FAIR EMPLOYMENT TRIBUNAL

CASE REFS: 84/19FET
3068/19

CLAIMANT: **Laurence Kirkpatrick**

RESPONDENT: **Presbyterian Church in Ireland**

PRE-HEARING REVIEW AMENDMENT DECISION

The decision of the tribunal is that the claim is amended to the extent set out in this decision.

CONSTITUTION OF TRIBUNAL:

Employment Judge (sitting alone): **Employment Judge Ó Murray**

APPEARANCES:

The claimant represented himself.

The respondent was represented by Mr N Phillips, Barrister-at-Law, instructed by Ms McAloon of Worthingtons Solicitors.

REASONS

<u>The Claims</u>

1. The claimant has four claims currently before the tribunal as follows:

   (i) The first claim with reference 101/18FET was presented on 14 September 2018 and alleged sex discrimination on grounds of marital status and discrimination on grounds of religious belief and political opinion.

   (ii) The second claim with reference 84/19FET was presented on 13 February 2019 and claimed "*victimisation*". This claim form is the subject of this amendment hearing.

   (iii) The third claim with reference number 97/19FET was presented on 18 February 2019 and replicates the allegations in the first claim form with the addition of further allegations.

(iv) The fourth claim form with reference 1255/19FET was presented on 17 June 2019 and alleges unfair dismissal, sex discrimination on grounds of marital status and claims for discrimination on grounds of religious belief and political opinion. The claimant's dismissal date was 20 March 2019.

Proposed Amendment to 84/19FET

2. The scope of the proposed amendment to the second claim claim (84/19FET) was set out in writing by the claimant in a letter dated 28 August 2019 to Ms McAloon of Worthingtons Solicitors. That letter attached a six-page document which set out in numbered paragraphs the content of claim form 84/19FET. The agreed position in relation to that attached document is that it is a replication of the content of that claim form but was simply broken up into numbered paragraphs. It was further agreed by the claimant that the reference to paragraphs in his letter of 28 August 2019 amounted to his summary of what was referred to in each of the numbered paragraphs in the amendment document and it was not part of the claimant's amendment application that the narrative set out in his letter of 28 August 2019 (which ran to two and half pages), should be included in the amendment of that claim form.

3. In summary the document which was the subject of the amendment application is the six page document setting out in 28 numbered paragraphs the content of the claim form bearing the reference 84/19FET.

Claims 101/18FET and 97/19FET

4. In the course of clarification of the amendment application at the outset of the hearing, the claimant stated that his third claim amounted to an expansion of his first claim and insofar as it was required he would wish to amend the first claim in order to include that expanded information. Mr Phillips indicated that he understood that the subject of the amendment hearing was solely in relation to claim with the reference 84/19FET.

5. Time points have been raised by the respondent in each of the four claims presented by the claimant. In light of that and in view of the overriding objective I considered that it was not appropriate to deal with an amendment application in relation to the first claim given that the parties have agreed that all four claims should be listed and heard together. The time points raised in relation to each claim can therefore be considered by the tribunal hearing the claims when consideration will be given to whether or not the allegations form a continuing act or whether any or all of them amount to discrete allegations in respect of which time points arise. The tribunal hearing all four claims can therefore assess whether or not time should be extended on just and equitable grounds.

6. This Amendment PHR therefore solely concerns amendment of the second claim which has the reference number 84/19FET.

Sources of Evidence

7. The claimant gave sworn testimony in relation to the amendment and in relation to the issue of any delay and was cross-examined in that regard by Mr Phillips. Both sides put forward arguments at the end of the hearing and Mr Phillips made

reference to the relevant parts of ***Harvey*** on Industrial Relations and Employment Law in relation to amendments together with the ***Selkent*** decision.

8. I had regard to the claim and response forms in all four claims together with the CMD records and the document setting out the scope of the application to amend.

THE LAW

9. The two pieces of discrimination legislation engaged in this application are the Sex Discrimination (NI) Order 1076 (as amended) ("SDO") and the Fair Employment and Treatment (NI) Order 1998 (as amended) ("FETO").

10. The decision on whether or not to allow an amendment is an exercise of discretion on the part of the tribunal. The tribunal must take account of all the circumstances and must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. (***Selkent*** - see below).

11. ***Harvey*** at Division P1 paragraphs 311 onwards deal with amendment of claims.

12. ***Harvey*** states *at Paragraph 311.3 of Part T*:-

> *"A distinction may be drawn between –*
>
> *(1) Amendments which are merely designed to alter the basis of an existing claim but without purporting to raise a new distinct head of complaint.*
>
> *(2) Amendments which add or substitute a new cause of action but one which is linked to or arises out of the same facts as the original claim.*
>
> *(3) Amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all*."

13. In relation to the issue of whether an amendment alters an existing claim or makes a new claim the following paragraph in ***Harvey*** (312.04) relates to the comments of Underhill LJ in the case of ***Abercrombie v Aga Rangemaster Ltd:***

> *"Underhill LJ summarised the approach adopted by the EAT and Court of Appeal when considering applications to amend 'which arguably raise new causes of action' (para 48). This is:*
>
> > *"… to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry 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."*

14. At paragraph 312.08 of ***Harvey*** the Court of Appeal decision in ***Housing Corporation v Bryant [1999] ICR 123 CA*** is referred to as follows:

"In order to determine whether the amendment amounts to a wholly new claim, as opposed to a change of label, it will be necessary to examine the case as set out in the original application to see if it provides a 'causative link' with the proposed amendment (see ***Housing Corpn v Bryant [1999] ICR 123, CA).***"

15. ***Harvey*** at paragraph 312.08 refers to the case of ***Foxtons Limited v Ruweil UKEAT/0056/08*** where Elias J stated as follows:

"It is not enough even to make certain observations in the claim form which might indicate that certain forms of discrimination have taken place; in order for the exercise to be truly a relabelling one, the claim must demonstrate the causal link between the unlawful act and the alleged reason for it. In other words, in this case it would have to identify not merely that there had been some discrimination but that the dismissal was by reason of sex discrimination."

16. At paragraph 312.09 of ***Harvey*** it states:

"However, although there may be an absence of a link between the case as pleaded in the original claim and the proposed amendment, this will not be conclusive against the amendment being allowed. In ***Evershed v New Star Asset Management UKEAT/0249/09 (31 July 2009, unreported),*** *Underhill J pointed out that it is no more than a factor, the weight to be given to it being a matter of judgment in each case (para 24). When considering whether to allow an amendment, an employment tribunal should analyse carefully the extent to which the amendment would extend the issues and the evidence."*

17. In the case of ***Selkent Bus Company v Moore 1996 ICR 836*** it was stated as follows:-

"Whenever the discretion to grant amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

...

What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively but the following are certainly relevant;

(a) The nature of the amendment; applications to amend are of many different kinds, ranging, on the one hand from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal has to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) *The applicability of statutory time-limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time-limit should be extended under the applicable statutory provisions.*

(c) *The timing and manner of an application. An application should not be refused solely because there has been a delay in making it. There are no time-limits laid down in the Rules for the making of amendments. The amendments can be made at any time before, at, or even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made; for example, the discovery of new facts or new information appearing from documents disclosed in discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result from adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision*."

18. In ***British Coal v Keeble [1997] IRLR 336*** the EAT suggested that a tribunal would be assisted by the factors mentioned in Section 33 of the Limitation Act 1980, which deals with the exercise of discretion by the courts in personal injury cases. This requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also take regard to all the circumstances of the case and in particular to:-

"(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) the extent to which the party sued had cooperated with any request for information;

(d) the promptness with which the plaintiff acted once her or she knew of the facts giving rise to the cause of action; and

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."

19. The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (as amended), state where relevant as follows:-

*"**Overriding objective***

3.(1) The overriding objective of these Regulations and the rules in Schedules 1, 2, 3, 4, 5 and 6 is to enable tribunals and chairmen to deal with cases justly.

(2) Dealing with a case justly includes, so far as practicable –

(a) ensuring that the parties are on an equal footing;

(b) dealing with the case in ways which are proportionate to the complexity or importance of the issues;

(c) ensuring that it is dealt with expeditiously and fairly; and

(d) saving expense.

(3) A tribunal or chairman shall seek to give effect to the overriding objective when it or he –

(a) exercises any power given to it or him by these Regulations or the rules in Schedules 1, 2, 3, 4, 5 and 6; or

(b) interprets these Regulations or any rule in Schedules 1, 2, 3, 4, 5 and 6.

(4) The parties shall assist the tribunal or the chairman to further the overriding objective.

Hearings - General

"14(2) So far as it appears appropriate to do so, the chairman or tribunal shall seek to avoid formality in his or its proceedings and shall not be bound by any statutory provision or rule of law relating to the admissibility of evidence in proceedings before the courts.

(3) The chairman or tribunal (as the case may be) shall make enquiries of persons appearing before him or it and of witnesses as he or it considers appropriate and shall otherwise conduct the hearing in such manner as he or it considers most appropriate for the clarification of the issues and generally for the just handling of the proceedings."

20. It is inappropriate for an Employment Judge or tribunal to become to become an advocate for an unrepresented party. At the other extreme, it could be an error of law for a tribunal to ignore a clear case being made even if the claimant puts the wrong legal label on it. This point is relevant to the claimant's application to include harassment on grounds of marital status under SDO as part of his claim.

21. In the case of ***Higgins v The Home Office [2015] UKEAT 0296/14,*** HH Judge Serota QC endorsed guidance provided by Barling J in another case:-

"I also need to refer to the approach which should be taken under the overriding objective to litigants in person; in this regard I refer to the judgment of Barling J in ***Drysdale v Department of Transport (Maritime and Coastguard Agency) [2014] IRLR 892*** *–*

'49. From the authorities to which Mrs Drysdale referred ... I derive the following general principles:

(1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.

(2) What level of assistance or intervention is 'appropriate' depends upon the circumstances of each particular case.

(3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the representative is legally qualified or not; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.

(4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.

(5) The determination of the appropriate level of assistance of intervention is properly a matter for the judgment of the tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and 'feel' for what is fair in all the circumstances of the specific case.

(6) There is, therefore, a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/omitted to do, and which amounts to unfair treatment of a litigant."

FINDINGS OF FACT AND CONCLUSIONS

22. At the outset of the hearing the claimant confirmed that his application was a claim for a relabelling of the content of the claim form in claim 84/19FET to substitute for victimisation, claims of harassment on grounds of marital status under SDO and harassment on grounds of religious belief and political opinion under FETO.

23. In the claim form the claimant alleged victimisation and stated at the Amendment Hearing that he had taken legal advice on that issue and was satisfied that his claim is not actually a claim of victimisation in the legal sense but was a claim of adverse treatment in the form of harassment on the grounds set out in paragraph 22 above.

24. It is important to note that at Part 8 of the claim form the claimant refers to the first claim form (101/18FET) when he states as follows:

> "*I have been under precautionary suspension since June 2018 and a formal discipline meeting is currently being arranged.*
>
> *I have already lodged claims for discrimination against my employer which have not yet been heard."*

25. Whilst in the claim form the claimant did not tick the boxes relating to any form of discrimination he did refer in Part 8 to his previous claim of discrimination. It was clear to me from the claimant's evidence that his position is that his second claim was linked to his first claim and I find that the first claim was clearly based on sex discrimination and discrimination under FETO on grounds of political opinion and religious belief.

26. Central to the claimant's claims are allegations by him that he was intrusively questioned about his private life from 1 June 2013 and was treated adversely once his employer became aware that he had separated from his wife and was in the process of divorcing. It was uncontested at previous CMDs that the claimant had told the respondent of his impending divorce in or around June 2015. At a previous CMD the claimant confirmed that the Degree Absolute in his divorce was granted on 26 July 2017.

27. The respondent's case is that the claimant was not subjected to unlawful discrimination, that he was suspended on 25 June 2018 following his participation in a Talkback radio programme on 13 June 2018, and the claimant was dismissed for gross misconduct, following an investigation and disciplinary and appeal process, with effect from 20 March 2019.

28. It was clear that the claimant regards the four claim forms as constituting his claim when taken together. The respondent, in effect, acknowledged this because in the response forms (in all but the first claim) the respondent relies on its response in the other claims. There was therefore a recognition by both sides of the substantial overlap and repetition between the four claim forms. In addition there was agreement at a CMD on 14 August 2019 that all four claims should be listed and heard together.

29. In the fourth claim (which centres on the claimant's dismissal) the claimant refers to alleged adverse treatment because of his political opinion and defines that political opinion at paragraph 73 in that claim form. The allegations of adverse treatment contained in that claim form date from June 2015 onwards. In the fourth claim the claimant therefore defines his political opinion as including a particular view on divorce in mainstream Christianity and liberal Presbyterianism. The claimant's view on divorce also comprises the religious belief relied upon in all four cases.

30. In the first claim form the allegation is that the claimant was subjected to adverse treatment from 2013 in relation to his private life and the claim in that claim form centres on the issue of the claimant's marital status and his separation and divorce. From all the claim forms I infer that the political opinion relied upon in the second claim also relates to that issue, ie a view on separation and divorce. I reject the claimant's attempt to widen, at this PHR, the scope of that opinion set out at paragraph 39 below.

31. I consider that it is not fatal to the claimant's application that he did not tick any of the boxes relating to discrimination as he clearly relates his second claim form to his first claim form in which he did tick the relevant boxes. For that reason the claimant has established to my satisfaction a causative link between the relabelling and most of the content of the second claim form.

Amendment Permitted

32. I am therefore satisfied that paragraphs 4 to 28 may be relabelled by the claimant as claims of harassment on grounds of marital status under SDO and on grounds of religious belief and/or political opinion under FETO. Those claims are in substitution for the claim of victimisation and for the avoidance of doubt there is no claim for victimisation now contained in the second claim form. The mechanism for claiming harassment on grounds of marital status is by way of a claim for less favourable treatment under Article 3 of SDO ie a claim of direct discrimination involving a comparator. The religious belief/political opinion relates to the claimant's view of divorce rather than the wider definition contained in the fourth claim form.

33. I am satisfied that the extent of the evidence will not be extended greatly by the relabelling of the remainder of the claim as a claim of harassment on grounds of religious belief, political opinion and under SDO as the political opinion relates to the claimant's views and beliefs on separation/divorce.

34. Time limit issues do not arise in this relabelling exercise.

35. In this Amendment Hearing I have decided that it is not appropriate for me to decide whether or not the claimant's attitude to divorce is capable of amounting to a political opinion within the meaning of FETO nor is it appropriate for me to determine whether the allegations of adverse treatment constitute, on the one hand, a continuing act, not involving time limits or whether, on the other hand, they constitute discrete acts, in respect of which time limits apply. These matters are apt for determination at a full hearing by a tribunal after hearing all the evidence in all four cases. My principal reason for so finding relates to the fact that there are four claims that have all been consolidated by agreement ie they are to be listed and heard together and because I have found that this amendment is a relabelling exercise.

Amendment Refused

36. The allegations of adverse treatment set out in paragraphs 2 and 3 of the amendment related to 2010 and 2013 were stated by the claimant, in this PHR, to form part of the series of events. I am not satisfied that the claimant has established a link with the discrimination claim in the first claim form as the thrust of

that claim form relates to matters in the period after 1 June 2013. It is my assessment that amending the claim form to include those allegations as allegations of adverse treatment on the grounds alleged, would not amount to relabelling. I also find it would extend the evidence disproportionately especially as firstly, there are time points in relation to them and secondly, the allegations in the period 2010-1 June 2013 do not fit with the thrust of the rest of the case contained in the first claim form. I therefore refuse the amendment in this regard.

The Fourth Claim Form

37. The fourth claim lists matters that the claimant says are relevant to this unfair dismissal following his participation in the Talkback programme.

38. A central issue in that claim is the relationship between QUB and UTC and whether the claimant's actions undermined that relationship and therefore amounted to gross misconduct or whether the relationship difficulties between the two bodies existed before that. That can be pursued by the claimant by giving proportionate evidence of the alleged less favourable treatment of him because of political opinion/religious belief.

39. During the PHR hearing the claimant stated that the political opinion relied upon in this claim relates to education and specifically the relationship between Union Theological College (UTC) and Queen's University Belfast (QUB). The claimant held the opinion:

> *"If we are part of the university let us do it the way the university would do it and that is the standard we should be striving to attain."*

40. As set out above I reject the claimant's attempt to widen the scope of the political opinion relied upon in this claim (ie 84/19FET).

SDO – Harassment

41. During the Amendment Hearing Mr Phillips made the point that harassment per se on grounds of marital status is not covered under SDO and that therefore in light of the claimant's clarification at the outset of the hearing that he only wanted to claim harassment then it was not for the tribunal to allow a cause of action which had not asked for by the claimant.

42. I reject that contention and have allowed the amendment to include a claim of less favourable treatment on grounds of marital status under SDO (in terms of the harassment alleged to be related to that status) for the following principal reasons:

    (i) The claimant's covering letter of 28 August 2019 in relation to the amendment mentions less favourable treatment in addition to harassment and makes clear that marital status is one of the protected characteristics relied upon.

    (ii) Whilst the claimant clarified at the outset of the hearing that harassment was an issue in the amendment rather than "less favourable treatment", I agree with Mr Kirkpatrick's submission that this is not a test of technical legal terminology in circumstances where he was clear that one reason for his

alleged harassment was his marital status, as defined by him, ie the fact that he was separated and in the process of divorcing.

(iii) Whilst the claimant obtained advice before the submission of his first claim from an experienced employment solicitor and from a trade union representative, he has represented himself in this and all previous hearings. As a litigant in person he clearly did not appreciate the effect of confining himself to harassment in the legal sense as set out in SDO in circumstances where it has been possible for claimants to pursue claims of harassment on grounds of marital status through the mechanism of less favourable treatment involving the use of a comparator under Article 3 of SDO.

(iv) The overriding objective includes seeking to put parties on an equal footing. Mr Phillips accepted that it was open to the claimant to ask for harassment by this mechanism during his submissions and Mr Phillips, in fairness, did not suggest that his cross-examination would have been different if this mechanism had been referred to by the claimant from the outset of the hearing.

SUMMARY

43. The first issue for me to determine is the causative link between the amendment sought and the claim form. The claim form in this case must be read in the context of the first claim form as the claimant's specifically linked the two by his inclusion in the second claim form at Part 8 reference to the first claim as set out at paragraph 24 above. I am satisfied that the claimant has established the link between paragraphs 4-28 of the amendment and the claims of discrimination on grounds of religious belief and discrimination on grounds of political opinion (as defined by the claimant in relation to his views on separation/divorce) and discrimination under SDO.

44. The second issue for me is the extent to which the evidence would be extended by allowing the amendment. Taking a holistic view of the first two claims I am satisfied that the evidence would not extend greatly because claims three and four were agreed to be consolidated with the first two claims.

45. I am not however satisfied that the allegations of adverse treatment in 2010 and 2013 set out at paragraphs 2 and 3 of the amendment should be included as part of this amendment, because I find no causative link with the first claim form and therefore this is not a relabelling. I find it also is not a particularisation of a claim already made in the first two claims and time limits therefore apply. The allegations of adverse treatment set out in this claim form for the period 2010-2013 are therefore self-contained allegations.

46. I am not convinced that it is just and equitable to extend time in relation to the said allegations for the period 2010-2013 in this claim form where firstly, the claimant has had the benefit of legal advice and trade union advice for some time and secondly where it would extend the evidence to reach back to a situation in 2010 and 2013 when the thrust of the claimant's claim concerns adverse treatment in 2013 in the form of intrusive questioning about his private life and also springing from his revelation in 2015 that he was separated and in the process of divorcing. Including this amendment could also extend the evidence inappropriately and I

therefore decline to exercise my discretion to include these paragraphs as part of this claim of discrimination.

Employment Judge:

Date and place of hearing: **9 September 2019, Belfast**

Date decision recorded in register and issued to parties: