



EMPLOYMENT TRIBUNALS

Claimant: Reverend Dr B Randall

Respondents: The Bishop of Derby (R1)
The Derby Diocesan Board of Finance Limited (R2)
Mr Julian Hodgson (R3)
Ms Hannah Hogg (R4)
Ms Amanda Clarke (R5)

Heard: In chambers, on the papers

On: 30 March 2023

Before: Employment Judge Ayre

JUDGMENT

The application to amend the claim is refused.

REASONS

Background

1. On the second day of a two day Preliminary Hearing in February 2023, the claimant sought to amend his claim. The amendment was contained within a document headed "Short Supplementary Argument for the Claimant", which was sent to the Tribunal after the conclusion of the evidence and after the submission of written submissions by all parties.
2. It was not possible to deal with the application to amend during the Preliminary Hearing. I therefore made an Order that the claimant should set out the terms of the proposed amendment in the form of an amended Particulars of Claim showing clearly the proposed changes that he wished to make. I also ordered the parties to set out in writing their arguments in relation

to the application to amend and their views on whether the application to amend could be dealt with on the papers or required a hearing.

3. On 8 March 2023 the claimant sent in his application to amend the claim. The application did not contain any views as to whether the application should be dealt with on the papers or required a hearing.
4. The First Respondent sent her response to the application to amend to the Tribunal on 20 March 2023. She opposes the application to amend and submitted that the application could be dealt with on the papers. The remaining respondents sent their response to the Tribunal the following day. They also object to the application to amend and expressed the view that the application to amend could be dealt with on the papers.
5. In light of the views expressed by the respondents, and in the absence of any contrary views from the claimant, I have considered the application to amend the claim on the papers.

The Amendment Application

6. The Amended Particulars of Claim submitted by the claimant contain just one amendment, namely the addition of the following words:

“42A. In the premises, the First Respondent has discriminated against the Claimant contrary to s.53(1) and/or s 53(2)(c) of the Equality Act 2010. Further, as set out in paragraph 8, Respondents 3-5 were acting on behalf of the First Respondent and are liable for acts of discrimination against the Claimant on such bases as pleaded above.”

7. The claimant submitted, in support of the application to amend, that:
 - a. The amendment amounts at most to a re-labelling of the claim by clarifying an alternative legal basis for jurisdiction without introducing any new factual matters;
 - b. The amendment does not necessitate adducing any new evidence;
 - c. Allowing the amendment would cause no unfair prejudice to the respondents;
 - d. The prejudice to the claimant in not being allowed to pursue the amended claim would be substantial, and far outweighs any prejudice to the respondents.
8. The claimant argues that the correct reading of the Particulars of Claim is that the claimant sought to establish jurisdiction on three distinct legal bases which were complementary or alternative, namely that the First Respondent is a qualifications body because she can confer the following relevant qualifications:
 - a. A licence;
 - b. Permission to officiate (“**PTO**”); and/or

- c. Confirmation that an applicant is not the subject of any adverse safeguarding finding or any ongoing safeguarding enquiry in a Clergy Current Status Letter (“**CCSL**”).
9. He also submits that the First Respondent admitted in her response to the claim that she holds the power to grant licences and PTO but did not deny that the licence is a relevant qualification. The parties had, he said, adduced detailed evidence at the Preliminary Hearing about the nature of the licence, the First Respondent’s power to issue it, the fact that it was issued to the claimant and the fact that it came to an end on 31 December 2020. The claimant acknowledges however that cross examination at the Preliminary Hearing focused on what he describes as “*identifiable areas of factual dispute*”.
10. There has, the claimant says, been a “*total failure*” by the respondents to plead to a whole range of averments in the Particulars of Claim, and a failure to give any “*viable substantive response*” to the section 53(2)(c) argument in submissions.
11. In relation to the balance of hardship and injustice, the claimant submits that there would be substantial prejudice and injustice to the claimant if he were precluded from pursuing his amended claim. The claimant further suggests that an amendment to the pleadings is not even necessary, as all factual elements of the claim are already pleaded, and legal submissions do not need to be pleaded.
12. The claimant acknowledges that the application is being made relatively late, but says that no issues of time limits arise, and that the lateness of the application is mitigated by the following:
 - a. The amendment is minor in nature and it was ‘far from obvious’ that a reference to section 53(2)(c) had to be expressly pleaded;
 - b. The respondents failed to plead to all the averments in the Particulars of Claim;
 - c. The Tribunal has shown ‘very considerable latitude’ to the respondents in allowing them to defend the claim;
 - d. The respondents had a fair opportunity to adduce evidence on the underlying factual matters at the Preliminary Hearing and will have a further opportunity at trial; and
 - e. The respondents also have the opportunity to adduce evidence and make submissions in relation to the application to amend.

Respondents’ objection to the application to the amend.

13. All of the respondents oppose the application to amend.
14. The First Respondent submits that it is not open to the claimant to argue that the new alleged jurisdictional basis for his claims was pleaded in the Particulars of Claim, because that point was determined at the Preliminary

Hearing. She further submits that the claimant's argument is wrong for the reasons given at the Preliminary Hearing and/or the following:

- a. The claimant admits in the application to amend that the claimant's new case was not 'expressly' pleaded in the Particulars of Claim;
 - b. There are limited references to licences in the Particulars of Claim and in light of that it is 'hardly surprising' that the First Respondent did not specifically deny that the licence was a 'relevant qualification', that allegation not having been pleaded by the claimant;
 - c. If the new argument had been pleaded in the Particulars of Claim, then it is 'inconceivable' that it would not have been mentioned by the claimant's counsel at any time prior to serving the Short Supplementary Skeleton Argument for the claimant on the second day of the Preliminary Hearing. The claimant's original Skeleton Argument made no mention of it.
 - d. The new alleged basis for jurisdiction raises new factual matters, none of which were put to the First Respondent in cross-examination;
 - e. There was a detailed consideration of the basis upon which the claimant was putting his claim at the start of the Preliminary Hearing when the claimant applied for judgment. At that point the claimant's counsel referred to the 'two limbs' upon which the claimant put his case, namely the provision of a CCSL approving/certifying safeguarding status and the power to grant PTO;
 - f. The Tribunal, in refusing the claimant's application for judgment at the start of the Preliminary Hearing, had indicated that all arguments about the basis on which the First Respondent is alleged to be a qualifications body would be considered at the Preliminary hearing. The claimant had the opportunity at that point to set out the third jurisdictional limb, but failed to do so; and
 - g. The suggestion that the Tribunal showed 'very considerable latitude' to the respondents is completely at odds with the Tribunal's reasons for refusing the claimant's application for judgment and should have no bearing on the amendment application.
15. The First Respondent submits that the key point which emerges from the case law is that injustice or hardship is far more likely to arise where the proposed amendment will extend the scope of the issues and evidence. The amendment proposed by the claimant is, the First Respondent says, substantial and will require detailed consideration of significant areas of fact and law, such that it is akin to adding a completely new claim.
16. The Tribunal has not, the First Respondent submits, heard any evidence in relation to the key issue that the Tribunal would have to decide if the

amendment were allowed, namely whether the connection between the alleged discriminatory act for which it is said the First Respondent is liable under section 53(2) of the Equality Act and the alleged 'relevant qualification' conferred by the alleged qualifications body is sufficiently close. The practical consequence of allowing the amendment, therefore, would be that the First Respondent would need to give evidence on that issue.

17. In relation to the timing of the application to amend, the First Respondent submits that the claimant left it to the "*last possible moment to seek to introduce a new jurisdictional basis for his substantive complaints*". The timing of the application is, it is suggested, prejudicial to the First Respondent because of the delay which would be caused if the amendment were allowed. Firstly, because the claims are serious ones – namely that a Bishop in the Church of England has discriminated against a clergyperson in the Church of England because he manifested religious beliefs consistent with church of England doctrine. The claim has already been 'hanging over' the First Respondent for a year and has taken up a substantial amount of her time. Allowing the amendment would mean that more of her time would be lost. Further delay may have a negative impact on her memory.
18. There is, the First Respondent argues, no explanation of or justification for the delay in raising the new issue that the claimant now seeks to rely upon. The practical consequences of allowing the proposed amendment would be the requirement for a further Preliminary Hearing of at least 1 day in order to hear additional evidence and submissions, which would result in additional costs. There is no evidence to suggest that the claimant would be in a position to pay a substantial award of costs.
19. The First Respondent also submits that the Tribunal is entitled to have regard to the merits of the proposed amendment so long as the Tribunal adopts a reasonable approach and avoids conducting a mini-trial (***Kumari v Greater Manchester Mental health NHS Foundation Trust [2022] EAT 132***). The argument advanced in the proposed amendment is, it suggests, 'hopeless' for two main reasons:
 - a. The claimant's case as to the link between the licence and either the safeguarding process or the CCSL is far too tenuous; and
 - b. The claimant has no real prospect of persuading a Tribunal that he suffered a detriment because:
 - i. The First Respondent's statements in the CCSL were purely factual and their accuracy cannot be disputed;
 - ii. The First Respondent was under a legal duty to raise any safeguarding concerns;
 - iii. In those circumstances, no reasonable person would consider they had been subjected to a detriment. The test for 'detriment' has an objective element and an unjustified sense of grievance cannot amount to a detriment (***Shamoon v Chief Constable of the Royal Constabulary [2003] IRLR 285*** and ***Keogh v***

University Court of Abertay (Sheriff Court Tayside Central and Fife) 12 December 2022, unreported;

- iv. Where an alleged discriminator acts because they are obliged to, the reason for the treatment in question is not the protected characteristic (***Commissioner of the Police of the Metropolis v Geldard [2021] ICR 1329***).
20. The First Respondent argues also that the claimant's argument that following a safeguarding process was discriminatory because there was a 'stereotypical assumption that a clergyman holding the claimant's beliefs was a safeguarding risk' is very unlikely to succeed at trial because:
- a. The safeguarding process was triggered by concerns raised by Trent College which were held to be justified and non-discriminatory in ***Randall v Trent College Ltd (Case No. 2600288/2020)***; and
 - b. In the circumstances no reasonable person would consider that being asked to undergo a risk assessment was to their detriment, and the First Respondent's stance was obviously justified.
21. In the First Respondent's submission, the balance of injustice and hardship weighs heavily against allowing the application to amend. In addition, it cannot be said that the claim will fail if the application is refused, as the claimant still has the original two 'limbs' relied upon at the Preliminary Hearing.
22. The Second, Third, Fourth and Fifth Respondents also object to the application to amend. They submit that the hardship to the respondents would be significant if the amendment application is granted, and that it would not be in the interests of justice to allow the amendment.
23. The remaining respondents also argue that the matters contained in the application to amend were not pleaded in the Particulars of Claim, nor is it clear upon what basis the claimant alleges that the remaining respondents are liable under the Equality Act. The respondents continue to incur costs and devote resources to defending a claim that is entirely parasitic on the claimant's claim that the First Respondent is a qualifications body. They would face further costs should the application to amend be permitted.
24. The balance of prejudice, they submit, weighs even more overwhelmingly against allowing the amendment. To allow the amendment would 'dramatically widen the scope of the jurisdictional issue', causing them delay, cost and resources whilst taking the claimant no further forward in his claim against them. Further, they submit, the claimant has been professionally represented throughout these proceedings and should have pleaded his claim in full at the outset.

Decision on application to amend

25. In reaching my decision on the claimant's application to amend his claim I have carefully considered the written submissions of the parties. I have also

taken into account the general principles governing applications to amend, including the following:

- a. When exercising their discretionary power to allow amendments, Tribunals should seek to do justice between the parties (***Chapman & others v Goonvean & Rostowrack China Clay Co Ltd [1973] ICR 50***).
- b. When deciding whether to allow amendments Tribunals must have regard to all of the circumstances, and in particular any injustice or hardship resulting from either allowing or refusing the amendment (***Cocking V Sandhurst (Stationers) Ltd & anor [1974] ICR 650***).
- c. Relevant factors to consider include:
 - i. The nature of the amendment: is the amendment merely the correction of clerical errors, is it the addition of factual details or relabelling of existing claims, or does it involve the making of entirely new factual allegations which change the basis of the existing claim?
 - ii. The applicability of time limits: if the amendment includes a new claim, is that claim in time and, if not, should time be extended to allow it in?
 - iii. The timing and manner of the application

(Selkent Bus Co Ltd v Moore [1996] ICR 836)

- d. The key test is the balance of injustice and hardship to each party in allowing or refusing the amendment, which involves a balancing exercise and the consideration of the practical consequence of allowing or refusing an application (***Vaughan v Modality Partnership [2021] ICR 535***).
 - e. Where an amendment involves a new cause of action, the Tribunal must consider the extent to which the new cause of action is likely to involve substantially different areas of enquiry. The greater the difference between the factual and legal issues in the claim as originally pleaded and in the amended claim, the less likely it is that the amendment will be allowed (***Abercrombie v Aga Rangemaster ltd [2014] ICR 209***).
26. The starting point in any application to amend is the original Particulars of Claim. Paragraph 6 of the Particulars of Claim reads as follows:

“The First Respondent is the Bishop of Derby. She holds power to license or give permission to Officiate (PTO) to clergy in her Diocese. It is not lawful for a Church of England to minister or to officiate in any way, with or without pay, without license or permission from the Bishop (Canon C8). The practical

exercise of a Church of England minister's vocation is dependent on qualifications under the power of the Bishop, who thus acts as a qualifications body within s.53 and s.54 of the Equality Act 2010."

27. Paragraph 7 of the Particulars of Claim reads as follows: "*The licence which the Claimant had for the purposes of his employment with Trent College was a necessary condition for the exercise of his ministry and lapsed with the termination of his employment.*"
28. Paragraph 8 states that: "*The First Respondent is responsible for the carrying out of safeguarding matters in the Diocese though she delegates safeguarding investigations to the Diocesan safeguarding team and other clergy in the Diocese such as Archdeacon Cunliffe, who act as her agents. At all material times Archdeacon Cunliffe was also an employee of the Second Respondent who is vicariously liable for his actions.*"
29. Paragraph 34 of the Particulars of Claim contains the following: "*On 5th July 2021, the First Respondent wrote to the fifth Respondent indicating she was going to accept her advice and require the Claimant to undergo an independent safeguarding assessment before allowing him PTO or otherwise to fulfil the duties of a C of E clergyman. This decision was a further act of less favourable treatment on the grounds of the beliefs...*"
30. Paragraph 36 states that: "*This denial of PTO by the Bishop was an act of discrimination/harassment whereby the Claimant was denied approval within s.53 and 54 of the Equality Act 2010 and was a continuing act which has continued from the end of July 2021 to the date of these particulars.*"
31. In the Short Supplementary Argument submitted by the claimant during the course of the Preliminary Hearing, it appeared that the amendment he wished to make to the claim was to rely on the argument that "*the Bishop when issuing her license with respect to the Claimant's Chaplaincy at Trent College, was acting as a Qualifications Body*". The new argument is described in that document as "*a point of law*" and "*an alternative to that set out in the original skeleton*".
32. The claim form in these proceedings was presented on 16 March 2022. It did not contain any express argument that the First Respondent is a qualifications body by virtue of her power to grant licences. Rather, it pleads that it is the power to grant PTO that makes the First Respondent a qualifications body. The new argument was raised for the first time on 24 February 2023, on the second day of a Preliminary Hearing, after skeleton arguments had previously been exchanged and after evidence had been heard. There was no evidence produced by any of the parties on the question of licences, understandably because that was not an issue that had been raised previously by the claimant. The issue was not put to the First Respondent in cross-examination.
33. The claimant has been legally represented throughout these proceedings. He has therefore had the benefit of legal advice since at least March 2022.

Despite that fact, no explanation whatsoever has been provided as to why the new argument that he now seeks to rely upon was not made earlier, including at the start of the Preliminary Hearing on 23 February when counsel for the claimant specifically said that there were two limbs to the claimant's argument on jurisdiction, namely:

- a. That the First Respondent is a qualifications body by virtue of her power to grant or withhold PTO; and
- b. That the First Respondent is a qualifications body by virtue of her powers in relation to safeguarding / CCSL.

34. The application to amend seeks to introduce a third limb to the argument, namely that the power to grant a licence makes the First Respondent a qualifications body. The claimant acknowledges in his application to amend that "*it would have been more helpful to develop the argument under s.53(2)(c) at an earlier stage*". He gives no reason however as to why that was not done.

35. Rather than provide any reasons as to why the application to amend was not made earlier, the claimant seeks to suggest that no application to amend is required. That argument has already been considered at the Preliminary Hearing and rejected.

36. Similarly, the suggestion that the respondents have failed to plead to certain aspects of the Particulars of Claim was also considered and rejected at the Preliminary Hearing. All of the respondents had, in their responses to the claim, denied all of the allegations made in the Particulars of Claim and in addition the Second, Third, Fourth and Fifth Respondents specifically pleaded that "*any failure to respond should not be taken as an admission.*"

37. I have some sympathy with the claimant's argument that the nature of the amendment that he seeks to make is a relabelling of an existing claim, relying on the same sections of the Equality Act as the original claim. The relabelling is however a significant one, raising an entirely new argument and requiring new evidence and submissions. The nature of the amendment weighs against allowing it.

38. The practical consequences of allowing the amendment would be that a further Preliminary Hearing would be required to hear evidence and submissions on the new argument. This would involve further factual enquiry and possibly the gathering of additional documentary and witness evidence. This would put all parties to further cost and delay in the proceedings.

39. All of the respondents in this claim are being sued in their personal capacities. The nature of the claims that are being made is particularly serious for them, given their roles within the Church of England – they are being accused individually of having discriminated on the grounds of religion and belief. They will be prejudiced by the additional cost, the requirement for a further Preliminary Hearing and the delay in resolving matters should the application to amend be allowed.

40. In contrast, the claimant will not be prevented from pursuing his claim using the arguments that were run until the second day of the Preliminary Hearing.
41. The balance of hardship and injustice in my view favours not allowing the amendment. The claimant can still rely upon the first two limbs of his jurisdiction argument and is not deprived of his right to pursue his claim if he is not allowed to amend his claim.
42. For the above reasons the application to amend the claim is refused.

Employment Judge Ayre

Date: 30 March 2023