Federal Court  Cour fédérale

Date: 20150317

Docket: T-1147-13

Citation: 2015 FC 335

Ottawa, Ontario, March 17, 2015

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

UNITED STATES OF AMERICA

Applicant

and

NADIA ZAKHARY

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The applicant applies under section 26 of the *Federal Courts Act* (RSC, 1985, c F-7) and section 10(4) of the *State Immunity Act*, RSC 1985, c S-18 (*SIA*), for an order setting aside a Certificate of Filing of Order (the Certificate) issued on February 20, 2013 under section 244 of the *Canada Labour Code*, RSC 1985, c L-2 (the *Code*). For the reasons that follow, the application is granted.

II. Facts

[2] The Certificate that the United States of America seeks to set aside or revoke was obtained by the respondent Ms. Nadia Zakhary in *Nadia Zakhary v United States of America*, Court File No T-1460-12. By way of background, the respondent filed a complaint (the Complaint) with Human Resources and Skills Development Canada (HRSDC) on October 6, 2010 under section 240 of the *Code* alleging unjust dismissal. The respondent had worked for 25 years as a cashier at the United States Consulate in Toronto before her termination in August, 2010.

[3] On November 9, 2010, Mr. Paul Bozzo, an Inspector in the Federal Ministry of Labour, sent the Complaint to the Consulate. Importantly, the Complaint was not served according to section 9(2) of *SIA*. This section requires service of legal documents through diplomatic transmittal by the Deputy Minister of Foreign Affairs. Instead, the Complaint was served on the United States via registered mail. Mr. Bozzo's cover letter stated:

> In accordance with subsection 241(1) of the Canada Labour Code, Part III, you are requested to provide the undersigned with a written statement giving the reasons for this dismissal within (15) days of the receipt of this letter.

[4] The only response to the Complaint from the Consulate was an acknowledgment of receipt by Ms. Elenita M. Shorter, Human Resources Officer with the Embassy of the United States of America in Ottawa, Ontario. Ms. Shorter's letter stated:

> Thank you for your letter dated November 9, 2010.
>
> As stated in our 30 September 2010 correspondence with Mr. Markowitz, the decision to terminate Ms. Zakhary for cause was

> carefully thought out and the reasons for the decision were provided to Ms. Zakhary in writing on August 3, 2010, a copy of which you can obtain from Ms. Zakhary. The Consulate continues to stand by its decision.

[5] On December 1, 2010, Mr. Bozzo wrote to both the respondent and the United States Consulate General inviting the parties to participate in the Labour Program's voluntary Alternative Dispute Resolution process. Attempts to mediate went unanswered by the applicant and, as such, the Complaint was subsequently referred to Mr. Lorne Slotnick, an Adjudicator appointed under section 242 of the *Code*.

[6] On July 7, 2011, the United States sent a diplomatic note to the Canadian Department of Foreign Affairs and International Trade (DFAIT) asking it "to inform the Ministry of Labour that because service was defective, the United States is not a party to this case and, therefore, the United States will not respond". The United States also advised the Adjudicator that the United States was not properly served under the *SIA* and would take no steps in the proceeding.

[7] The Adjudicator scheduled a preliminary hearing to discuss the jurisdictional objection that had been raised by the United States, however, the United States, through its Canadian counsel, adhered to the position articulated in the note of July 7, 2011. The Adjudicator nevertheless held the hearing in the absence of the United States and on March 26, 2012, made a finding of unjust dismissal. The Adjudicator ordered the applicant to reinstate the respondent to her former position, compensate her for lost pay and benefits, and awarded $5,000 in legal costs. I will turn to the reasons which underlie the Adjudicator's decision later in this judgment.

[8] On February 20, 2013, a copy of the Adjudicator's Order was filed for enforcement in the Federal Court pursuant to section 244 of the *Code*. The Certificate was issued on March 15, 2013 and served on the United States through diplomatic transmittal on April 26, 2013. It is this certificate that is the subject of the application and is sought to be set aside.

[9] The originating application commenced by the United States to set aside the Certificate joined the Attorney General of Canada (AGC) as a respondent. On December 19, 2013, the AGC brought a motion to be removed from the proceeding. The motion was settled with a term that the AGC would provide a letter to the United States that could be filed with the Court as part of the record in this application. The letter states, in part:

> (a) The AGC is unaware of any authority to suggest that the requirements of [SIA] are not applicable to service on foreign states of complaints under the [Code] (assuming there is jurisdiction over foreign states for claims filed under that legislation).
>
> (b) There is no dispute that the originating process in this case was mailed to the Consulate of the United States, rather than being served by the Deputy Minister of Foreign Affairs under cover of diplomatic note as required by section 9 of the SIA.

[10] It should also be noted that in a separate proceeding, on August 31, 2012, the Canadian Embassy in Washington delivered to the United States a Diplomatic Note enclosing a Statement of Claim issued by the respondent in the Ontario Superior Court of Justice. This proceeding seeks damages for wrongful dismissal against the United States. The United States filed a Statement of Defence in response on October 30, 2012.

III. Decision

[11] On March 26, 2012, the Adjudicator rendered his decision with respect to the unjust dismissal claim. The decision noted the jurisdiction objection of the United States and its absence from the hearing. The Adjudicator explained he would address the jurisdictional arguments even though no submissions were made.

[12] After a review of the history of the case and the relevant legislation, the Adjudicator concluded that Ms. Shorter's response to Mr. Bozzo's letter of November 9, 2010 constituted a waiver of the right of the United States to object to any failure to comply with the service requirements under section 9 of *SIA*. In reaching this conclusion the Adjudicator reasoned that the "employer responded" and "did not raise any claim of immunity". That is, the "employer took a step" in the proceeding and "therefore has waived immunity pursuant to section 4 of [SIA]."

[13] The Adjudicator went on to analyze whether the activities of the United States consulate that were the subject of the *Code* complaint were a "commercial activity" and thus exempt from state immunity pursuant to section 5 of *SIA*. The Adjudicator reviewed the nature of the job performed by the respondent and concluded that Ms. Zachary's employment situation involved an individual contract of employment in a purely administrative position. Therefore, the activity ought to be viewed as a commercial activity of the foreign state and was therefore outside the protection of state immunity.

[14] The Adjudicator also concluded that the *Code* applied to the respondent's employment relationship with the United States. The Adjudicator relied on the dissenting Supreme Court of Canada judges in *Re Canada Labour Code*, [1992] 2 SCR 50 at paragraph 107 to state that "a Canadian worker, working on Canadian soil, should not be deprived of the benefits of Canadian law unless the foreign state is acting in a context which warrants immunity."

[15] Having found that the Adjudicator and the *Code* had jurisdiction to deal with the Complaint, the Adjudicator also found that the respondent had been unjustly dismissed. The allegations made against the respondent in the termination letter were not proved before the Adjudicator, and the respondent received no pay in lieu of notice or severance pay upon her termination.

IV. Issues

[16] The United States contends that the Complaint was not served in accordance with the *SIA*; that the doctrine of waiver was inapplicable and, in the alternative, there was no waiver of the defect in service. The United States further contends that the reinstatement order violated section 11 of *SIA*, which precludes the availability of certain remedies, such as specific performance, against foreign states.

[17] In response, Ms. Zakhary says that the United States, as a matter of equity, cannot complain of any defect of service, as service was effective. The objection is purely technical or procedural, and should not be allowed to defeat the substance of the respondent's claim, or evade the Adjudicator's decision. She also relies on the Adjudicator's finding that her duties as cashier

were commercial in nature and therefore exempt from state immunity pursuant to section 5 of *SIA*.

[18] I propose to consider these issues in the following manner:

1. Whether the United States was properly served;

2. Whether the United States waived any defect in service;

3. Whether the United States was otherwise immune from a labour proceeding involving the *Code*; and

4. Whether the reinstatement order violated section 11 of *SIA*.

[19] The relevant statutory provisions are set out in Schedule A to these reasons.

V. Analysis

A. *The United States was not properly served with the Complaint*

[20] The case law in this Court, and others, is both unequivocal and longstanding; service on foreign states must be made pursuant to section 9(2) of *SIA*: *Tritt v United States of America*, (1989), 68 OR (2d) 284 (QL) (HCJ); *Softrade v Tanzania*, [2004] OJ No 2325 (SCJ). Leaving documents at the feet of a representative of the US Consulate is not proper service. Apart from agreement by a foreign state as to the manner of service, a state can only be served through the medium of the Deputy Minister of Foreign Affairs: Janet Walker, *Castel & Walker: Canadian*

Conflict of Laws, 6th ed., loose-leaf (Markham, ON: LexisNexis, 2005), at 10-21; H.L Molot and M.L. Jewett, "The State Immunity Act of Canada", (1983) Can Bar Rev 843.

[21] The provenance of state immunity in international law, its codification in the *Vienna Convention* on Diplomatic Relations and its incorporation into domestic law is traced in detail in the recent decision of the Supreme Court of Canada in *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62, where Justice LeBel, writing for the majority, observed at paras 42 and 43:

> In Canada, state immunity from civil suits is codified in the *SIA*. The purposes of the Act largely mirror the purpose of the doctrine in international law: the upholding of sovereign equality. The "cornerstone" of the Act is found in s. 3 which confirms that foreign states are immune from the jurisdiction of our domestic courts "except as provided by th[e] Act" (*Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 (C.A.), at para. 42; *SIA*, s. 3). Significantly, the *SIA* does not apply to criminal proceedings, suggesting that Parliament was satisfied that the common law with respect to state immunity should continue governing that area of the law (*SIA*, s. 18).
>
> When enacting the *SIA*, Parliament recognized a number of exceptions to the broad scope of state immunity. Besides the commercial activity exception, canvassed above, Canada has chosen to include exceptions to immunity in situations where a foreign state waives such right, as well as for cases involving: death, bodily injury, or damage to property occurring in Canada; maritime matters; and foreign state property in Canada (*SIA*, ss. 4, 6, 7 and 8; Currie, at pp. 395-400; Emanuelli, at pp. 346-49; J.-M. Arbour and G. Parent, *Droit international public* (6th ed. 2012), at pp. 500-8.3).

[22] The policy objectives furthered by section 9 of the *SIA* are articulated in a Government of Canada Circular of March 28, 2014 titled "Service of Originating Documents in Judicial and Administrative Proceedings Against the Government of Canada in other States." The Circular emphasizes that "under Canada's *State Immunity Act*, all other States receive in Canada the

protections…with respect to service by diplomatic means to their Ministries of Foreign affairs in their respective capitals of Canadian originating documents with at least 60 days' notice before the next step in the proceedings." The Circular also notes that "[s]ervice on a diplomatic mission or consular post is therefore invalid, however accomplished, and additionally constitutes a breach of Article 22 of the Vienna Convention on Diplomatic Relations…"

[23] The service of the Complaint on the Consulate by registered mail did not conform with section 9 of *SIA*. As service pursuant to section 9 of *SIA* is a mandatory, jurisdictional pre-condition to the commencement of proceedings against a foreign state, the Adjudicator could have no jurisdiction over the United States.

[24] To conclude on this point, Ms. Zakhary submits that when she was terminated she followed the proper procedure under section 240 of the *Code* and filed a complaint. Once the Complaint was filed, it was the Canada Labour Board which was charged with the responsibility of proper service of her complaint. The respondent therefore had no participation or control over the service process, and should not bear the consequences of improper service.

[25] In my view, this does not alter the analysis. The service provisions of the *SIA* are mandatory, regardless of which individual or agency is responsible for service under any particular recourse mechanism.

B. *The United States did not waive any defect in service*

[26] I turn next to the argument that the United States had waived its immunity and had therefore also waived the ability to object to defective service.

[27] As noted, the waiver argument is founded on the acknowledgment by a Human Resources Officer in the United States Embassy in Ottawa of receipt of Mr. Bozzo's correspondence. This does not constitute a waiver of immunity. The case law in respect of waiver of immunity accorded foreign states, both under the *SIA* and at international law, is not analogous to the treatment of waiver in a domestic law context. Waiver by a foreign state must be explicit, it must be unequivocal or unconditional and it must be certain. The waiver must also be that of the state itself, and the representative who waives immunity must be authorized by the state to do so. In the present case, none of those requirements are met; see for example, *Defense Contract Management Agency – America (Canada) v Public Service Alliance of Canada and Ontario Labour Relations Board*, 2013 ONSC 2005.

C. *The commercial activity exception does not apply*

[28] In my view, the commercial activity exception under section 5 of *SIA* does not apply in the context of this case, and the Adjudicator erred in suggesting the employment of personnel in the United States Consulate was a commercial activity.

[29] In *Re Canada Labour Code*, Justice La Forest found that the operation of an embassy was a quintessentially sovereign activity and did not fall within the commercial activity exception:

> While bare employment contracts are primarily commercial in nature, the management and operation of a military base is undoubtedly a sovereign activity. The operations of embassies and offshore military posts are the quintessential examples of state activity that should be immune from foreign review.

[30] The 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. It is not a commercial matter, 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. Nor can any principled distinction can be drawn between employment in the United States Consulate, in Toronto, and the United States Embassy, in Ottawa.

[31] 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, a further reason as to why the Court will not engage in a dissection of specific employment responsibilities within embassies or consulates.

[32] In *Canada v The Employment Appeals Tribunal*, [1992] IR 484 (Irish SC), a chauffeur, engaged by the Canadian embassy in Ireland was released. He sued for damages, contending that the commercial activity exception to state immunity applied. In rejecting the argument, O'Flaherty J, writing for a five member panel of the Irish Supreme Court wrote:

> Into which category does Mr. Burke's claim fall, public or private? The employment of a chauffeur at the Canadian Embassy is clearly not a commercial contract in the ordinary sense of the

> word; it is a contract of service. Is it any different to having the heating system in the embassy repaired? (cf. the claim against the *Empire of Iran* (1963) 45 ILR 57). I believe it is. I think once one approaches the embassy gates one must do so on an amber light. *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 in this case.

[33] The respondent's duties within the financial operation of the consulate, however administrative they may be, engaged elements of trust and confidentiality, and were thus integral to the operations of the consulate. The *prima facie* presumption of immunity alluded to by the Irish Supreme Court is not rebutted.

[34] To conclude on this point, Ms. Zakhary has issued a Statement of Claim in the Ontario Superior Court of Justice seeking damages for wrongful dismissal. The United States has defended, and has not asserted immunity in respect of the claim for monetary damages relating to termination from employment. The fact that the Ms. Zakhary may, as a practical matter, have a remedy in the form of an action for damages has no bearing on the scope of the immunity provisions. Even had the United States raised an immunity defence in the Ontario action, the result in this Court would be the same.

[35] In *Amaratunga v Northwest Atlantic Fisheries Organization*, 2013 SCC 66, the applicant commenced a suit for wrongful dismissal against an international organization. His plea was met

with a defence of state immunity. In response to the argument that to accede to the immunity argument would leave the plaintiff with no recourse, the Supreme Court said:

> The fact that the appellant has no forum in which to air his grievances and seek a remedy is unfortunate. However, it is the nature of an immunity to shield certain matters from the jurisdiction of the host state's courts. As La Forest J. said in *Re Canada Labour Code* in the context of sovereign immunity, it is an "inevitable result" of a grant of immunity that certain parties will be left without legal recourse, and this is a "policy choice implicit" in the legislation: p. 91. The same holds true in the instant case.

D. *The reinstatement order violated section 11 of SIA*

[36] While not necessary to my disposition of the matter, the reinstatement order granted by the Adjudicator contravenes section 11 of *SIA*. Section 11 of the *SIA* prohibits any "relief by way of an injunction [or] specific performance" against a foreign state. An 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.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted with costs. The Certificate of Filing of an Order made under section 244 of the *Canada Labour Code* on February 20, 2013 in the matter of *Nadia Zakhary v United States of America* (T-1460-12) in this Court is revoked and is of no force or effect.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1147-13
STYLE OF CAUSE:	UNITED STATES OF AMERICA v NADIA ZAKHARY
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 9, 2014
JUDGMENT AND REASONS:	RENNIE J.
DATED:	MARCH 17, 2015

APPEARANCES:

Malcolm Ruby Michael Comartin	FOR THE APPLICANT
Howard Markowitz	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gowling Lalfeur Henderson LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Du Markowitz Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT