVI-OTIR/05 (Oslo Dist. Ct. 2015)

- **New Zealand**

One New Zealand decision was found relating to employment disputes and sovereign immunity. In *Governor of Pitcairn and Associated Islands v. Sutton*, the New Zealand Court of Appeal held that it did not have jurisdiction over an unfair dismissal dispute involving a former typist/clerk at a regional office of the Governor of the Pitcairn (housed within the British Consulate-General because the British High Commission is also the Governor of Pitcairn).⁴⁶ The two judges who wrote full opinions justified this holding by focusing on the employee’s duties, with both concluding that immunity was required because those duties related to the exercise of governmental authority. Judge Cooke explained that although “Mrs Sutton’s duties did not entail any significant responsibility for decision-making, . . . they were close to the heart of the administrative process. She was an important cog in the administrative wheel.”⁴⁷ Judge Richardson was more explicit, explaining that “[t]he focus must be on the particular contractual relationship and responsibilities and their termination.”⁴⁸ Judge Richardson then held that New Zealand courts cannot exercise jurisdiction over employment disputes involving foreign States “[i]f the employee is engaged in carrying out public functions of the foreign State.”⁴⁹ He

⁴⁵ *Id.* at 29.

⁴⁶ 104 I.L.R. 508 (Ct. App. 1994).

⁴⁷ *Id.* at 514.

⁴⁸ *Id.* at 522.

⁴⁹ *Id.*

explained that Sutton was engaged in carrying out public functions of the Governor of Pitcairn because “she performed all secretarial and clerical services necessary to operate the office of Governor.”⁵⁰ Judge Richardson also addressed the likelihood that other categories of workers would be able to sue foreign States: “[c]leaners and others engaged to maintain the physical fabric may be able to make such a claim depending on whether their work brings them into a sufficient association with the sovereign functioning of the office,” but “[d]omestic staff, who are often in a position of trust and confidence, may find it harder to establish a sufficient separation.”⁵¹

- **Sri Lanka**

In *British High Commission v. Jansen*, the Sri Lankan Supreme Court considered the duties and role of the employee bringing an unlawful dismissal suit in determining whether the foreign State was immune.⁵² The case involved a security agency who had been dismissed by the British High Commission after he was found sleeping while on duty. The court held that the United Kingdom was immune because the employee’s duties—“to provide security [and] also to maintain the inviolability of the Embassy premises”—were “integral to the core sphere of sovereign activity.”⁵³

Position	TEST: Did the employee perform functions integral to the core sphere of sovereign activity?	Citation
Security agent	Yes – “[T]he employee’s duties in this case . . . were not only to provide security but also to maintain the inviolability of the Embassy premises. The maintenance of security in the mission could not be classified as merely auxiliary but in my view since the duties of the Respondent were integral to the core sphere of sovereign activity, the contract of employment was not effected in the capacity of a private citizen and the functions of the Respondent were enlisted in the interest of the public service of the UK Government and . . . immunity becomes applicable in the instant case.” (15)	<i>British High Commission v. Jansen</i> , SC Appeal No. 99/2012 (Sup. Ct. 2014)

- **International Courts**

European Court of Justice

⁵⁰ *Id.* at 523.

⁵¹ *Id.* at 522.

⁵² SC Appeal No. 99/2012 (Sup. Ct. 2014), http://www.supremecourt.lk/images/documents/sc_appeal_99_2012.pdf.

⁵³ *Id.* at 15.

In *Mahamdia v. Algeria*, the European Court of Justice (“ECJ”) described state practice as requiring courts to consider the dismissed embassy or consulate employee’s duties in determining whether to grant a foreign State immunity in employment disputes.⁵⁴ Mahamdia had worked as a driver at the Algerian embassy in Berlin. After he was dismissed, he sued Algeria for wrongful dismissal and also sought unpaid overtime in German courts. The case involved the applicability of the Brussels I Regulation. Under that regulation, “where an employer is domiciled outside the European Union (EU) but has an ‘establishment’ in the EU, where the employee works, the employee may sue the employer in the courts of the Member State in which the employer’s ‘establishment’ is situated.”⁵⁵ Algeria argued that its embassy was not an “establishment” within the meaning of the regulation and thus the German courts did not have personal jurisdiction over it. The Higher Labour Court in Berlin referred the case to the ECJ, asking it to determine whether the embassy could be considered an “establishment.”⁵⁶

The ECJ rejected Algeria’s argument, and held that an embassy can act as both a sovereign body and a private entity.⁵⁷ Most relevant for this report, the ECJ described state practice as permitting states to exercise jurisdiction over employment claims by employees of diplomatic missions “where the court seised finds that the functions carried out by that employee do not fall within the exercise of public powers or where the proceedings are not likely to interfere with the security interests of the state.”⁵⁸ Thus, it held that an embassy can be considered an “establishment” under the regulation when these conditions are met.⁵⁹

European Court of Human Rights

In three recent decisions, the European Court of Human Rights (“ECHR”) has treated Article 11 of the UN Convention on Jurisdictional Immunities as customary international law. Thus, it held that domestic courts that correctly apply the Convention’s exceptions to non-immunity do not violate the right of access to court under Article 6(1) of the European Convention on Human Rights.⁶⁰ The ECHR held that the exception to non-immunity under Article 11(2)(a) applies only where the employee’s duties within the embassy or consulate

⁵⁴ (C-154/11), [2013] I.C.R. 1.

⁵⁵ Garnett, *supra* note 1, at 814.

⁵⁶ *Id.*

⁵⁷ *Mahamdia v. Algeria*, [2013] I.C.R. 1., para. 49 (“[T]he functions of an embassy, as stated in Article 3 of the Vienna Convention on Diplomatic Relations, consist essentially in representing the sending State, protecting the interests of the sending State, and promoting relations with the receiving State. In the exercise of those functions, the embassy, like any other public entity, can act *iure gestionis* and acquire rights and obligations of a civil nature, in particular as a result of concluding private law contracts.”).

⁵⁸ *Id.* para. 56.

⁵⁹ *Id.* para. 57.

⁶⁰ *Sabeh El Leil v. France*, App. No. 34869/05, 54 Eur. H.R. Rep. 14, para. 54 (2012) (“Article 11 of the International Law Commission’s 1991 Draft Articles, as now enshrined in the 2004 Convention, applies under customary international law, even if the State in question has not ratified that convention, provided it has not opposed it either.”); *id.* para. 49 (“It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the rule of State immunity.”).

“objectively . . . related to the sovereign interests of” the foreign State.⁶¹ In all three cases below, the ECHR held that the domestic courts had incorrectly concluded that an exception to immunity under Article 11 applied (or in the first case, had incorrectly permitted the United States to refuse a summons and not serve the Department of Justice to represent it in the case), and thus held that the foreign States involved had violated Article 6(1).

Position	TEST: Did the employee perform any functions objectively related to the sovereign interests of the foreign State?	Citation
Photographer at the embassy	No	<i>Wallishauser v. Austria</i> , App. No. 156/04 (2012) (unreported)
Accountant at the embassy	No – The employee “performed the duties of accountant, then head accountant, until his dismissal in 2000 on economic grounds. . . . Neither the domestic courts nor the Government . . . have shown how these duties could objectively have been linked to the sovereign interests of the State of Kuwait.” (para. 62)	<i>Sabeh El Leil v. France</i> , App. No. 34869/05, 54 Eur. H.R. Rep. 14 (2012)
Secretary and switchboard operator at the embassy	No – “[T]he applicant was a switchboard operator at the Polish embassy whose main duties were: recording international telephone conversations, typing, sending and receiving faxes, photocopying documents, providing information and assisting with the organisation of certain events. Neither the Lithuanian Supreme Court nor the respondent Government have shown how these duties could objectively have been related to the sovereign interests of the Polish government.” (para. 70)	<i>Cudak v. Lithuania</i> , App. No. 15869/02, 51 Eur. H.R. Rep. 15 (2010)

IV. All Employment Contracts are a Matter of Private Law

Courts in six countries—including one in Africa, four in Europe, and two in South America—have held that foreign States are not immune in employment disputes involving embassy or consular employees because employment contracts are a matter of private law. The courts in these countries did not distinguish between different types of positions or levels of responsibility, instead stating their holdings broadly as applicable to all to employment contracts without qualification. However, almost every case included below included low-level embassy or consular employees (drivers or secretaries). Thus, although the courts stated their holdings broadly, it is not clear whether these courts would necessarily adopt a similar approach if faced

⁶¹ *Cudak v. Lithuania*, App. No. 15869/02, 51 Eur. H.R. Rep. 15, para. 70 (2010).

with a claim by a high-level embassy or consular employee. The one exception is Austria, in which a court allowed the former Head of the Visa Section of the French Consulate to sue.

- **Botswana**

In *Bah v. Libyan Embassy*, Bah brought proceedings against Libya after he was dismissed from its embassy, arguing that Libya had not provided three months' notice as required by his employment contract and that he was entitled to severance pay, notice pay and wrongfully withheld wages.⁶² The Industrial Court held that it had jurisdiction over the case, explaining that "an action and or legal suit arising out of breach of the employment contract and [/] or Employment Act involves a private law transaction and is justiciable."⁶³ The court explained that "[t]he applicant in this matter is not in anyway [sic] challenging a governmental act, but is merely seeking compliance with the Employment Act in so far as he is merely claiming payment of severance pay, notice pay and the payment of wrongfully withheld wages."⁶⁴ The Industrial Court did not distinguish between different types of positions, and in fact did not even specify what position Bah had held. The Industrial Court reaffirmed *Bah* three years later in *Dube and Rabasha v. American Embassy/Botswana*, holding that the United States was not immune in a case brought by two dismissed embassy employees seeking compensation for unfair retrenchment.⁶⁵

- **Czech Republic**

In *State Immunity in Labour Law Matters Case*, a former driver at the Polish embassy challenged the validity of a termination notice he received in Czech courts.⁶⁶ The Czech Supreme Court reversed the lower courts' rulings that Poland enjoyed immunity in the case. Citing the Report of the Working Group on Jurisdictional Immunities of States and Their Property, the Supreme Court explained "that a State cannot invoke its jurisdictional immunity . . . in proceedings concerning its commercial transactions, labour contracts . . . ; that is, substantially in the cases in which the State does not act as the executor of public authority."⁶⁷ The court did not cite any specific provisions of the UN Convention on Jurisdictional Immunities, and it did not elaborate further on its reasoning.

- **Spain**

The Spanish Supreme Court has held that foreign States act as private actors when employing individuals to perform work in Spain. Thus, the Supreme Court has allowed a former embassy chauffeur⁶⁸ and a former embassy secretary⁶⁹ to bring unfair dismissal claims against foreign States. The reasoning of these decisions is not particularly clear, but in one of the

⁶² Application to Industrial Court, No. IC 956/2005 (Industrial Ct. 2005), ILDC 154 (BW 2005).

⁶³ *Id.* para. 25.

⁶⁴ *Id.* para. 26.

⁶⁵ First Instance Judgment, No. IC 897/2006 (Industrial Ct. 2008), ILDC 1347 (BW 2008), para. 22 ("An employment contract being a matter of private law, the court finds that this matter is justiciable under the restrictive immunity doctrine.").

⁶⁶ 142 I.L.R. 206, 207 (Sup. Ct. 2008).

⁶⁷ *Id.* at 214–15.

⁶⁸ *Emilio B.M. v. Embassy of Equatorial Guinea*, 86 I.L.R. 508 (Sup. Ct. 1986).

⁶⁹ *Diana A. v. Republic of South Africa*, 86 I.L.R. 512 (Sup. Ct. 1986).

decisions, the Supreme Court cited to Article 5 of the 1972 European Convention on State Immunity, which states that “[a] contracting State cannot claim immunity from the jurisdiction of a court of another contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the forum.”⁷⁰

- **Austria**

In several decisions, Austrian courts have characterized employment contracts between foreign States and embassy or consular employees as a matter of private law, and thus held that the foreign States involved were not immune.⁷¹ In every decision identified, the Austrian courts exercised jurisdiction over the employment claim, without analyzing the duties and roles of the employee bringing the claim and whether those duties related to the exercise of governmental authority. Thus, in addition to allowing low-level former embassy employees who were Austrian nationals to sue foreign States—including a driver,⁷² an interpreter,⁷³ and a photographer⁷⁴—the Austrian Supreme Court allowed a French national who had been dismissed as the Head of the Visa Section of the French Consulate in Innsbruck to sue France for breach of contract.⁷⁵

- **Poland**

In *Maciej K v. Embassy of a Foreign State*, a Polish national who had been terminated from a foreign State’s embassy sued, alleging ineffective notice of termination.⁷⁶ The Polish Supreme Court held that it had jurisdiction over the dispute. The court did not specify what position the plaintiff had held at the embassy. Instead, the court reasoned broadly that “[t]he Embassy . . . appears in the case under consideration as an employer,” and “[i]n this capacity, it

⁷⁰ *Id.* at 514.

⁷¹ See *French Consular Employee Claim Case*, 86 I.L.R. 583, 586 (Sup. Ct. 1989) (“Where a foreign State acts as the holder of private rights and concludes a contract of employment for work to be performed on the territory of the State of the forum, that foreign State can also be subjected to proceedings concerning the employment relationship. What must be examined is not the purpose of the work but the nature of the employment obligations.”); see also *Seidenschmidt v. United States of America*, 116 I.L.R. 530, 532 (Sup. Ct. 1992) (holding that the United States was not immune in a proceeding for severance pay brought by an Austrian national who had been dismissed for security reasons as an official at the U.S. Information Service in the embassy because according to “the European Convention on State Immunity, . . . immunity cannot be claimed if the proceedings relate to an employment contract concluded between the State and an individual and the work is to be performed in the State of the forum” and none of the exceptions in that Convention applied); *British Embassy Driver Case*, 65 I.L.R. 20, 22 (Super. Provincial Ct. Vienna 1978) (“Since the conclusion of the contract of employment between [an embassy driver] and the foreign State would not have occurred in the exercise of sovereign rights of the foreign State, that foreign State would not, with regard to claims arising from the employment relationship, be excepted from domestic jurisdiction by virtue of generally recognised principles of public international law.”).

⁷² *British Embassy Driver Case*, 65 I.L.R. 20 (Super. Provincial Ct. Vienna 1978).

⁷³ (1991) 2 Journal du Droit International 441, cited in Garnett, *supra* note 1, at 797 n.50.

⁷⁴ *RW v. Embassy of X* (Sup. Ct. 1990), cited in Garnett, *supra* note 1, at 797 n.51.

⁷⁵ *French Consular Employee Claim Case*, 86 I.L.R. 583 (Sup. Ct. 1989).

⁷⁶ OSNAP 2000/19/723 (Sup. Ct. 2000), reproduced in Poland’s Submission for State Practice Regarding State Immunities (Council of Europe), http://www.coe.int/t/dlapil/cahdi/Source/state_immunities/cahdi%20_2005_%206%20bil%20PartII%20POLAND.pdf.

does not execute acts of public authority of a foreign state,” but rather acts as “a party to a civil law transaction[.]”⁷⁷ Therefore, the court held that the foreign State was not immune.

- **Colombia**

In *Garcia de Borrisow v. Embassy of Lebanon*, a former secretary at the Lebanese embassy initiated proceedings against Lebanon in Colombian courts, claiming that Lebanon had failed to comply with Colombian social security obligations and had dismissed her without cause.⁷⁸ The Supreme Court of Justice held that it had jurisdiction over the dispute. The court reasoned broadly that “in light of a labour relationship that is in keeping with the employment laws of the receiving state (in this case, Colombia), that service is distinct from the activities of the foreign country within the scope of its sovereign functions, i.e. they are not government activities.”⁷⁹

- **Argentina**

A 1994 decision of the Argentinian Supreme Court involving an employment dispute between embassy employees and a foreign State indicates that Argentina considers all employment contracts to be matters of private law and thus will exercise jurisdiction over such cases. In *Manauta v. Russian Embassy*, several employees of the Press Office of the Soviet Union embassy sued Russia (as the successor state to the Soviet Union), claiming that the embassy had not paid social security and other contributions required under Argentinian law.⁸⁰ The Supreme Court held that it had jurisdiction over the dispute. It explained that “[h]aving regard to current practice, it is no longer possible to contend that absolute immunity from jurisdiction is a rule of general international law since it is no longer uniformly applied and does not reflect a legal conviction with regard to its obligatory nature.”⁸¹ The court then concluded that “what is at issue here is not a governmental act since the dispute submitted to this Court relates to the performance of obligations concerning employment and welfare contributions, so that the normal activity of a diplomatic representation is in no way involved.”⁸² The court did not focus on the duties of the employees involved.

V. Foreign States are Immune in Suits by All Embassy and Consular Employees

Three countries—Romania, South Africa, and Pakistan—will not exercise jurisdiction over employment claims brought by *any* members of embassies or consulates.

- **Romania**

⁷⁷ *Id.* at 2.

⁷⁸ *Garcia de Borrisow v. Embassy of Lebanon*, Decision on Admissibility, No. 32096 (Sup. Ct. J. 2007), ILDC 1009 (CO 2007).

⁷⁹ *Id.* para. 27.

⁸⁰ 113 I.L.R. 429 (Sup. Ct. 1994).

⁸¹ *Id.* at 433.

⁸² *Id.*

One relatively recent decision from Romania indicates that it still applies a rule of absolute immunity, even in employment claims. In *SDG v. Canada and Prosecutor General*, a former security agent at the Canadian embassy initiated proceedings seeking reinstatement after he was dismissed for failing to comply with a procedure related to embassy visitors.⁸³ The Romanian court held that Canada was immune by applying a theory of absolute immunity.⁸⁴

- **South Africa**

In contrast to Romania, South Africa generally applies a theory of restrictive immunity. Section 5(1) of South Africa's state immunity legislation creates a presumption of non-immunity in "proceedings relating to a contract of employment between the foreign state and an individual if" (a) "the contract was entered into in the Republic or the work is to be performed wholly or partly in the Republic;" (b) "at the time when the contract was entered into the individual was a South African citizen or was ordinarily resident in the Republic"; and (c) "at the time when the proceedings are brought the individual is not a citizen of the foreign state."⁸⁵ However, Section 5(2)(b) provides that a foreign State is immune if "the proceedings relate to the employment of the head of a diplomatic mission or any member of the diplomatic mission or any member of the diplomatic, administrative, technical *or service staff* of the mission or to the employment of the head of a consular post or any member of the consular, labour, trade, administrative, technical *or service staff* of the post."

- **Pakistan**

Like South Africa, Pakistan has incorporated a theory of restrictive immunity into its state immunity legislation. Section 6(1) provides that foreign States are not immune in "proceedings relating to a contract of employment between a State and an individual where the contract was made, or the work is to be wholly or partly performed in Pakistan."⁸⁶ However, Section 17(a)(1)(a) provides that "section 6 does not apply to proceedings concerning the employment of the members of a mission within the meaning of the [VCDR] . . . or of the members of a consular post within the meaning of the [VCCR]."

VI. Categorical Approaches to Sovereign Immunity Based on the Employee's Position, Nationality, and/or Residency Status

Five countries—the United Kingdom, Australia, Singapore, Israel and Japan—employ a mixture of categorical rules to determine whether a foreign State is immune in employment disputes based on the type of position the employee held (diplomat or consular officer, administrative and technical staff, or service staff), and/or the employee's nationality and residency status. The combined effect of these provisions is to permit many low-level staff to bring claims against foreign States. Australia permits claims by all service staff, as well as by administrative and technical staff who were Australian permanent residents when the

⁸³ Decision on Annulment of Appeal, File No. 1781/2002, No. 1292/2003 (Civ. Div. 2003), ILDC 1024 (RO 2003).

⁸⁴ *Id.* para. H3.

⁸⁵ Foreign States Immunities Act 87 of 1981,

<http://www.dfa.gov.za/chiefstatelawadviser/documents/acts/foreignstatesimmunitiesact.pdf> (emphases added).

⁸⁶ State Immunity Ordinance, 1981.

employment contract was made, and the United Kingdom likely will permit claims by service staff who do not perform duties connected to the sovereign functions of the foreign State. Additionally, Singapore, Israel and Japan provide that foreign States are immune from suit only when the employee is a national of the foreign State and not a resident (or a citizen) of the forum State (Japan provides that foreign States are immune in a few additional circumstances that relate to high-level staff). As foreign States are more likely to recruit only their own nationals to perform high-level positions (such as diplomats or consular officers), and are more likely to recruit local employees for low-level positions, this means that claims by low-level employees are often likely to be permitted in these three countries.⁸⁷

- **United Kingdom**

The United Kingdom employs categorical immunity rules based on the nationality and residency status of the employee, and the type of position held by the embassy or consular employee bringing the claim. Section 4(1) of the State Immunity Act 1978 provides that foreign States are 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.”⁸⁸ However, foreign States remain immune in employment disputes in three circumstances relevant to this survey: (1) “at the time when the proceedings are brought the individual is a national of the State concerned”;⁸⁹ (2) “at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there”;⁹⁰ or the proceedings “concern[] the employment of the members of a mission within the meaning of the [VCDR] . . . or of the members of a consular post within the meaning of the VCCR.”⁹¹

Accordingly, English courts have consistently held that foreign States are immune in employment cases brought by administrative and technical staff because that category of staff is included in the definition of members of a mission or consular post. For example, in *Arab Republic of Egypt v Gamal-Eldin*, the Employment Appeals Tribunal held that Egypt was immune in an unfair dismissal case brought by drivers at the medical office of Egypt’s London embassy because such drivers were members of the administrative and technical staff.⁹²

However, a recent decision by the Court of Appeal in *Benkharbouche v. Embassy of Sudan* (and its companion case *Janah v. Libya*) will likely change the legal landscape with regard

⁸⁷ See, e.g., Garnett, *supra* note 1, at 798 (noting that “[e]mployees appointed to the administrative or technical staff of a mission performing generic, routine roles such as secretarial or chauffeur positions are often locally recruited from nationals of the forum State, as compared to diplomatic personnel who are almost always nationals of the foreign State”).

⁸⁸ State Immunity Act 1978, <http://www.legislation.gov.uk/ukpga/1978/33>.

⁸⁹ *Id.* § 4(2)(a).

⁹⁰ *Id.* § 4(2)(b).

⁹¹ *Id.* § 16(1)(a). Section 4(2)(c) additionally provides that Section 4(1) does not apply if “the parties to the contract have otherwise agreed in writing.”

⁹² 104 I.L.R. 673, 681 (Employment App. Trib. 1995); see also *Al-Kadhimi v. Saudi Arabia*, [2003] EWCA Civ 1689 (Ct. App.) (holding that Saudi Arabia was immune in a case brought an interpreter in the Military Attache’s Department at Egypt’s embassy); *United Arab Emirates v Abdelghafar*, 107 I.L.R. 626 (Employment App. Trib. 1995) (holding that the UAE was immune in a case brought by employees of the Medical Office of the UAE embassy);

to claims by service staff in the United Kingdom. The cases involved claims for unfair dismissal, unpaid wages, and violations of the Working Time Regulations 1998 brought by a Moroccan national who had been employed as a cook at the Sudanese embassy and a Moroccan national who had been a member of the domestic staff at the Libyan embassy whose “duties included cooking, cleaning, laundering, shopping and serving meals.”⁹³

The Court of Appeal’s decision has two key holdings. First, the Court of Appeal held that, although Section 16 of the State Immunity Act (“SIA”) barred the former employees’ claims, Section 16 as applied to service staff violates Article 6(1) of the European Convention on Human Rights (“ECHR”) because state practice indicates that there is no customary international law norm *requiring* courts to grant immunity to foreign States in employment disputes with service staff.⁹⁴ Second, the Court of Appeal held that, although Section 4(2) of the SIA also barred Janah’s claim, it likewise is not required by international law and therefore violates Articles 6(1) and 14 of the ECHR (because it discriminates on the basis of nationality).⁹⁵ The Court of Appeal issued a declaration of incompatibility under section 4 of the Human Rights Act 1998, which “does not affect the operation or validity of the SIA,” but rather “acts primarily as a signal to Parliament that it needs to consider amending that legislation.”⁹⁶ The wording of the declaration of incompatibility indicates that the United Kingdom may move to a model of case-by-case determinations of state immunity based on whether the duties of service staff relate closely to the sovereign functions of missions or consulates: “The order of this court will disapply sections 4(2)(b) and 16(1)(a) to the extent necessary to enable employment claims (other than for recruitment, renewal or reinstatement) falling within the scope of EU law by members of the service staff, whose work does not relate to the sovereign functions of the mission staff, to proceed.”⁹⁷

- **Australia**

Like the United Kingdom, Australia has categorical immunity rules based on the nationality and residency status of the employee, and the type of position held by the embassy or consular employee bringing the claim. Section 12(1) of the Foreign States Immunities Act provides that “[a] foreign State, as employer, is not immune in a proceeding in so far as the proceeding concerns the employment of a person under a contract of employment that was made

⁹³ [2015] EWCA Civ 33 (Ct. App.), para. 3–4.

⁹⁴ *Id.* para. 53. In addition to surveying state practice, the Court of Appeal considered the text of Article 11(2)(b)(iv) of the UN Convention on Jurisdictional Immunities. The Court of Appeal acknowledged that “[a] literal reading” of that article might suggest that it encompasses members of the service staff of a mission who are not nationals or permanent residents in the receiving state because such individuals enjoy immunity for acts performed in the course of their duties under the Vienna Convention. *Id.* para. 38. However, the Court of Appeal rejected this reading for two reasons: (1) such a broad interpretation would have made it redundant to include Article 11(2)(b)(i) because a diplomatic agent would fall under Article 11(2)(b)(iv) if it were so broad; and (2) “consideration of the travaux préparatoires demonstrates that it was not intended to require immunity in respect of employment claims by all members of a mission,” and that the ad hoc committee drafting the Convention chose to bar claims only by diplomatic agents, and rejected a proposal to bar claims by all members of a mission. *Id.* Rather, the Court of Appeal concluded that “[i]t may be that . . . the intention was . . . to limit this residual category of employees to miscellaneous persons of diplomatic status not already mentioned in Article 11(2)(b).” *Id.*

⁹⁵ *Id.* para. 65–66.

⁹⁶ *Id.* para. 72.

⁹⁷ *Id.* para. 85.

in Australia or was to be performed wholly or partly in Australia.”⁹⁸ However, the Act re-imposes immunity where: (1) at the time the contract was made, the employee was a national of the foreign State employer and not a resident of Australia, or the employee was a habitual resident of the foreign State;⁹⁹ (2) the employee is “a member of the diplomatic staff of a mission as defined by the [VCDR]” or “a consular officer as defined by the [VCCR]”;¹⁰⁰ or (3) “a member of the administrative and technical staff of a mission” or “a consular employee as defined by” the Vienna Conventions previously referenced, “unless the member or employee was, at the time when the contract of employment was made, a permanent resident of Australia.”¹⁰¹ Service staff are not mentioned specifically in the statute, with the implication being that such individuals can sue foreign States in employment disputes. Under this statutory regime, Australia has allowed a gardener at an embassy,¹⁰² a secretary/typist at an embassy,¹⁰³ and a driver/receptionist at an embassy¹⁰⁴ to sue for damages for wrongful dismissal.

- **Singapore**

Singapore employs categorical immunity rules based on the nationality and residency status of the employee bringing the claim. Section 6(1) of the State Immunity Act 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 Singapore or the work is to be wholly or partly performed in Singapore.”¹⁰⁵ Section 6(2) re-imposes immunity if (1) “at the time when the proceedings are brought the individual is a national of the State concerned”; or (2) “at the time when the contract was made the individual was neither a citizen of Singapore nor habitually resident in Singapore.”¹⁰⁶

- **Israel**

Like Singapore, Israel has categorical immunity rules based on the nationality and residency status of the employee bringing the claim. Section 4(a) of its state immunity legislation provides that “[a] foreign state shall not have immunity from jurisdiction in an action by an employee or by an applicant for employment” where three conditions are met: (1) “the cause of action is within the exclusive jurisdiction of a Regional Labour Court, under any legal provision”; (2) “the subject matter of the action is labour, all or a part of which has been performed, or is to be performed, in Israel”; and (3) “when the cause of action arose, the employee or applicant for employment was an Israeli citizen or was habitually resident in Israel

⁹⁸ Foreign States Immunities Act 1985, Act No. 196,
https://www.comlaw.gov.au/Details/C2010C00145/Html/Text#_Toc255404392.

⁹⁹ *Id.* § 12(3).

¹⁰⁰ *Id.* § 12(5).

¹⁰¹ *Id.* § 12(6). Section 12(4) also provides that Section 12(1) does not apply where “an inconsistent provision is included in the contract of employment.”

¹⁰² *Robinson v. Kuwait Liaison Office*, (1997) 145 ALR 68, cited in Garnett, *supra* note 1, at 803 n.87.

¹⁰³ *Thomas and Consulate General of India*, [2002] NSWIR Comm 24, cited in Garnett, *supra* note 1, at 803 n.88.

¹⁰⁴ *Hussein v. Libya*, 2006 AIRC 486, cited in Garnett, *supra* note 1, at 803 n.89.

¹⁰⁵ State Immunity Act, Act 19 of 1979,

<http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A1be1a8f7-0968-4fcc-ac26-39d3a51b7b70%20Depth%3A0%20Status%3Ainforce;rec=0>.

¹⁰⁶ Section 6(2)(c) also states that Section 6(1) does not apply if “the parties to the contract have otherwise agreed in writing.”

or in a region.”¹⁰⁷ However, Section 4(b) states that, even if these three conditions are met, a foreign State is nevertheless immune “if the employee or applicant for employment was, at the commencement of the proceeding, a citizen of the foreign state and was not resident in Israel.”

- **Japan**

Like the United Kingdom and Australia, Japan employs categorical immunity rules based on the nationality and residency status of the employee, and the type of position held by the embassy or consular employee bringing the claim. Article 9(1) of its state immunity legislation provides that “[a] Foreign State, etc. shall not be immune from jurisdiction with respect to Judicial Proceedings regarding labor contracts between said Foreign State, etc. and an individual wherein all or part of the labor is, or is to be, provided in Japan.”¹⁰⁸ However, Article 9(2)(i) re-imposes immunity when the individual holds one the following types of positions: “(a) A diplomat as provided in Article 1 (e) of the [VCDR]”; “(b) A consular officer as provided in Article 1 (d) of the [VCCR]”; “(c) A diplomatic staff of a permanent missions [sic] or a special mission to an international organizations [sic] or a persons employed to represent said Foreign State, etc., . . . at international conferences”; or “(d) . . . persons enjoying diplomatic immunity.” Article (2)(v) additionally re-imposes immunity “where the individual is a citizen of said Foreign State, etc. at the time of the filing of the action . . . ; provided however, that this shall not apply where said individual has the permanent residence in Japan.”¹⁰⁹

VII. Canada’s Approach to Sovereign Immunity in Employment Disputes

Canadian court decisions are not internally consistent and reveal three different approaches to sovereign immunity in employment disputes. Canada’s State Immunity Act does not include an exception to immunity for employment contracts, but does include a broad exception for “any proceedings that relate to any commercial activity of the foreign state.”¹¹⁰ A recent decision by the Federal Court in Ottawa held broadly that the employment of any member of a consulate or embassy is not a commercial activity and therefore a foreign State is immune in such suits.¹¹¹ However, two decisions by Ontario courts considered the duties and status of the consular employee bringing the unfair dismissal claim, and one of the courts allowed the consular employees to sue.¹¹² Additionally, at least two other decisions have held that the nature of the claim determines whether a foreign State is immune in an employment dispute (see Section IX below).

¹⁰⁷ Foreign States Immunity Law 5769-2008,

http://www.coe.int/t/dlapil/cahdi/Source/state_immunities/Israel%20Immunities%20January%202009.pdf.

¹⁰⁸ Act on the Civil Jurisdiction of Japan with Respect to a Foreign State, Act No. 24 of April 24, 2009.

¹⁰⁹ Additional exceptions relating to security issues and the nature of the claim are discussed in the Sections VIII and IX below. Like Singapore and Australia, Japan also has an exception to non-immunity for “[c]ases where the parties to said labor contract have otherwise agreed in writing; provided however, that this shall not apply where the lack of jurisdiction over the action or petition regarding said labor contract by Japanese courts is contrary to public order from the viewpoint of protecting workers.” *Id.* art. 9(2)(vi).

¹¹⁰ State Immunity Act (R.S.C., 1985, c. S-18) § 5, <http://laws-lois.justice.gc.ca/eng/acts/S-18/page-2.html#h-3>.

¹¹¹ *United States of America v. Zakhary*, 2015 FC 335, 2015 CarswellNat 549 (Ottawa Fed. Ct. 2015).

¹¹² *Roy v. South Africa*, 2013 ONSC 4633, 2013 CarswellOnt 9806 (Ontario Super. Ct. J. 2013).

In *United States of America v. Zakhary*, a cashier who had been dismissed from the United States Consulate in Toronto sued the United States for unjust dismissal.¹¹³ The court held that the employment of the cashier was not a commercial activity and that the United States was therefore immune from suit.¹¹⁴ The court reasoned that “[t]he question of who works within an embassy, and whether they perform their responsibilities to the satisfaction of the foreign government, is not a commercial activity . . . such as hiring someone to repaint the interior or to repair the plumbing; rather employment within the embassy is integral to its operations and is immune from review in domestic courts.”¹¹⁵ The court explicitly added that it would not focus on the nature of the employee’s duties:

The nature of the functions and responsibilities of the employee, whether administrative, clerical or, as in this case, financial, do not limit the immunity. The immunity extends to the operations of the Consulate. The Court does not parse or dissect, within the walls of embassies or consulates, which functions are purely diplomatic, or which functions may be administrative. It is doubtful that such bright lines can be drawn.¹¹⁶

However, in *Roy v. South Africa*, the Ontario Superior Court of Justice held that it had jurisdiction over a wrongful dismissal suit against South Africa brought by a former consular clerk / assistant at the South African High Commission.¹¹⁷ The employee “was responsible for the intake and processing of all visa and permit applications, diplomatic protocol, maintenance orders, pension and outstanding revenue matters, custom declarations, birth, marriage and death certificate process, e-mail inquiries and personal interviews.”¹¹⁸ In justifying its decision that her employment was a commercial activity, the court focused on the employee’s duties and noted the following factors indicating that she did not perform duties related to South Africa’s governmental activity: “she did not participate in the creation of government policy or its administration,” but rather “[s]he carried out directions”; “[s]he was not privy to political deliberations”; and “[s]he could not speak for the government in its decision-making, lobbying or legislative work.”¹¹⁹ Rather, the court characterized her job as “an administrative and client service driven role.”¹²⁰

Similarly, in *Butcher v. Saint Lucia*, the Ontario Court of Justice considered the nature of the employee’s duties and whether those duties related to the sovereign activity of the foreign State in determining whether the foreign State was immune in an employment case.¹²¹ In that case, Butcher, who had been appointed to be Consul General in Toronto, sued Saint Lucia for breach of contract after it rescinded his offer of employment before he began work due to negative media coverage. The court explained that “[r]etaining the services of the plaintiff . . . was an activity . . . which had both a commercial and a sovereign aspect.”¹²² The court expanded

¹¹³ *United States of America v. Zakhary*, 2015 FC 335, 2015 CarswellNat 549, para. 2 (Ottawa Fed. Ct. 2015).

¹¹⁴ *Id.* para. 28.

¹¹⁵ *Id.* para. 30.

¹¹⁶ *Id.* para. 31.

¹¹⁷ *Roy v. South Africa*, 2013 ONSC 4633, 2013 CarswellOnt 9806, para. 6, 63 (Ontario Super. Ct. J. 2013).

¹¹⁸ *Id.* para. 48.

¹¹⁹ *Id.* para. 61.

¹²⁰ *Id.*

¹²¹ 1998 CarswellOnt 1939 (Ontario Ct. J. 1998).

¹²² *Id.* para. 16.

that “[t]he act of entering a contract for the provision of identified services over a fixed period of time with stipulated compensation is commercial in nature. However, the appointment of a Consul General to establish a Consulate for Saint Lucia in Toronto, to be Saint Lucia’s principal representative in Toronto and to be responsible for carrying on all normal Consular activities in Toronto is an activity of a sovereign nature.”¹²³ The court emphasized the close links between the duties of a Consul General and sovereign activities of a foreign State:

[T]he more significant impact of his claims is on the right of the Government of Saint Lucia to decide how and when its consulates abroad will be established, who will be in charge of those consulates, how its image abroad both with foreigners and with its own nationals living abroad will be managed, the objectives to pursue in the area of foreign affairs and international trade, etc. A Consul General represents a state in the same way as an ambassador. Each country is entitled to retain control over the choice of such individuals and their tenure in this capacity.¹²⁴

The court concluded that “[t]he significance of [the sovereign] aspect of the activity far outweighs in importance the commercial aspect of the activity,” and therefore held that Saint Lucia was immune.¹²⁵

VIII. Employment Disputes Involving Security Concerns

Ten countries with decisions or legislation on employment disputes involving security concerns were identified. In all but two of the countries (Belgium and Austria), the courts held that the foreign State was immune entirely or in part because the employee had been dismissed for security reasons or because the employee had been employed in a security position, or the relevant legislation provides that a foreign State is immune in such circumstances. Additionally, decisions from India and Norway, as well as Japan’s state immunity legislation, indicate that these countries would apply Article 11(2)(d) of the UN Convention on Jurisdictional Immunities, but only where the foreign State involved made a specific declaration that the proceeding would interfere with its security interests.

Foreign State immune

- **The Netherlands**

In *Van der Hulst v. United States*, the plaintiff had been hired as a secretary—subject to a satisfactory security investigation—in the Foreign Commercial Service Department of the U.S. Embassy in The Hague.¹²⁶ A month after she had been hired, the United States terminated her for security reasons.¹²⁷ The Netherlands Supreme Court held that the United States was immune. It explained that:

¹²³ *Id.*

¹²⁴ *Id.* para. 18.

¹²⁵ *Id.* para. 16.

¹²⁶ 94 I.L.R. 373, 374 (Sup. Ct. 1989).

¹²⁷ *Id.*

In carrying on its diplomatic mission and providing consular services in the receiving State, a foreign State should, for reasons of State security, be given the opportunity to allow the conclusion or continued existence of a contract such as the present one to depend on the result (which is not subject to the assessment of the other party or the courts of the receiving State) of a security check by stipulating a condition such as the present one. It cannot be assumed that a foreign State which enters into such a contract thereby loses its right to rely on immunity when terminating the contract on the ground of a security check of the kind mentioned above, no matter how much the contract itself is of a private law nature.¹²⁸

- **Canada**

Although not actually the holding of the case, the Canadian Supreme Court in *Re Canada Labour Code* stated that it would hold foreign States immune in cases involving dismissal for security reasons.¹²⁹ First, in explaining that employment contracts between individuals and foreign States can have both commercial and sovereign aspects, the Supreme Court stated that “the right to dismiss an employee without notice for security reasons is a sovereign attribute of the relationship.”¹³⁰ Second, in its review of state practice, the Canadian Supreme Court found that “cases have recognized that foreign states are immune from wrongful dismissal claims when the dismissal was for national security reasons,” and cited *Van der Hulst v. United States* as well as a decision from Norway (*Kayiambakis v. United States*, Norway, Eidsivating App. Ct., May 29, 1989, unreported).¹³¹

- **Italy**

A recent Supreme Court of Cassation decision suggests that Italy also would recognize a foreign State’s immunity from suit when it dismisses an employee for security reasons. However, a translated copy of the decision could not be located, so only a summary of the court’s decision and analysis is cited. In *Brazil v. De Vianna Dos Campos Riscado*, a Brazilian citizen who had worked as a porter at the Brazilian Embassy in Rome sued the Embassy after being dismissed for disciplinary reasons.¹³² De Vianna had told the Embassy that his year-and-a-half absence from work was due to illness, when in fact he had been imprisoned in Italy.¹³³ De Vianna asked that his dismissal be declared invalid and that he be reinstated.¹³⁴ Brazil asserted that it was immune because its embassy’s organization constituted a *jure imperii* function and that, given De Vianna’s criminal record, it could not trust De Vianna with the security and confidentiality of its embassy’s operations.¹³⁵ The Court of Cassation held that Brazil was

¹²⁸ *Id.* at 376–77.

¹²⁹ 94 I.L.R. 264 (Can. Sup. Ct. 1992).

¹³⁰ *Id.* at 281.

¹³¹ *Id.* at 283.

¹³² *Brazil v. De Vianna Dos Campos Riscado*, Preliminary Order on Jurisdiction, No. 1981 (Sup. Ct. Cass. 2012), ILDC 2037 (IT 2012), para. F1.

¹³³ *Id.*

¹³⁴ *Id.* para. F2.

¹³⁵ *Id.* para. F3.

immune from suit. In addition to citing the fact that reinstating De Vianna would impermissibly interfere with Brazil's sovereign functions, it also noted that De Vianna had performed tasks related to the security at the Brazilian Embassy.¹³⁶

- **Norway**

In *Sostrand v. United States*, the Oslo District Court held that the United States was immune in an unlawful dismissal suit for damages brought by a former security guard at the embassy.¹³⁷ As previously discussed, the court cited Article 11(2)(a) of the UN Convention on Jurisdictional Immunities to hold that the United States was immune because the employee's "functions . . . were connected with the Embassy's security," and as "uncover[ing] potential security risks to the Embassy" is a core role of an embassy, he was therefore "hired to perform these duties as an element in the exercise of governmental authority."¹³⁸

Additionally, the Oslo District Court held that the exception to non-immunity in Article 11(2)(d) of the UN Convention applies only where the "head of State, head of government or foreign secretary of the employer State" has made a declaration in writing that the proceeding would interfere with its security interests.¹³⁹ As the United States had not submitted such a written declaration, the court held that Article 11(2)(d) did not apply.¹⁴⁰

- **Japan**

Article 9(2)(ii) of Japan's state immunity legislation provides that foreign States are immune in proceedings regarding employment contracts where the "individual has been employed in order to perform duties pertaining to the security, diplomatic secrets, or other important interests of said Foreign State, etc."¹⁴¹ Additionally, Article 9(2)(iv) provides that in "[a]n action or petition regarding the effect of a dismissal or other termination of the labor contracts (excluding those seeking compensation for damages)," a foreign State is immune "where the head of said Foreign State, etc., the head of its government, or its Minister of Foreign Affairs finds that there is a risk that Judicial Proceedings pertaining to said action or petition would harm the security interests of said Foreign State, etc."

- **Sri Lanka**

In *British High Commission v. Jansen*, the Sri Lankan Supreme Court considered a suit for unlawful dismissal filed by a security agent who had been dismissed by the British High Commission after he was found sleeping while on duty.¹⁴² The Supreme Court held that the United Kingdom was immune from suit because "the employee's duties . . . were not only to provide security but also to maintain the inviolability of the Embassy premises," and as "[t]he

¹³⁶ *Id.* para. H4.

¹³⁷ *Sostrand v. United States*, No. 14-111748 TVI-OTIR/05 (Oslo Dst. Ct. 2015).

¹³⁸ *Id.* at 26.

¹³⁹ *Id.* at 23.

¹⁴⁰ *Id.* at 23–24.

¹⁴¹ Act on the Civil Jurisdiction of Japan with Respect to a Foreign State, Act No. 24 of April 24, 2009.

¹⁴² SC Appeal No. 99/2012 (Sup. Ct. July 2014),

http://www.supremecourt.lk/images/documents/sc_appeal_99_2012.pdf.

maintenance of security in the mission could not be classified as merely auxiliary but . . . were integral to the core sphere of sovereign activity,” the case concerned an act *jure imperi*.¹⁴³

- **India**

In a recent decision, the Delhi High Court affirmed the validity of Article 11(2)(d)’s exception to non-immunity in employment cases, but held that its conditions had not been met in the case before it.¹⁴⁴ A former driver at the Greek embassy sued Greece for unlawful dismissal and claimed compensation for his dismissal as well as unpaid retirement benefits.¹⁴⁵ Greece argued that Article 11(2)(d) of the UN Convention on Jurisdictional Immunities should be interpreted as requiring courts to grant immunity to foreign States in any legal action related to dismissal or termination of employment.¹⁴⁶ The High Court rejected such a broad reading of Article 11(2)(d), but it affirmed the validity of the exception so long as the foreign State involved has made a specific determination that the proceeding would interfere with its security interests.¹⁴⁷ As Greece had not yet made such a determination, the High Court refused to grant Greece immunity in the case.¹⁴⁸

Foreign State not immune

- **Belgium**

In *Van Averbek v. United States*, the United States dismissed a computer assistant for compromising the security of its embassy’s computer systems.¹⁴⁹ Despite the fact that the employee had been fired for security concerns, the Francophone Labour Tribunal of Brussels held that the United States was not immune because the computer assistant did not carry out or participate in missions stemming from governmental authority, and thus his employment was a private act.¹⁵⁰

- **Austria**

In *Seidenschmidt v. United States of America*, a dismissed official at the United States Information Service in the U.S. Embassy in Vienna sued the United States, seeking severance pay but not reinstatement.¹⁵¹ The United States asserted that it had dismissed Seidenschmidt because he had breached the embassy’s security regulations.¹⁵² The Supreme Court held that it had jurisdiction over the case, stating that “[t]here was no principle in international law whereby a State was entitled to terminate an employment relationship, concluded under private law, on

¹⁴³ *Id.* at 15.

¹⁴⁴ *Shyam Lal v. Union of India*, [2010] INDLHC 4446 (High Ct. Delhi 2010), <http://lobis.nic.in/ddir/dhc/SMD/judgement/20-09-2010/SMD16092010CW101852009.pdf>.

¹⁴⁵ *Id.* para. 1–3.

¹⁴⁶ *Id.* para. 7.

¹⁴⁷ *Id.* para. 11.

¹⁴⁸ *Id.*

¹⁴⁹ *Van Averbek v. United States*, No. 12/15.954/A at 3 (Francophone Labor Trib. Brussels 2015).

¹⁵⁰ *Id.* at 9–10.

¹⁵¹ 116 I.L.R. 530, 531 (Sup. Ct. 1992).

¹⁵² *Id.* at 531–32.

the grounds of security by recourse to an act of sovereignty.”¹⁵³ The Supreme Court cited to Article 5 of the European Convention on State Immunity, and explained that “[n]one of the three exceptional situations provided for in Article 5(2) of the Convention related to claims arising from the termination of an employment relationship by a State on grounds of security.”¹⁵⁴

IX. Nature of the of Claim

Nine countries consider the nature of the claim in an employment dispute in determining whether the foreign State is immune.

Reinstatement

The clearest trend is that many countries will not exercise jurisdiction over claims for reinstatement, or if not framed jurisdictionally, prohibit reinstatement as a permissible remedy against a foreign State. The one exception is Spain, whose courts have exercised jurisdiction over foreign States in employment disputes, even when the remedy sought is reinstatement.¹⁵⁵

- **Canada** - Section 11 of the State Immunity Act prohibits any “relief by way of an injunction [or] specific performance” against a foreign State.¹⁵⁶ As the Federal Court for Ottawa recently held, “[a]n order reinstating an employee interferes with a foreign state’s ability to conduct the operations of its consulate in Canada, a ‘quintessentially sovereign’ activity, and is void.”¹⁵⁷
- **United Kingdom** - Section 13(2)(a) of the State Immunity Act provides that “relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property.”¹⁵⁸
- **Australia** - Section 29(2) of the Foreign States Immunities Act states that “[a] court may not make an order that a foreign State employ a person or re-instate a person in employment.”¹⁵⁹
- **Japan** – Section 9(2)(iii) provides that foreign States are immune in “[a]n action or petition regarding the existence or nonexistence of the contract for the employment or re-employment of the individual (excluding those seeking compensation for damages).”¹⁶⁰
- **Norway** - The Norwegian Supreme Court has held that it did not have jurisdiction over an unlawful dismissal claim brought by a former embassy driver against a foreign

¹⁵³ *Id.* at 532.

¹⁵⁴ *Id.*

¹⁵⁵ *Diana A. v. Republic of South Africa*, 86 I.L.R. 512 (Sup. Ct. 1986); *Emilio B.M. v. Embassy of Equatorial Guinea*, 86 I.L.R. 508 (Sup. Ct. 1986).

¹⁵⁶ State Immunity Act (R.S.C., 1985, c. S-18), <http://laws-lois.justice.gc.ca/eng/acts/S-18/page-2.html#h-3>.

¹⁵⁷ *United States of America v. Zakhary*, 2015 FC 335, 2015 CarswellNat 549, para. 36 (Ottawa Fed. Ct. 2015).

¹⁵⁸ State Immunity Act 1978, <http://www.legislation.gov.uk/ukpga/1978/33>.

¹⁵⁹ Foreign States Immunities Act 1985, Act No. 196, https://www.comlaw.gov.au/Details/C2010C00145/Html/Text#_Toc255404392.

¹⁶⁰ Act on the Civil Jurisdiction of Japan with Respect to a Foreign State, Act No. 24 of April 24, 2009.

State.¹⁶¹ One factor in the court's decision was that the employee had requested reinstatement. The court explained that "[a] decision on invalidity with the effect of reinstatement in the employment would be incompatible with general principles under international law on State immunity."¹⁶² The Supreme Court cited the UN Convention on Jurisdictional Immunities, noting that it "includes rules that except civil proceedings on 'reinstatement' into employment from civil proceedings linked to employment cases that could . . . be brought before courts in foreign countries."¹⁶³

- **Portugal** - In two decisions, the Portuguese Supreme Court has held that it did not have jurisdiction over requests for reinstatement in wrongful dismissal suits brought by former embassy employees, but did exercise jurisdiction over claims for unpaid salary, holiday bonuses, and "non-material damages arising from the unfair dismissal."¹⁶⁴
- **Belgium** - In *Van Averbek v. United States*, the Francophone Labor Tribunal of Brussels held that "a State that is an employer benefits from immunity from any claim regarding hiring, re-hiring, or reinstatement of the worker; on the other hand, immunity does not protect against claims for financial compensation that is justified by termination of the contract."¹⁶⁵
- **Italy** - The Italian Court of Cassation has long held that it does not have jurisdiction over requests for reinstatement by embassy or consular employees because such requests unduly interfere in the organization and operation of foreign State's diplomatic and consular missions.¹⁶⁶

Claims that require inquiry into the internal organization of the embassy or consulate

Italy, Switzerland and Canada will not exercise jurisdiction over claims that would require the court to inquire into the internal organization or sovereign functions of the foreign State. The most common example given is claims that will require a court to "examine the reasons for termination [or to] call upon the employer State to justify the termination."¹⁶⁷ On the

¹⁶¹ *A v. B*, Appeal Decision, No. HR-2004-00462-U (Sup. Ct. 2004), ILDC 23 (NO 2004), para. 26.

¹⁶² *Id.* para. 24.

¹⁶³ *Id.*

¹⁶⁴ *AA v. Austrian Embassy*, Final Decision on Jurisdiction, No. 05S3279 (Sup. Ct. 2006), ILDC 826 (PT 2007), para. IX–X; *A v. Islamic Republic of Pakistan*, (Ct. App. 2004), cited in Richard Garnett, *State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?*, 64 I.C.L.Q. 783, 799 n.71 (2015).

¹⁶⁵ *Van Averbek v. United States*, No. 12/15.954/A, at 10 (Francophone Labor Trib. Brussels 2015) (translated copy provided by U.S. Department of State). (emphasis added).

¹⁶⁶ See, e.g., *Vespignani v. Bianchi*, Final Appeal on a Preliminary Question, No. 13711 (Sup. Ct. Cass. 2004), ILDC 556 (IT 2004), para. 2 ("[T]his Court, in Combined Sections, has found in respect of disputes pertaining to the working relationship of Italian staff in foreign consulates in Italy that the Italian judge lacks jurisdiction on the basis of consular immunity when the ruling requested of this judge would entail interference with the organisation of the consular office — as in the case of an appeal against dismissal with a request for a judgment ordering reinstatement to the previous position.").

¹⁶⁷ HAZEL FOX, *THE LAW OF STATE IMMUNITY* 452 (Oxford Univ. Press 3d ed. 2013); see also *id.* ("State practice increasingly makes a distinction between the manner of termination and the financial consequences of a termination of an employment contract by a State. As to the manner, national courts will not examine the reasons for termination nor call upon the employer State to justify the termination; the decision to terminate is an acte de gouvernement not

other hand, courts in these countries will exercise jurisdiction over claims for financial compensation that do not interfere with or require inquiry into the sovereign functions of the foreign State.

- **Italy**

Italian courts will exercise jurisdiction over foreign States in employment disputes where the claim “exclusively concerns pecuniary questions,” such as claims for salary in arrears or overtime pay.¹⁶⁸ This is true even if the plaintiff-employee occupied a senior position and performed non-auxiliary functions tied to the sovereign acts of the foreign State.¹⁶⁹ For example, in *Vespignani v Bianchi*, an Italian citizen who had worked for the Honorary Consul of Côte d’Ivoire instituted proceedings against Côte d’Ivoire after he was terminated, seeking unpaid wages.¹⁷⁰ The Court of Cassation held that it had jurisdiction over Vespignani’s claim.¹⁷¹ Although the court did not specify precisely what duties Vespignani performed in the Honorary Consul, it stated broadly that it had jurisdiction even “in the case of employees tasked with helping with consular functions” where, as in the present case, “the request concerns only receiving salaries due, or, in any event, where it exclusively concerns pecuniary questions.”¹⁷²

In contrast, Italian courts will not exercise jurisdiction over foreign States in employment disputes where the nature of the claim would require inquiry into or interference with the operations or organizational structure of the foreign State’s diplomatic or consular posts. As documented in the table below, Italian courts therefore have declined to exercise jurisdiction over claims for reinstatement; claims for declarations that a particular dismissal was unlawful or damages for unlawful dismissal, because such claims would require investigating the reasons for the dismissal; and a claim that the employee’s position should have been graded higher than it was.

Remedy requested	Too intrusive?	Rationale	Citation
Reinstatement and declaration that the	Yes	[No translated text]	<i>Brazil v. De Vianna Dos Campos Riscado</i> ,

subject to the local court’s jurisdiction. But the local court will exercise jurisdiction over the financial consequences of summary dismissal and termination.”).

¹⁶⁸ *Vespignani v. Bianchi*, Final Appeal on a Preliminary Question, No. 13711 (Sup. Ct. Cass. 2004), ILDC 556 (IT 2004), para. 2.

¹⁶⁹ See, e.g., *Carbonar v. Magurno*, 114 I.L.R. 534, 535 (Sup. Ct. Cass. 1993) (“[I]n the case of contracts of employment between Italian citizens and foreign States, . . . the jurisdiction of the Italian courts in proceedings brought by such employees applies . . . not only where the employment is merely auxiliary to the institutional functions of the defendant State or entity, but also to those cases where the employee performs duties closely bound up with those functions, but the decision sought from the court relates solely to financial aspects of the employment relationship and hence is not liable to affect or interfere with the said functions.”). This is a more recent trend in Italian jurisprudence. In earlier decisions, the Supreme Court of Cassation held that it did not have jurisdiction over claims by such employees, even over purely financial claims. See, e.g., *Republic of France v. Jacuzio*, 87 I.L.R. 53 (Sup. Ct. Cass. 1987); *Special Representative of State of the City of the Vatican v. Pieciukiewicz*, 78 I.L.R. 120 (Sup. Ct. Cass. 1982).

¹⁷⁰ *Vespignani v. Bianchi*, ILDC 556 (IT 2004), para. F1.

¹⁷¹ *Id.* para. 2.

¹⁷² *Id.*

dismissal was unlawful			Preliminary Order on Jurisdiction, No. 1981 (Sup. Ct. Cass. 2012), ILDC 2037 (IT 2012)
Severance compensation	No	[No translated text]	<i>Schmidt v. Goethe Institut</i> , Preliminary Order on Jurisdiction, No. 2448 (Sup. Ct. Cass. 2008), ILDC 1616 (IT 2008)
Compensation for work he had performed	No	Requests are not intrusive when “the complaints submitted remain—as in the case at hand—limited to financial payment and in no way involve questions relating to the organisation of the authority.” (para. 2)	<i>Vespignani v. Bianchi</i> , Final Appeal on a Preliminary Question, No. 13711 (Sup. Ct. Cass. 2004), ILDC 556 (IT 2004)
Declaration that his dismissal was unlawful and compensation in lieu of reinstatement	Yes	This “purely monetary claim requires an investigation of the behaviour of the employer in having recourse to dismissal,” and “such an investigation directly concerns the exercise of public-law powers relating to the organization of the offices [of the foreign State] and the management of its employment relationships.” (566)	<i>Canada v. Cargnello</i> , 114 I.L.R. 559 (Sup. Ct. Cass. 1998)
Reinstatement and damages for unlawful dismissal	Yes	“[T]he employee started the proceedings in order to establish the unlawfulness of her dismissal,” and examining the reasons for her dismissal “necessarily and directly affect the exercise of the public powers of the foreign State concerned.” (557)	<i>United States of America v. Lo Gatto</i> , 114 I.L.R. 555 (Sup. Ct. Cass. 1995)
Compensation for losses arising from the non-payment of social security contributions	No	“[T]he jurisdiction of the Italian courts in proceedings brought by such employees applies, under the principle of so-called ‘restrictive immunity’ now generally accepted in international law, not only where the employment is merely auxiliary to the institutional functions of the defendant State or entity, but also to those cases where the employee performs duties closely bound up	<i>Carbonar v. Magurno</i> , 114 I.L.R. 534 (Sup. Ct. Cass. 1993)

		with those functions, but the decision sought from the court relates solely to financial aspects of the employment relationship and hence is not liable to affect or interfere with the said functions.” (535)	
Arrears of salary	No	“[T]he dispute is essentially concerned solely with financial matters This fact would in any event have brought the case within the scope of the jurisdiction of the Italian courts, even if Sendanayake’s duties had been more closely bound up with the Embassy’s institutional functions.” (533)	<i>Zambian Embassy v. Sendanayake</i> , 114 I.L.R. 532 (Sup. Ct. of Cass. 1992)
An order (1) declaring her dismissal invalid and reinstating her; (2) requiring Norway to pay her a till allowance; (3) requiring Norway to pay her salary from her date of dismissal to her date of reinstatement; (4) compensating her for losses related to her unlawful dismissal; and (5) requiring Norway to pay her various allowances required under Italian law (531)	Yes for (1), (3) and (4) No for (2) and (5)	No jurisdiction over (1), (3) and (4) because “any enquiry into the lawfulness of the dismissal constitutes a direct interference with the public-law powers of the foreign State with regard to the manner in which it organizes its ambassadorial offices and services, which are matters not susceptible of examination by the Italian courts,” and acceptance of these claims “would imply a declaration that the dismissal was invalid.” (531) Jurisdiction over (2) and (5) because these claims “do not involve any violation of the [foreign State’s] immunity from examination by the Italian courts . . . since such an examination can be halted when it reaches the threshold of the domain covered by the public-law powers of the foreign State, into whose exercise the courts are not entitled to enquire.” (531)	<i>Norwegian Embassy v. Quattri</i> , 114 I.L.R. 525 (Sup. Ct. of Cass. 1991)
Compensation for a higher salary owed	Yes	Too intrusive because it would require the court “to pass judgment	<i>Libyan Arab Jamahiriya v.</i>

because she allegedly was incorrectly graded lower than she should have been		on acts of the defendant coming within the scope of its right of self-organization.” (524)	<i>Trobbiani</i> , 114 I.L.R. 520 (Sup. Ct. of Cass. 1990)
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- **Switzerland**

Provided the other conditions discussed in Section III are met, Switzerland will exercise jurisdiction over “any financial claim which does not require an intrusion into the internal life of a diplomatic or consular mission or an examination of its staff policy.”¹⁷³ In contrast, Swiss courts will not “examine the justification or reasons for . . . terminations by a diplomatic [or consular] mission,” and will not “summon[] the employer State to justify itself” in terminating an employee at such missions.¹⁷⁴ In the context of summary dismissals, this means that Swiss courts will not exercise jurisdiction over a claim seeking a declaration that a particular dismissal was unlawful or unjustified, but Swiss courts will exercise jurisdiction over “disputes concerning the financial consequences of a summary dismissal.”¹⁷⁵ In the two cases identified addressing this issue, the Swiss courts explained that an employer State will be given the option to justify a summary dismissal, and if “the employer State refuses to notify possible ‘just cause’ it will be ordered to pay salary in lieu of notice . . . or the salary due for the remainder of a fixed-term contract,” if such remedies are applicable in a particular case.¹⁷⁶

- **Canada**

In two decisions, Canadian courts have held that they did not have jurisdiction over employment disputes involving claims by dismissed embassy or consular employees that would require the court “to examine the reasons for and the circumstances of the plaintiffs departure.”¹⁷⁷ As the Ontario Superior Court of Justice explained, this type of inquiry “will necessarily have an impact on the right of the defendant state to decide how it manages and deals with its personnel at its consulate.”¹⁷⁸ The proceedings therefore “would have a significant impact on the sovereign right of the defendant state to control and regulate his own workforce,” and “[t]he case would be . . . an unacceptable interference with . . . sovereignty.”¹⁷⁹ One case involved an action for damages for wrongful dismissal,¹⁸⁰ and the other involved a claim filed pursuant to section 34 of the Ontario Human Rights Code alleging that the plaintiff had been

¹⁷³ *X v. United States of America*, 116 I.L.R. 668, 675 (Labour Ct. Geneva 1995).

¹⁷⁴ *Nicoud v. United States of America*, 116 I.L.R. 650, 654–55 (Labour Ct. Geneva 1994).

¹⁷⁵ *Id.* at 655.

¹⁷⁶ *X v. United States of America*, 116 I.L.R. 668, 675 (Labour Ct. Geneva 1995).

¹⁷⁷ *Bentley v. Consulate General of Barbados/Invest Barbados*, 2010 HRTO 2258, 2010 CarswellOnt 9446, para. 43. (Ontario Human Rights Trib. 2010).

¹⁷⁸ *Greco v. Holy See*, [2000] OJ No. 5293, para. 6 (Ont. Super. Ct. J. 2000).

¹⁷⁹ *Id.* (internal quotation marks omitted).

¹⁸⁰ *Bentley v. Consulate General of Barbados/Invest Barbados*, 2010 HRTO 2258, 2010 CarswellOnt 9446, para. 39–40 (Ontario Human Rights Trib. 2010) (describing the *Greco* decision, the full text of which could not be located).

fired because she was pregnant.¹⁸¹ In the case involving an action for wrongful dismissal, “the plaintiff was permitted to continue with that part of her claim which related to unpaid wages.”¹⁸²

X. Appendix

This appendix charts decisions from countries discussed in Section III, grouped by the position of the employee bringing the claim, to facilitate analysis of whether there is any consensus on which types of positions involve duties connected to the exercise of governmental or sovereign authority. Only positions for which there are multiple decisions are included.

1. Chauffeur or driver

Duties connected to the exercise of governmental activity?			
Yes		No	
Ireland	<i>Canada v. Employment Appeals Tribunal and Burke</i> , 95 I.L.R. 467 (Sup. Ct. 1992)	Italy	<i>Zambian Embassy v. Sendanayake</i> , 114 I.L.R. 532 (Sup. Ct. Cass. 1992)
Finland	<i>Ricardo v. Republic of Venezuela</i> (Dst. Ct. Helsinki), cited in Richard Garnett, <i>State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?</i> , 64 I.C.L.Q. 783, 801 n.77 (2015)	Portugal	<i>A v. Islamic Republic of Pakistan</i> , (Ct. App. 2004), cited in Richard Garnett, <i>State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?</i> , 64 I.C.L.Q. 783, 799 n.71 (2015)
		Switzerland	<i>Nicoud v. United States of America</i> , 116 I.L.R. 650 (Labour Ct. Geneva 1994)
		Belgium	(1) <i>Kingdom of Morocco v. DR</i> , 115 I.L.R. 421 (Labour Ct. Brussels 1989) (2) <i>Rousseau v. Republic of Upper Volta</i> , 82 I.L.R. 118 (Labour Ct. Brussels 1983)
		ECJ	<i>Mahamdia v. Algeria</i> , (C-154/11), [2013] I.C.R. 1

2. Secretary / typist / clerk / telephone operator / radio-telegraph operator

Duties connected to the exercise of governmental activity?	
Yes	No

¹⁸¹ *Id.* para. 1.

¹⁸² *Id.* para. 41.

Italy	(1) <i>United States of America v. Lo Gatto</i> , 114 I.L.R. 555 (Sup. Ct. Cass. 1995) (2) <i>Norwegian Embassy v. Quattri</i> , 114 I.L.R. 525 (Sup. Ct. Cass. 1991) (3) <i>Libyan Arab Jamahiriya v. Trobbiani</i> , 114 I.L.R. 520 (Sup. Ct. Cass. 1990)	Switzerland	(1) <i>X v. United States of America</i> , 116 I.L.R. 668 (Labour Ct. Geneva 1995) (2) <i>Landano v. United States of America</i> , 116 I.L.R. 636 (Labour Ct. Geneva 1987) (3) <i>S v. India</i> , 82 I.L.R. 13, 19–20 (Fed. Trib. 1984)
Finland	<i>Heusala v. Turkey</i> , Appeal Judgment, KKO:1993:120 (Sup. Ct. 1993), ILDC 576 (FI 1993)	Portugal	<i>AA v. Austrian Embassy</i> , Final Decision on Jurisdiction, No. 05S3279 (Sup. Ct. 2007), ILDC 826 (PT 2007)
New Zealand	<i>Governor of Pitcairn and Associated Islands v. Sutton</i> , 104 I.L.R. 508 (Ct. App. 1994)	France	<i>Barrandon v. United States of America</i> , 116 I.L.R. 622 (Ct. Cass. 1998) *also a nurse
		Belgium	<i>Sawas v. Saudi Arabia</i> , First Instance Judgment, (Labour Ct. 2007), ILDC 1146 (BE 2007)
		Netherlands	<i>Kingdom of Morocco v. H.A.</i> , LJN No. BB4066, NIPR (2007) No. 302 (Ct. App. The Hague 2007), <i>cited in</i> [2008] 39 NETH. Y. ON INT'L L. 392
		ECHR	<i>Cudak v. Lithuania</i> , App. No. 15869/02, 51 Eur. H.R. Rep. 15 (2010)

3. Cleaner

Duties connected to the exercise of governmental activity?			
Yes		No	
		Portugal	<i>X v. Israel</i> , 127 I.L.R. 310 (Sup. Ct. 2002)
		Ireland	<i>Adan v. Embassy of the Republic of Kenya</i> , [2013] 4 JIEC 0508 (Employment App. Trib.)

4. Translator / interpreter

Duties connected to the exercise of governmental activity?	
Yes	No

Finland	<i>Heusala v. Turkey</i> , Appeal Judgment, KKO:1993:120 (Sup. Ct. 1993), ILDC 576 (FI 1993)	Italy	<i>Special Representative of the Vatican v. Pieciukiewicz</i> , 78 I.L.R. 120 (Sup. Ct. Cass. 1982)
		Switzerland	<i>R v. Republic of Iraq</i> , 116 I.L.R. 664 (Fed. Trib. 1994)
		Italy	<i>Zambian Embassy v. Sendanayake</i> , 114 I.L.R. 532 (Sup. Ct. Cass. 1992)

5. Gardener / caretaker

Duties connected to the exercise of governmental activity?			
Yes		No	
Ireland	<i>Greene v. Embassy of India</i> , [2013] 9 JIEC 0301 (Employment App. Trib.)	France	<i>Saignie v. Embassy of Japan</i> , 113 I.L.R. 492 (Ct. Cass. 1997)