



EMPLOYMENT TRIBUNALS

Claimant

Reverend A. A. Pereira

v

Respondent

The Bristol Diocesan Board of
Finance Ltd (R1)
Bishop of Bristol (R2)
Oliver Home (R3)
Christine Froude (R4)

PRELIMINARY HEARING JUDGMENT

Heard at: Bristol

On: 7th November 2019

Before: Employment Judge P Cadney

Appearances

For the Claimant: In Person

For the Respondent: Mr M Sheridan (Counsel)

The Judgment of the tribunal is that:-

- i) The claimant's claims of victimisation contrary to s27 Equality Act 2010 are dismissed upon withdrawal.
- ii) The claimant's claims of direct discrimination contrary to s13 Equality Act 2010 are dismissed as the tribunal has no jurisdiction to determine them.
- iii) The claimant's application to amend to add claims of harassment contrary to s26 Equality Act 2010 is dismissed.

REASONS

Introduction

At the previous case management hearing the case was set down to determine the issues set out below. Since then the claimant has withdrawn his existing victimisation claims (which are dismissed by consent); and has withdrawn the application to amend to include claims of indirect discrimination. Accordingly the issues to be determined are:-

- a) Whether the claimant's application for permission to include claims of harassment (s26 Equality Act 2010) is granted;
- b) Whether any or all of the claimant's original claims were presented out of time;
- c) If so whether time will be extended and/or whether that the issue shall be determined at the final hearing;
- d) Whether all or any of the claimant's claims should be struck out as having no reasonable prospect of success and/or that the claimant be ordered to pay a deposit as a condition of being permitted to pursue all or any of his claims on the grounds that they have little reasonable prospect of success. *(This was originally included but in the event the respondent has only advanced arguments as to the time points and the question of amendment. As it has been agreed that if any of the claims proceed a further jurisdictional preliminary hearing will be necessary this issue can be determined at that point.)*

The claim (This is the summary as set out in the previous case management hearing and is reproduced for ease of comprehension)

1. By a claim form presented on 9th October 2018 the Claimant brought complaints of discrimination on the grounds of race. He brought claims of direct discrimination in the failure to appoint him to Incumbency status (i.e. vicar or equivalent) in seven applications he made in 2014/2015; and in the failure to grant him permission to officiate (PTO) or licensed supervision between 30th June 2015 and 3rd May 2017; and in the refusal of the St Thomas Ecclesiastical Charity to make grants to him in or about August 2017. In addition he lodged complaints with the Church of England in the latter part of 2017 and early 2018. He alleges that delays in that process and its unsatisfactory outcome are acts of victimization.
2. He has applied to amend his claim to add claims of harassment in respect of all of the factual allegations of direct discrimination as summarized above; and indirect discrimination in relation to the failure of the St Thomas Ecclesiastical Charity to award grants.
3. The respondents submit that there are a number of preliminary issues to be resolved. Firstly, they contend that some or all of the claims are out of time. Secondly, they contend that some or all of the claims have no reasonable prospect or little reasonable prospect of success, at least as against some of the respondents. Finally, they contend that there are complex jurisdictional issues which may arise subject to the outcome of the first preliminary hearing, and may require a second. Accordingly, they suggested, and the claimant agreed, to list initially a preliminary hearing which will not deal with the underlying jurisdictional issues but only with those matters set out above.
4. In summary the parties' positions following the oral discussion this morning are as follows:-
 - a) Direct discrimination claims – Incumbency applications- The respondents submit that (as is set out at paragraphs 10.1 – 10.7 of the response) only the

Bishop of Bristol (R2) and the Archdeacon of Malmesbury (R4) played any part in the any of the selection process, to the extent set out in those paragraphs, and that the claims against the other two respondents should be struck out in any event. The claimant accepts that what is set out in those paragraphs is factually accurate (in essence he is simply aware that he applied and was rejected and has no knowledge of any of the processes but does not dispute the accuracy of the pleaded case) but he contends that R1 and R3 should remain as respondents as they were part of the same organization or organizational structure as R2 and R4.

- b) Direct discrimination - PTO/Licensed Supervision - The claimant asserts that the Bishop of Bristol (R2) had an ongoing responsibility to consider these options and the failure to take one or both was discriminatory. He accepts that only the Bishop has the power to grant either (which the respondents assert means that any claim can of necessity only lie against him) and that the claim is only against R2.
- c) Direct discrimination – Charitable Grant – The respondents contend that the only respondent relevant to this claim is the Archdeacon of Malmesbury (R4) who was a trustee of the charity. The claimant accepts this and that the claim lies only against her. The respondent submits that the tribunal in any event has no jurisdiction in respect of the failure to award a grant to an applicant to a charity.
- d) Victimisation – The respondents contend that none of them are responsible for or played any part in the process of dealing with complaints. The respondent intends to call brief oral evidence in support of this at the Preliminary Hearing.

Time Limits / Amendment

- 5. The issues of amendment and time limits are connected, and it is convenient to deal first with the questions of whether the original claims were out of time and if so whether time should be extended.

Time Limits

- 6. In respect in particular of the prejudice the respondents allege that they would be under in seeking to meet these claims if time is extended, the respondent called the Diocesan Secretary Oliver Home (R3 above although identified as R4 in the parties' documentation) to give evidence. The claimant asked a number of questions of him but in the main his evidence was unchallenged.
- 7. The claimant also gave evidence and was also relatively briefly cross examined, in the main, as is set out below in relation to the advice he received after October 2017.
- 8. Subject to the application to amend, the victimisation claim having been withdrawn, the claims before the tribunal are those for direct discrimination in the failure to

appoint him to incumbency status, and to grant permission to officiate, and to provide a grant, as set out at paragraph 4 above.

9. It is not in dispute in relation to the incumbency applications that the claimant made seven applications between 17th February 2014 and 1st November 2015. He was interviewed in relation to the last application on 14th December 2015, and is likely to have been informed that he was unsuccessful at or around Christmas 2015 or the new year 2016. As his claim form was lodged on 9th October 2018 it follows that the earliest act of alleged discrimination took place over four and a half years before the claim was lodged and the last over two and half years beforehand. For today's purposes, particularly as the claimant alleges that although different individuals may have been involved, that the common link is the involvement of the former Bishop of Bristol the Right Reverend Michael Hill (R2) that they are at least arguably part of a continuing act both in themselves and in relation to permission to officiate claims.
10. The complaint in relation to the permission to officiate/ licensed supervision claims lies between 30th June 2015 and 3rd May 2017. In respect of these claims again the central allegation lies against the former Bishop of Bristol (R2) and the early part of the claim overlaps with the claims set out above. Again, I will assume that these allegations (if true) are arguably capable of forming part of a continuing act.
11. The complaint in respect of the failure to award a charitable grant occurred in October 2017 and relates solely to the Archdeacon of Malmesbury (R4 above but R3 as identified in the parties documents). It appears to me much less likely that the claimant will be able to demonstrate that this is part of a continuing act, both because there is no allegation of any involvement by the Bishop of Bristol (R2) and because it is extremely unlikely in my judgement that the tribunal has any jurisdiction over this complaint in any event. However even if included as potentially falling within a finding of a continuing act it follows that all of the acts of discrimination fall at the latest one year before the claim was lodged.
12. It follows from this that all of the claims are out of time and the issue before me is whether time should be extended.
13. The parties have referred me to the factors to be taken into consideration in determining whether it is just and equitable to extend time as set out in *British Coal Corporation v Keeble* [1997] IRLR 336; and to the further explanation and guidance as to the exercise of the discretion in *Southwark London Borough v Afolabi* [2003] IRLR 22 (which the claimant contends is particularly relevant to the period prior to October 2017), and *Abertawe Bro Morgannwg ULHB v Morgan* [2018] EWCA Civ 640 (in particular paras 18, 19, 20 and 25 of the judgment of Leggatt LJ) :-
 - a) The length of and reasons for the delay;
 - b) The extent to which the cogency of the evidence is likely to be affected by the delay;
 - c) (not relevant in this case)
 - d) The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action;

- e) The steps taken by the claimant to take appropriate professional advice once he knew of the possibility of taking action.
14. The respondent contends that all of these factors favour rejecting the application to extend time.
15. The reasons for the delay must be divided into two separate periods. The first is prior to 18th October 2017. On that day the claimant attended the Bishop's Office to view the "Blue file" (in effect a personnel file relating to the individual). In it he discovered a letter from the former Bishop of Bristol (R2) written on 5th July 2016. He contends that that letter contains the evidence which supports his contention that the failure to secure an incumbency post and/or being granted permission to officiate was discriminatory. Prior to that date he was suspicious as to the reason for the failures but had no specific evidence to support those suspicions. He describes himself (witness statement para 6) as fearing taking on the church both from a spiritual point of view and because of fear of being a whistleblower, "so I decided to leave it". Accordingly, the respondent submits that this is not a case of someone who was living in blissful ignorance of being the victim of discrimination until he found that but someone who believed it had occurred and made a deliberate decision not to pursue any claim.
16. The claimant contends that until that point he had no evidence to support his suspicions and that it should be borne in mind that for a priest to accuse the church generally and a bishop in particular of discrimination is a very serious matter. He could not do so simply on the basis of suspicion and that his failure to bring proceedings prior to October 2017 is entirely reasonable.
17. Assuming that I accept the claimant's position as to the period prior to 18th October 2017 there is then a further period of almost exactly a year before the proceedings were issued on 9th October 2018. The respondent contends that that delay was wholly unreasonable. Firstly, they submit that in the present day and age that it is not possible that the claimant was in general terms ignorant of the existence of employment tribunals and should at very least have made enquiries about bringing proceedings. Moreover, by the process set out at paragraphs 7 to 9 in the claimant's witness statement he had, on 14th November 2017 spoken to Dr Liz Henry of the Church of England's HR Department who had specifically advised him of his options which included mediation, an internal complaint and "the possibility of a tribunal". Thus, on any analysis the claimant had been advised of the possibility of bringing a tribunal claim as early as 14th November 2017.
18. The claimant decided to pursue the option of an internal complaint which he submitted on 28th January 2018, and then lodged a further complaint on 4th March 2018. At some point in February 2018 at a social gathering he met an employment lawyer who advised him that he appeared to have a strong discrimination claim but that "the three month time period" would be an issue.". The claimant expressed the view that "*..I thought that the tribunal would take into account that I had tried and exhausted all other means first to get justice..*" Again, the respondent submits that on his own evidence the claimant made a second conscious choice in February 2018 not to pursue a tribunal claim despite having been specifically advised as to its merits, albeit in a social context, and in the specific knowledge of the three month time limit.

19. The claim was finally submitted in October 2018 because the claimant believed that his internal complaint had been “kicked into the long grass”.
20. The respondent therefore submits that in respect of factors a) d) and e) set out above that the reason for the delay, at least from November 2017 was that the claimant had actively chosen twice not bring proceedings despite knowing of the possibility of doing so; and that he had not acted promptly when he knew both of the facts giving rise to the claim, nor when he was in receipt of professional advice. In respect of these factors the delay was the result of a conscious choice made by the claimant.
21. That leaves the question of the effect of the delay on the cogency of the evidence. The respondent submits, on the basis of the evidence of Mr Home, that the prejudice is very substantial. He sets out in detail at paragraphs 11- 29 of his witness statement the process in relation to the selection for appointment for the seven incumbent and/or Priest-in-charge positions. Put simply the DBF is responsible for the administration of the process. In each case there is a selection panel comprising the candidates Patron or representative, the PCC representatives, the Diocesan Bishop or representative and the Area Dean. Applications are sent to the selection panel for shortlisting together with a shortlisting grid allowing for scoring against specified criteria. The shortlisting takes place at a face to face meeting at which the candidates are scored and the decision is taken as to which are to be interviewed. After references have been taken up there is a second twenty four hour interview stage during which there is a formal one hour interview. Recording sheets are kept scoring the candidates and there is a final meeting of the panel to decide who will be offered the post. There is therefore a substantial amount of paperwork generated in the process. This is retained by the DBF team but is only for 6 months to comply with data protection legislation. Given the age of these applications none of those records should have been retained. In fact, following a data subject access request made by the claimant the respondent has located some relevant documentation, the claimant’s application forms and a copy of one letter telling him he had not been shortlisted, together some email threads. Apart from that none of the documentation created as part of the process described above has been retained. While it is possible that some individuals, such as the PCC representatives may in some cases have retained some documentation there is no guarantee of that, or that at this distance in time they could be identified and contacted in any event. Even if that is possible and they have retained any documentation it will inevitably be incomplete, and in reality there will not be any possibility in relation to any of the selection exercises of assembling anything approaching a complete record so as to allow for an examination of the claimant’s scoring or performance against those of the other candidates. Equally the likelihood that any of the participants will have any independent recollection of the events is very remote indeed.
22. The respondent submits that as a result it would be extraordinarily difficult to defend these claims and that they face effectively insuperable prejudice. Making every allowance for the claimant they submit that the prejudice to the respondents far outweighs that to the claimant.
23. In relation to the PTO/licensed supervision claims the former Bishop of Bristol’s emails were destroyed on the instructions of his successor, the Right Reverend Vivienne Faull prior to the receipt of this claim. Equally, therefore the documentary

records from which the second respondent could reconstruct events and refresh any recollection he has no longer exists.

24. Similarly, for the reasons set out at paragraphs 43 and 44 of his witness statement the documents in relation to the reason for not awarding the charitable grant are no longer in existence.
25. The claimant does not accept these contentions. At paragraph 30 of his Skeleton Argument he argues that the critical documentary evidence, in particular the emails of 25th May 2014 and that of 5th July 2016 which prompted this litigation are still in existence and are sufficient to demonstrate the second respondents influence over the process. In particular he relies on the phrases "*cultural eccentricities*" in the first email and "*the factor in much of the misunderstanding*" being negative perceptions of people from the Indian sub-continent" in the second. He contends essentially that that is sufficient to transfer the burden of proof and that what is need from the respondent is an explanation of the contents of those documents which their authors should be able to explain even at this distance in time. He contends that the second respondent should have no difficulty in recollecting in broad terms why he did not support the claimant's applications at the time, and pointed to paragraphs 29 and 32 of Grounds of Resistance which, he submits contain a lucid explanation which in and of it itself demonstrates that the respondent is not laboring under the difficulty it contends for, Moreover he submits that even if there is merit in the respondent's position that the delay has caused prejudice that this has to weighed against his own position which is, if not unique, at least very unusual. He is not simply an employee in the ordinary sense of the term, but a Church of England clergyman who is required to swear an oath of allegiance to the Bishop of the diocese in which he ministers. There are two separate systems of law in play, both the statutory employment legislative regime, and ecclesiastical law, which is not true of employees generally. He believes that he had an obligation to exhaust internal procedures, or at least give the respondent a reasonable opportunity to participate in them before proceeding to legal action which should be a last resort. In addition, he points to the public interest in holding the established church, given its place and position in society, to the highest standards, and that there is a public interest in permitting the case to proceed.
26. In balancing these competing arguments I have reached the following conclusions. In my judgment there is some merit in the contention that on the face of it the emails relied on could without explanation from the respondent be sufficient for the tribunal to draw an inference of discrimination. However there are two potential consequences of that. The first is whether there in fact is a non-discriminatory explanation for the comments, in respect of which I agree with the claimant that the passage of time should not necessarily be an insuperable barrier for the respondent providing it. However, if at any final hearing the tribunal concludes that the respondent has not been able to establish a non-discriminatory explanation for the comments themselves and/or or that the circumstances surrounding the failure to appoint the claimant itself requires further explanation (for example if the claimant's extracts are accurate the emails appear to confirm that other successful candidates were less experienced and/or qualified than the claimant) they will need to provide detailed explanations as to the extent to which the second respondent did or did not influence, in particular the incumbency selection procedures, and I accept the evidence of Mr Home and the submissions of Mr

Sheridan that in that regard they are very seriously prejudiced in being able to defend the claims.

- 27.** In the end I have reached the following conclusions. Firstly, for today's purposes as set out above I will assume that all of the claims are arguably capable of being part of a continuing act which concluded in October 2017. Secondly, I accept the claimant's contention that the delay prior to October 2017 was reasonable in any event. However, that makes it all the more necessary to act promptly at that point. Where, as here, there has been significant delay as a matter of choice by the claimant and where there was no other impediment to bringing a claim for approximately a year before he did so, that is something I am bound to take into account in exercising the discretion. In addition, for the reasons set out above in my view the prejudice to the respondent of permitting the claims to proceed outweighs that to the claimant of refusing the application to extend time. Weighing all the competing arguments in the balance I am not persuaded that it would be just and equitable to extend time so as to allow the claims of direct discrimination to proceed to hearing.

Amendment

- 28.** The claimant has also applied to amend to include claims of harassment contrary to s26 Equality Act 2010 as set out in the draft amended claim form presented on 1st August 2019. In addition to the application to amend the claim the proposed amendment also seeks to add a new respondent, The Office of the Bishop of Swindon, and to add a further protected characteristic of marital status. However, after oral discussion the claimant has restricted the application simply to amendment on the grounds of the protected characteristic of race. For the avoidance of doubt the respondent does not take the point that if I have not extended time for the direct discrimination claims then there is in fact no claim to amend; but accepts that both applications can be considered in any event and that they do not necessarily stand or fall together.
- 29.** The proposed draft is difficult to follow, and it was not at all clear initially which of the allegations are intended to be new allegations requiring amendment. However, having orally discussed the allegations the claimant has identified the following paragraphs as containing allegations of acts of harassment for which he seeks permission to amend:-
- i) Paragraph 4 – The comments of the second respondent in the 25th May 2014 email.
 - ii) Paragraph 5 – The reply from the Bishop of Swindon suggesting using CDM measures.
 - iii) Paragraph 14 – The failure to provide a reference
 - iv) Paragraph 16 - The contents of R2's letter of 8th March 2016 refusing to create a post and or grant PTO/licensed supervision.

- v) Paragraph 29 - The second respondent's letter to the 4th respondent of 18th November 2016.
 - vi) Paragraph 30 - The second respondent's email of 2nd March 2016.
 - vii) Paragraph 31 – The email from the Reverend Paul Langham of 5th March 2016.
 - viii) Paragraph 38 – Letter of 5th July 2016 from the second respondent
 - ix) Paragraph 40 – Comments made on 6th November 2015.
- 30.** The respondent submits that all of the claims are entirely new. The only application which could even potentially be considered re-labelling is that at paragraph 38 as the email itself is factually already before the tribunal. However, at present it is simply the evidential basis on which the direct discrimination claims stand, and therefore to bring any claim directly arising from it is a wholly new claim. All the others are completely new. In addition, the second and seventh allegations set out above (re: paras 5 and 31) will require not just the amendment of the existing claim but the addition of new respondents as the allegations relate to comments alleged made by individuals who are not parties and for whose actions the existing parties could not be vicariously liable. Those two claims are therefore not simply new causes of action but would require two new respondents if they are permitted to proceed.
- 31.** However, the fact that there is a new cause of action does not prevent an amendment from being made. The Court of Appeal stressed in *Abercrombie and ors-v-Aga Rangemaster Ltd* [2013] IRLR 953 CA that Tribunals should, when considering applications to amend that arguably raise new causes of action, focus *“not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted”*
- 32.** In my judgment this application self evidently raises wholly new and different areas of enquiry than the claims pleaded originally.
- 33.** This leads on to the question of time limits. Where, as here, the claims are entirely new and not simply the re-labelling of existing claims it is “essential” for the tribunal to consider the application of time limits (See the Judgment of Mummery J in *Selkent Bus Company v Moore* [1996] ICR 836 at 843H). All the claims are very significantly out of time and, with one exception all took place at least three years prior to the date of the application to amend. Even if they can be regarded as part of a continuing act either in and of themselves or when considered together with the direct discrimination allegations they remain significantly out of time. Whilst this is a factor to be taken into account it is not in and of itself determinative of the issue.
- 34.** In addition, I am entitled to take into account that the original claims are themselves significantly out of time and that I have determined for the reasons set out above that it is not in my view just and equitable to extend time in respect of them. In those circumstances, it would be a curious and counter-intuitive result to permit the claimant to advance wholly new out of time claims as an amendment to an original claim which is itself no longer proceeding.

- 35.** In the circumstances I am not persuaded that the amendment should be permitted.
- 36.** It follows that as time has not been extended for the existing claims, and that the application to amend has been rejected that there are no live claims going forward and no further directions are required.

Employment Judge P Cadney
Bristol
Dated 11th December 2019