

FEDERAL CIRCUIT COURT OF AUSTRALIA

*KUMAR v CONSULATE GENERAL OF INDIA,
SYDNEY*

[2018] FCCA 7

Catchwords:

INDUSTRIAL LAW – Fair Work – claim for payment under the *Clerks - Private Sector Award 2010* – application of the award to a foreign government employer considered.

WORDS AND PHRASES – “private sector”.

Legislation:

Acts Interpretation Act 1901 (Cth), s.2C

Consular Privileges and Immunities Act 1972 (Cth)

Diplomatic Privileges and Immunities Act (Cth), s.7

Fair Work Act 2009 (Cth), ss.30A, 30K, 35, 40, 45, 46, 47, 48, 134, 738, 795

Fair Work Regulations 2009 (Cth)

Foreign States Immunities Act 1985 (Cth), s.3

Overseas Missions (Privileges and Immunities) Act 1995 (Cth)

Public Service Act 1999 (Cth), s.9

Cases cited:

Award Modernisation [2010] FWAFB 9916

Broken Hill South Ltd (Public Officer) v Commissioner of Taxation (NSW)
(1937) 56 CLR 337

City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union [2006] FCA 813; 153 IR 426

Federated Clerks' Union of Australia, NSW Branch v Kingmill Pty Ltd t/as Thrifty Car Rental (1999) 94 IR 67

George v Park Trent Properties Group Pty Ltd [2013] FWC 7447

Gray v Hamilton James and Bruce Pty Ltd [2011] FWAFB 6884

J. Fenwick and Company Pty Ltd v Merchant Service Guild of Australia & Ors
(1973) 150 CAR 99

Joyce v Cristofferson (1990) 26 FCR 261

Kassis v Republic of Lebanon [2014] FCCA 155; 282 FLR 408

Kucks v CSR Ltd (1996) 66 IR 182

Martinuzzi v Fair Work Ombudsman [2012] FCA 636; 205 FCR 106

Miotto & Benvenuto v Republic of Italy (Italian Consulate of Adelaide) [2015]
SAIR 33

Mucci v Consulate General of Italy in Melbourne [2012] FWA 9243

NEI Pacific Limited v Nicholl [1994] 53 IR 355

Otto Waste Industries Pty Ltd v Klajman [1985] 34 IR 361

Republic of Italy v Benvenuto [2017] FCA 940

Republic of Italy v Benvenuto & Miotto [2016] SAIRC 31
San Remo (Southland) Pty Ltd v Farrell [1987] 22 IR 291
Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd
[2014] FCAFC 148; 245 IR 449
Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd
[2014] FCCA 4
Wool Selling Brokers Officers' Association of Australia v The Employers'
Association of Wool Selling Brokers (1949) 67 CAR 224
Workplace Ombudsman v QMGIM Pty Ltd & Ors [2010] FMCA 64

Applicant: HITENDER KUMAR

Respondent: CONSULATE GENERAL OF INDIA,
SYDNEY

File Number: SYG2516 of 2016

Judgment of: Judge Driver

Hearing dates: 31 July 2017, 1 August 2017

Date of Last Submission: 25 August 2017

Delivered at: Sydney

Delivered on: 13 February 2018

REPRESENTATION

Counsel for the Applicant:	Mr R Dalglish
Solicitors for the Applicant:	RS Global Pty Ltd
Counsel for the Respondent:	Mr J Phillips SC
Solicitors for the Respondent:	Barker Henley

ORDERS

- (1) The application as amended on 3 March 2017 is dismissed.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY**

SYG2516 of 2016

HITENDER KUMAR
Applicant

And

CONSULATE GENERAL OF INDIA, SYDNEY
Respondent

REASONS FOR JUDGMENT

Introduction and background

1. By an amended application and statement of claim lodged on 3 March 2017, the applicant (Mr Kumar) sought the following relief under the *Fair Work Act 2009* (Cth) (Fair Work Act):
 1. *A declaration that the respondent between 17 September 2010 and 13 March 2015 contravened s. 44 of the Fair Work Act 2009 (Cth) (FW Act) in respect of the National Employment Standard at s. 62(1) of the FW Act, in that the respondent required the applicant to work from 8.30am to 6.30pm on weekdays, ie more than 38 hours per week, this requirement being unreasonable in that the additional hours were to be worked without overtime payments.*
 2. *A declaration that the respondent between 17 September 2010 and 13 March 2015 contravened s. 45 of the FW Act by contravening the following terms of a modern award, namely the Clerks - Private Sector Award 2010 (the Award):*
 - a) *clauses 10 and 25.1(a) - by requiring the applicant to work ordinary hours in excess of 38 hours per week;*
 - b) *clause 27 - by failing to pay the applicant overtime at time and a half for the first two hours and double time*

thereafter, and failing to pay the applicant for his work on Sundays at double time;

- c) clause 16 - by paying the applicant an hourly base rate below that required by the minimum wage;*
 - d) clause 27.3(c) - by failing to pay the applicant at double his ordinary time base rate of pay when he was required to work without having 10 consecutive hours off duty;*
 - e) clause 19.3(a) - by requiring the applicant to work for more than one and a half hours of overtime without being given 24 hours' notice without providing a meal or a meal allowance.*
- 3. A declaration that the respondent between 17 September 2010 and 30 September 2014 contravened s. 293 of the FW Act in that it paid the applicant a base rate of pay less than that required by the national minimum wage orders in force from time to time during that period.*
- 4. An order that the respondent pay a pecuniary penalty pursuant to s. 546 of the FW Act for each of its contraventions of ss. 44, 45 and 293 of the FW Act.*
- 5. An order that the amount of the penalties be paid to the applicant pursuant to s. 546(3) of the FW Act.*
- 6. An order pursuant to ss. 543 or 545 of the FW Act that the respondent pay to the applicant the amount that the respondent underpaid the applicant in respect of the period of his employment 17 September 2010 to 13 March 2015, the said underpayments being in breach of:*
- a) the Award;*
 - b) the National Employment Standards;*
 - c) the national minimum wage orders; and*
 - d) the applicant's contract.*
- 7. An order that the respondent pay the applicant:*
- a) The amount by which he was underpaid wages in accordance with:*

- i. *the minimum wages orders made by the Fair Work Commission from time to time from 17 September 2010 to 30 September 2014;*
 - ii. *the minimum wage prescribed for his classification under the Award from time to time from 17 September 2010 to 13 March 2015*
 - b) *The amount of unpaid overtime to which he was entitled under:*
 - i. *the Award; or*
 - ii. *his contract of employment;*

in respect of the hours worked in excess of the 38 hours per week prescribed by s. 62 of the FW Act and clauses 10 and 25.1 of the Award.
 - c) *The amount to which the applicant was entitled under clause 27.3(c) of the Award in respect of work without having 10 consecutive hours off duty.*
 - d) *The amount to which the applicant was entitled under clause 19.3 of the Award in respect of meal allowances.*
 - e) *The amount of \$3,540 being the amount one month's pay that was not paid to the applicant in 2014 as his annual bonus.*
 - 7A *An order that the respondent pay the applicant interest up to judgment under s. 76(2) of the Federal Circuit Court of Australia Act 1999 (Cth) on the amounts underpaid.*
 - 7B *An order that, in addition the amounts referred to above, the respondent contribute to the applicant's superannuation fund such an amount as will avoid the respondent being required to pay the superannuation guarantee charge.*
 - 7C *An order that the respondent pay the applicant's costs.*
 - 8. *Such other or further orders as the Court thinks fit.*
2. By the time of the trial of this matter, the respondent (Indian consulate) only opposed the application in part.

3. The Indian consulate conceded at the trial that Mr Kumar should receive the following amounts:
 - a) \$605.17 under the National Minimum Wage Orders;
 - b) \$8,032 under the employment contract between Mr Kumar and the Indian consulate for 9.5 hours per week at the contract overtime rate; and
 - c) an employment bonus of \$3,540.
4. The critical issue remaining in dispute between the parties is whether Mr Kumar's employment was covered by the *Clerks – Private Sector Award 2010* (Award). It was agreed that the Court would initially deal with the issue of liability pursuant to the Award and that any issue of penalties could be deferred. While the Indian consulate concedes that it is a National System Employer under the Fair Work Act, it claims immunity in respect of any penalties.
5. The background to this matter is as follows. Mr Kumar was employed by the Indian consulate between 3 February 2010 and 13 March 2015 as a "chauffeur-cum-messenger". There was a written contract of employment dated 1 April 2010. The contract forms Exhibit HT-1 to the affidavit of Mr Kumar made on 8 May 2017.
6. There is no description of the nature of Mr Kumar's duties in the contract. He was to "look after work as allotted to him from time to time".¹
7. Mr Kumar was at all times a member of the Transport Workers' Union (TWU). He is an Australian citizen, living and working in Sydney.
8. Taking into account the issues which were resolved between the parties during the trial, Mr Kumar was paid in accordance with the contract of employment. The dispute between the parties arises from differences between the employment contract and the entitlements afforded pursuant to the Award.
9. In addition to his statement of claim, Mr Kumar relies upon his affidavits made on 8 May 2017 and 28 July 2017. He was

¹ at [3]

cross-examined on his affidavits. The affidavit of Renuka Sharma made on 11 May 2017 was also read on behalf of Mr Kumar.

10. The Indian consulate relies upon the documents in its tender bundle, produced at the trial. This comprised its response, defence and documents bearing upon the employment of Mr Kumar.
11. I also received the following documents tendered during the course of the trial:
 - A1 Notice to Produce to the Indian Consulate;
 - A2 *Clerks – Private Sector Award 2010*;
 - A3 Fair Work Commission order, Annual Wage Review 2013-14;
 - A4 *Clerks – Private Sector Award 2010* as at March 2015.

Consideration

The Award

Mr Kumar's submissions

12. Sections 45 to 48 of the Fair Work Act relevantly provide:

Subdivision C—Terms and conditions of employment provided by a modern award

45 *Contravening a modern award*

A person must not contravene a term of a modern award.

Note 1: This section is a civil remedy provision (see Part 4-1).

Note 2: A person does not contravene a term of a modern award unless the award applies to the person: see subsection 46(1).

46 *The significance of a modern award applying to a person*

(1) *A modern award does not impose obligations on a person, and a person does not contravene a term of a modern award, unless the award applies to the person.*

(2) *A modern award does not give a person an entitlement unless the award applies to the person.*

....

47 *When a modern award applies to an employer, employee, organisation or outworker entity*

(1) *A modern award **applies** to an employee, employer, organisation or outworker entity if:*

(a) *the modern award covers the employee, employer, organisation or outworker entity; and*

(b) *the modern award is in operation; and*

(c) *no other provision of this Act provides, or has the effect, that the modern award does not apply to the employee, employer, organisation or outworker entity.*

....

(3) *A reference in this Act to a modern award applying to an employee is a reference to the award applying to the employee in relation to particular employment.*

48 *When a modern award covers an employee, employer, organisation or outworker entity*

(1) *A modern award **covers** an employee, employer, organisation or outworker entity if the award is expressed to cover the employee, employer, organisation or outworker entity.*

...

(5) *A reference to a modern award covering an employee is a reference to the award covering the employee in relation to particular employment.*

Was Mr Kumar's employment covered by the Clerks – Private Sector Award 2010?

13. Clause 4.1 of the Award provided at all material times:

This award covers employers in the private sector throughout Australia with respect to their employees engaged wholly or

principally in clerical work, including administrative duties of a clerical nature, and to those employees. *However, the award does not cover:*

(a) *an employer bound by a modern award that contains clerical classifications; or*

(b) *an employee excluded from award coverage by the Act.*

(emphasis added)

14. It is not disputed that the Indian consulate was at all material times a National System Employer.² It was hence an “employer” as defined by clause 3.1 of the Award.

Was the Indian consulate an employer “in the private sector throughout Australia”?

15. The wording of the coverage clause is determinative under s.48 of the Fair Work Act. The wording of clause 4.1 makes the geographical limitation clear. It is said to be irrelevant whether or not the Indian consulate is part of the public sector in India. Mr Kumar contends that in Australia it is not part of the public sector, either Commonwealth or State. Hence it is said to be “necessarily” part of the “private sector” in Australia.

16. “Private sector” is not defined in clause 3.1 of the Award or the Fair Work Act. However, in s.12 the Fair Work Act does define “public sector employment” as “see subsections 795(4) and (5)” and “public sector employment law” as “see subsection 40(3)”.

17. Under s.40(3) a public sector employment law is a law of the Commonwealth (other than the Fair Work Act) that deals with public sector employment. Such a law prevails over a Fair Work instrument that deals with public sector employment.³ Hence the Fair Work Act contemplates that there will be a separate regime dealing with public sector employment. That regime includes the *Public Service Act 1999* (Cth), which establishes the Australian Public Service.⁴

18. Section 795 (4) of the Fair Work Act relevantly provides:

² defence to amended statement of claim at [3]

³ section 40(1)

⁴ section 9

Public sector employment means employment of, or service by, a person in any capacity (whether permanently or temporarily, and whether full-time or part-time):

(a) under the Public Service Act 1999 or the Parliamentary Service Act 1999; or

(b) by or in the service of a Commonwealth authority; or ...

19. The subsection then specifies various authorities in the Territories.⁵ It does not refer to any foreign government.

20. In *Miotto & Benvenuto v Republic of Italy (Italian Consulate of Adelaide)*,⁶ the Italian consulate argued that the Clerks – Private Sector Award 2010 did not apply to its local employees. Industrial Magistrate SM Lieschke stated:⁷

The respondent submits the Clerks Award cannot apply, despite both applicants performing clerical and administrative duties, because they were employed by the Italian public sector. They were not therefore employed in the private sector, as is required by that Award.

The Clerks Award covers private sector employers throughout Australia. Section 795 of the Fair Work Act adopts a definition of public sector employment as employment in the public sector of Australia. In my opinion Italian public sector employment falls outside the concept of public sector employment in the current context, and falls within the concept of private sector employment for the purposes of the Act and Award.

The Award is underpinned by s 45 of the Fair Work Act which prohibits contravention of an Award. The Fair Work Act applies to Australian employers. These are defined by s 35 to include, in part, employers that carry on an activity in Australia, and whose central management and control is in Australia^[4] Ms Borgia's evidence, which I accept, was that control and management of the Consulate and of local employees was by the Consul or the Ambassador.

In my opinion the appropriate conclusion is that the Clerks Award applied to both applicants due to operation of Australian law.

⁵ regulation 6.08 of the *Fair Work Regulations 2009* (Cth) (Regulations) prescribes other Australian Government authorities such as the Australian Federal Police

⁶ [2015] SAIR 33

⁷ [28]-[31]. Footnote [4] in the text refers to s.35(1)(f) of the Fair Work Act

21. The decision of the Industrial Magistrate was the subject of appeal, but not in respect of the above conclusion.⁸
22. The Award was applied to the Republic of Lebanon in *Kassis v Republic of Lebanon* by Judge Raphael,⁹ who referred to s.2C of the *Acts Interpretation Act 1901* (Cth) which provides:
- (1) *In any Act, expressions used to denote persons generally (such as “person”, ...), include a body politic or corporate as well as an individual.*
23. His Honour then considered the claims for underpayment under the Award.¹⁰ Although clearly aware of the consulate’s governmental functions, his Honour held that the Award applied without discussing the “private sector” issue now raised.
24. Mr Kumar submits that there is nothing in the Fair Work Act which supports the conclusion that a foreign government’s operations in Australia should be regarded as the “public sector” from the viewpoint of Australian law. He submits that if an employer is not part of the Australian public sector, then it is part of the private sector, at least for the purposes of the Award.
25. For the purposes of the application of the Fair Work Act to referring States, ss.30A and 30K of the Act include a definition of “State public sector employer”. Such employers are specifically excluded by clause 4.3 of the Award.

Was Mr Kumar engaged principally in administrative duties of a clerical nature?

26. The principles of construction of an award are discussed by French J (as he then was) in *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*,¹¹ and by the Full Court of

⁸ *Republic of Italy v Benvenuto & Miotto* [2016] SAIRC 31 at [24], [27] and [54] (Judge Hannon). On 11 August 2017 the Federal Court (White J) granted leave to appeal against that decision. See *Republic of Italy v Benvenuto* [2017] FCA 940. The Full Federal Court heard argument on 9 November 2017 and judgment is reserved

⁹ *Kassis v Republic of Lebanon* [2014] FCCA 155; 282 FLR 408 at [8] and [78]

¹⁰ at [50]-[53], [56] and [79]

¹¹ [2006] FCA 813; 153 IR 426 at [53]-[57]

the Federal Court in *Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd*.¹²

27. Section 134 of the Fair Work Act relevantly provides:

What is the modern awards objective?

(1) *The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*

...

(g) *the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; ...*

28. “Clerical work” is defined in clause 3.1 of the Award to include:

recording, typing, calculating, invoicing, billing, charging, checking, receiving and answering calls, cash handling, operating a telephone switchboard and attending a reception desk.

29. This has been described as a somewhat antiquated definition.¹³ In *Workplace Ombudsman v QMGIM Pty Ltd & Ors*, Wilson FM (as his Honour then was) stated:¹⁴

What then is the natural and ordinary meaning of the words “clerical and administrative staff”. That phrase in my view has a chameleon like quality adapting to a variety of situations. “Clerical” is a word that has been considered many times. In my view, the collocation of the word administrative adds to the breadth of the phrase. The decision to which reference is most often made is that of Sheldon J in Federated Clerks’ Union of Australia, New South Wales Branch v Australian Workers Union (The Purchasing Officers Case) [1971] AR (NSW) 419 at 421:

“This phrase, in my view, must be read against the background of the way industry has developed and is now conducted. Clerical work in industry has long since moved

¹² [2014] FCAFC 148; 245 IR 449 at [39], citing *Kucks v CSR Ltd* (1996) 66 IR 182

¹³ *Federated Clerks’ Union of Australia, NSW Branch v Kingmill Pty Ltd t/as Thrifty Car Rental* (1999) 94 IR 67, at 92 (Glynn J) cited in *George v Park Trent Properties Group Pty Ltd* [2013] FWC 7447 at [38]-[41] and [51]-[56]

¹⁴ [2010] FMCA 64 at [29] – reversed on appeal on other grounds

from the Dickensian era of the high stool and the quill pen. The voice and the mind are part of the clerical stock in trade. So is the acceptance of responsibility and the exercise of discretion. The conception is fluid and progressive and recourse to a dictionary gives only partial help. It is impossible, and in any event it would be undesirable, to attempt to devise a code as to what in the setting of industry today can fairly be regarded as clerical work. But two (sic) fine a tooth comb should not be used in solving the question in particular cases.”

30. Clause 4.1 includes “administrative duties of a clerical nature”.
31. “Administrative” work has been:¹⁵
- universally acknowledged to mean simply and exhaustively: of or pertaining to administration, that is to say, to the management or conduct or the performance of the executive duties of an institution or establishment.*
32. Mr Kumar performed mixed functions. This is evident from his job title of “chauffeur – cum- messenger”. The role of “messenger” required him to perform a wide range of administrative tasks, not just running messages.
33. The role of “messenger” is expressly included in Schedule B.1.2 of the Award.
34. Mr Kumar submits that, during his long normal office hours (8.30am to 6.30pm), he spent 80 per cent of his time on administrative work and only 20 per cent on chauffeur duties.¹⁶ Outside normal hours, he was more engaged in chauffeur duties, except in the case of special events or office moves.
35. Although the test is qualitative as well as quantitative, the amount of time spent on performing particular tasks is obviously relevant¹⁷, and the actual time occupied in different duties has been described as a substantive role/function analysis.¹⁸

¹⁵ *Wool Selling Brokers Officers' Association of Australia v The Employers' Association of Wool Selling Brokers* (1949) 67 CAR 224, at 227, per Kelly CJ, cited by Wilson FM in *QMGIM* at [33]

¹⁶ affidavit of Mr Kumar sworn on 8 May 2017 at [26]

¹⁷ *Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCCA 4 at [133]

¹⁸ *Ibid*, at [169]

36. Mr Kumar's affidavit sets out the duties which he claims he performed. Coverage is to be tested by these duties and their purpose, not by the job title.¹⁹
37. The coverage clause has to be construed in the context of the Award as a whole. Critical to this are clause 15.1 and the classification in Schedule B of the Award.²⁰ There is an issue of how specifically the indicative "typical duties" in the classification of a Level 1 employee match the duties performed by Mr Kumar.
38. Mr Kumar submits that the written "Designation and Indicative List of Duties" dated 30 April 2010 (but not obtained by Mr Kumar until September 2016) at page 220 of Exhibit HT-1 and particulars (a), (c), (d), (f) and (g)²¹ bear a close resemblance to the indicative duties in Schedule B on the Table.
39. Coverage under the Award has been held by the Full Bench of Fair Work Australia to require the application of the "principal purpose test". Hence, a senior manager is not covered by the Award merely because the role includes administrative tasks.²² Rather, for coverage to be achieved, those tasks would need to be performed principally for the purpose of senior management.
40. The wording of clause 4.1 itself is said to be critical under s.48(1) of the Fair Work Act. That wording suggests the test of coverage is more objective or functional: in what work was Mr Kumar principally engaged?
41. Mr Kumar submits that the principal purpose of his administrative work was to contribute to the administration of the Indian consulate.

Indian consulate's submissions

42. The Indian consulate disputes that Mr Kumar at any relevant time was employed by it pursuant to the provisions of the Award.

¹⁹ *Joyce v Cristofferson* (1990) 26 FCR 261 at 278; 33 IR 390; *Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCCA 4 at [133]

²⁰ *Martinuzzi v Fair Work Ombudsman* [2012] FCA 636; 205 FCR 106, at [37]-[39] (Logan J); *Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCAFC 148; 245 IR 449 at [31]-[35]

²¹ the "dak" referred to in (g) is mail in sealed envelopes

²² *Gray v Hamilton James and Bruce Pty Ltd* [2011] FWAFB 6884

43. As is noted in Mr Kumar's submissions, clause 4 of the Award deals with the "Coverage" of the Award.
44. As is also noted in Mr Kumar's submissions, the expression "private sector" is not defined in clause 3.1 of the Award; nor is it defined in the Fair Work Act.
45. The expression "private sector" is a compound noun defined by the *New Shorter Oxford English Dictionary* (1993 edition) in Volume 2 at page 2359 as "the part of the economy, industry *etc.*, which is free from direct State control."
46. The starting point of the interpretation of words in statutes, instruments, wills, and contracts is an adherence to the ordinary and grammatical sense of the words used unless there is some clear countervailing factor dispelling that rule.²³
47. However, as outlined at [16] above, the Fair Work Act does define in s.12 "public sector employment" as "see subsections 795(4) and (5)" and "public sector employment law" as "see subsection 40(3)".
48. Under s.40(3) a public sector employment law is a law of the Commonwealth (other than the Fair Work Act) that deals with public sector employment. Such a law prevails over a Fair Work instrument that deals with public sector employment.²⁴ Hence, there is contemplated by the Fair Work Act that there will be a separate regime dealing with public sector employment. That regime includes the *Public Service Act 1999* (Cth), which establishes the Australian Public Service.²⁵
49. Section 795(4) deals with public sector employment and specifies various authorities in the Territories.²⁶ It does not refer to any foreign government.
50. The Indian consulate refers to the decisions in *Miotto* and *Kassis* and submits that such an approach as advanced by Mr Kumar ignores the

²³ See *Broken Hill South Ltd (Public Officer) v Commissioner of Taxation (NSW)* (1937) 56 CLR 337 at 371 per Dixon J

²⁴ section 40(1)

²⁵ section 9

²⁶ regulation 6.08 of the Regulations prescribes other Australian Government authorities such as the Australian Federal Police

status of foreign states and the presence of those foreign states as diplomatic missions: high commissions, embassies or consulates. It elides the statutory instruments that set out the rights, immunities, exemptions and obligations of foreign states representing themselves and being present in Australia in doing so.

51. In the *Foreign States Immunities Act 1985* (Cth), s.3 provides that a “foreign State” means a country the territory of which is outside Australia, being a country that is:
 - a) an independent sovereign state; or
 - b) a separate territory (whether or not it is self-governing) that is not part of an independent sovereign state.
52. Regard must also be had to other enactments such as the *Diplomatic Privileges and Immunities Act 1967* (Cth) and in particular s.7(1) which incorporates parts of the Vienna Convention on Diplomatic Relations as having the force of law in Australia.²⁷
53. Such statutes recognise that foreign states in Australia have governmental functions divorced from the ordinary meaning and functions of the private sector.
54. In fact, [2] of the amended statement of claim states that “[t]he respondent is part of the Ministry of External Affairs of the Government of India and operates a Consulate office in Sydney.” At [3], Mr Kumar claims that the Indian consulate was his employer. The very wording of Mr Kumar’s own pleadings identify the governmental nature of the Indian consulate which is “divorced from the private sector”. Mr Kumar’s reliance on the definitions of the “public sector” under the Fair Work Act is said to be misplaced. Those definitions relate to the governmental functions of Australia and in a broader sense the States and Territories of the Commonwealth.
55. As extracted at [13] above, the Coverage section of the Award (subsection 4.1) states that it covers, “...employees engaged wholly or

²⁷ also see the *Consular Privileges and Immunities Act 1972* (Cth) and the *Overseas Missions (Privileges and Immunities) Act 1995* (Cth)

principally in clerical work, including administrative duties of a clerical nature...”

56. Mr Kumar accepts that he was not “wholly” engaged in clerical duties. He accepts that he must prove that he was “principally” so engaged. In determining if an award applies to a particular employee or which award applies to an employee, the question posed by industrial courts and tribunals is to identify the “major and substantial purpose” or the “principal purpose” of the employment. This test recognises that some jobs might entail a number of duties, skills and callings. It is, however, necessary to consider what are the substantial tasks and what are ancillary tasks. It is said to be a qualitative rather than a quantitative test.²⁸
57. The Indian consulate submits that another piece of evidence pointing to the nature of Mr Kumar’s employment was that earlier unfair dismissal proceedings were conducted for him by the TWU, which is an organisation of employees which generally covers persons employed in or whose callings are found within the transport industry.²⁹ The TWU does not have coverage for persons who are wholly or principally engaged in clerical duties. The TWU’s Conditions of Eligibility covers, among other things, all driving and chauffeurs and attendants on or about motor vehicles.³⁰
58. The Indian consulate submits that circumstances of the position of “chauffeur-cum-messenger” and the evidence point to the principal purpose or major and substantial purpose of the position being driving duties and other duties looking after the staff car. Driving or maintenance of a car is not clerical work. The title of the job itself identified the major task that of chauffeur. The Latin conjunction “cum” means “with”, so that the job was chauffeur or driver with the tasks of messenger. The evidence also revealed that Mr Kumar acted as a messenger or courier by foot or by driving the car. The work of a courier is not clerical work. When the Consul-General’s dedicated

²⁸ See *J. Fenwick and Company Pty Ltd v Merchant Service Guild of Australia & Ors* (1973) 150 CAR 99 at 101-102 per Ludeke J and on appeal at 108 before Moore P, Robinson J and Chambers DP; *Otto Waste Industries Pty Ltd v Klajman* [1985] 34 IR 361 at 366 per Cahill J; *San Remo (Southland) Pty Ltd v Farrell* [1987] 22 IR 291 at 294 et seq per Macken J and *NEI Pacific Limited v Nicholl* [1994] 53 IR 355 at 356 per Cullen J

²⁹ see the Indian consulate’s tender bundle at page 196

³⁰ see pages 281-282

driver was absent Mr Kumar fulfilled that role as well. The driving duties and making sure the staff car was cleaned, maintained and serviced fell upon Mr Kumar as his priority and his most important task. The Indian consulate submits that the driving duties, in particular driving the Head of Chancellory and other dignitaries, took precedence over any clerical or administrative task. The Indian consulate employed others wholly or principally engaged on clerical work. Common sense dictated that Mr Kumar could be used to do such tasks of a clerical nature as he waited to be called upon to perform his primary function of driving and maintaining the staff car. The submissions relied upon by Mr Kumar accept that outside normal hours he was more engaged in chauffeur duties.³¹ The Log Book also reveals significant chauffeur duties during normal hours.

Resolution – is the Indian consulate an employer in the “private sector” in Australia?

59. An initial (and important) question in resolving whether the Indian consulate is an employer in the private sector is whether the Award, when read with the Fair Work Act, sets up a dichotomy between public and private sector employment. Mr Kumar approaches that issue by asserting that there is a dichotomy and that, if the Indian consulate is not an employer in the public sector as defined in the Fair Work Act, then it must be an employer in the private sector. It is important that the public sector is a defined term whereas the private sector is not. The Indian consulate approaches the issue from the opposite direction, namely asserting that the Indian consulate is not an employer in the private sector in terms of the ordinary meaning of those words and so it must be engaged in the public sector, although it does not fall within the parameters of the definition of that expression in the Fair Work Act.
60. There is a third possibility, which is that the Award, when read with the Fair Work Act, does not set up a strict dichotomy and there may be employment which is neither in the public sector as defined, nor in the private sector. This appears to have been the approach taken by Fair Work Australia in *Mucci v Consulate General of Italy in Melbourne*,³²

³¹ see [47] of Mr Kumar's written submissions

³² [2012] FWA 9243

where Senior Deputy President Kaufman stated this at [21] in determining that s.738 did not apply to the employment of Mr Mucci:

It is then put in the alternative that the Division applies because a modern award provides a procedure for dealing with disputes. The applicant submits that the parties are covered by a modern award, "the Clerks Award". I take this to be a reference to the Clerks - Private Sector Award 2010. Again the applicant's submission is misconceived. As its name suggests, and its coverage clause makes clear, the Award only covers employers in the private sector and their clerical employees. Neither Mr Mucci nor his employer is involved in the private sector. The requirements of section 738(a) have not been met.

61. I take a similar approach here (while accepting the common position of the parties that the Indian consulate is a National System Employer). The private sector is not a defined term either in the Award or the Fair Work Act. The fact that employment at the Indian consulate does not fall within the statutory definition of public sector employment under the Fair Work Act does not inevitably lead to a conclusion that employment in the Indian consulate is private sector employment. Part of the reason is that the Fair Work Act relevantly does two things: it defines public sector employment and it also defines what is not public sector employment for the purposes of the Fair Work Act. Foreign state employment is not referred to in either sense.³³
62. Further, while it is both necessary and appropriate to have regard to the Fair Work Act in interpreting the Award, the provisions of the Fair Work Act do not provide an end to the inquiry of what is private sector employment for the purposes of the Award. Those words still need to be construed on the basis of their ordinary and natural meaning.
63. 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

³³ compare the position of local government employment under the Fair Work Act which is dealt with separately to public sector employment: see Fair Work Australia Decision on *Award Modernisation* [2010] FWAFB 9916 at [48]

part of the private sector in Australia and employment in the service of a foreign state is not private sector employment.

64. It follows, and I find, that Mr Kumar's employment was not covered by the Award.
65. It is not necessary to determine whether the Award would have covered Mr Kumar's employment if that employment had been in the private sector. If, however, I were wrong in relation to that issue, I would have accepted the submissions of the Indian consulate concerning Mr Kumar's employment set out at [58] above.

Conclusion

66. Mr Kumar has failed to establish that his employment was covered by the Award. Accordingly, I will order that the application be dismissed.

I certify that the preceding sixty-six (66) paragraphs are a true copy of the reasons for judgment of Judge Driver

Associate: 

Date: 13 February 2018