

STATE CHAMBERS

LEVEL 36 52 MARTIN PLACE SYDNEY NSW 2000

DX 410 SYDNEY ☎ (02) 9223 1522 📠 (02) 9223 7646

STATECHAMBERS.NET

IN THE FEDERAL CIRCUIT COURT OF AUSTRALIA

Case No. SYG2516 of 2016

Kumar v Consulate General of India, Sydney [2018] FCCA 7¹

Before: Driver

Date of Judgement: 13 February 2017

Case Note

A comparatively simple underpayment of wages claim against a foreign mission present in Australia has raised some interesting points regarding the reach of the industrial laws.

On account of diplomatic immunity for embassies, consulates and foreign missions, the applicability of local laws for those employed by them has not been clear cut.

Generally speaking, those employed as diplomatic staff have fallen outside of the reach of domestic employment laws, whereas locally hired employees have been covered.

In this case, the applicant, a locally employed permanent resident of Australia claimed that he was underpaid pursuant to the terms of the *Clerks Private Sector Award 2010*. The applicant's job title was the somewhat esoterically named 'chauffeur cum messenger'. The respondent in its defence claimed that the award did not apply to the work of the applicant for two reasons:

- (i) the respondent was not engaged in the private sector; and secondly
- (ii) the major and substantial purpose of the applicant's work was driving duties and not clerical work.

¹ *Kumar v Consulate General of India, Sydney* [2018] FCCA 7 (13 February 2018)

Judge Driver found for the respondent on both of those points.

At paragraph [63] of the decision, Judge Driver said the following on the issue of whether the respondent was engaged in the private sector:

“I accept the submission of the Indian consulate that, in accordance with the ordinary meaning of the words, “private sector” does not include that part of the economy or industry which is under direct state control; much less could it include the operations of a government itself. I do not rule out the possibility that a foreign state may be engaged in the private sector in Australia (for example in carrying on the business of a state owned enterprise) but the business of government itself is not a part of the private sector in Australia and employment in the service of a foreign state is not private sector employment.”

This decision has ramifications for all clerical staff employed locally by foreign missions. Such staff are award free and subject only to the National Employment Standards (NES) of the *Fair Work Act 2009* (Cth).

Jeffrey Phillips, SC

State Chambers

March 2018