

Submission to Workplace Relations Commission

Parties: Mr John Hamill

v

Mr Simon Coveney
Minister for Foreign Affairs and Defence

Issue: Employment Equality Act
ADJ-00031432
CA-00041738

Date: 8th March 2022

Venue: Remote

Information for Remote Hearing:

Complainant:

Mr John Hamill



Witness:

Mr Michael Nugent
Atheist Ireland



Evidence:

In his role as the Chair of Atheist Ireland, Mr Nugent has engaged directly with the Department of Foreign Affairs and Defence in relation to the military chaplaincy. He can give evidence as to the nature of these interactions, which relate directly to the present case. He can also comment on the needs of atheists in general with respect to pastoral care.

1. Narrative

1.1

The Irish military chaplaincy states that it provides support services to “*all members of the Defence Forces*”¹. That is, this is not a support service that is only available to Christians, but rather it is intended for those of all faiths and none. On 16th November 2018, Mr Hamill wrote to the Minister for Defence indicating that in this context, it is unacceptable that Defence Force Regulation A3 Section 1 requires that chaplains are appointed by bishops. In explaining why this would be contrary to the Employment Equality Act, Mr Hamill stated that:

“There are many non-religious chaplains working in Ireland. That publicly-funded chaplain positions are appointed by bishops, treats potential non-religious applicants less favourably. There is no reason why State-funded chaplaincy positions should be appointed by bishops in secret, rather than open to applications from those of all faiths and none.”

Moreover, Mr Hamill went on to describe how other European militaries have appointed non-religious chaplains, and how other parts of the Irish public service (such as the Prison Service) have appointed chaplains through open competition using the Public Appointments Service. Appendix 1 includes this correspondence of 16th November 2018, and some example public sector chaplaincy tenders. This includes public sector tenders that have been awarded to the Roman Catholic Church, such that representatives of that Church are perfectly comfortable with competing to provide the best candidate for chaplaincy jobs in the normal manner. Appendix 2 includes the relevant section of the Defence Force Regulations.

1.2

On 12th February 2019, Mr Hamill wrote again to the Minister for Defence, stating that:

“I would like to provide you with formal notice that I and others are interested to apply for ... State-funded military chaplain positions.”

This correspondence also quoted the judgement from the Court of Justice of the European Union in the case of *Garda Commissioner and Minister for Justice vs Workplace Relations Commission*². Just as the Workplace Relations Commission has the power to disapply national law to ensure compliance with EU equality law, Mr Hamill argued that the Defence Force Regulations should not constitute a justification for religious discrimination in employment. Appendix 3 includes this correspondence of 12th February 2019.

1.3

Mr Hamill wrote again to the Minister of Defence on the issue of military chaplaincy on 20th April 2019 and on 18th June 2019. On 16th July 2019 Mr Hamill sent a further letter to the Minister of Defence in which he stated that:

“I'd like to formally request an advance notification of any plans to recruit any additional military chaplains, as I may be interested in applying for such roles.”

Mr Hamill suggested that allowing a bishop to appoint additional chaplaincy roles in secret, would represent unlawful discrimination. Appendix 4 includes this correspondence of 16th July 2019.

1.4

Mr Hamill wrote again to the Minister of Defence on the issue of military chaplaincy on 26th September 2019, on 22nd November 2019, on 25th January 2020 and on 17th June 2020. On 19th June 2020, the Department of Defence responded stating that the military chaplaincy:

¹ <http://militarychaplaincy.ie>

² <http://curia.europa.eu/juris/document/document.jsf?text=&docid=208381>

“... has a long tradition of providing pastoral care and spiritual support to personnel in the Defence Forces of all faiths, beliefs and non-belief.”

The Department of Defence as the employer in this case, is not a religious, educational, or medical institution, and it is not under the direct control of a body established for religious purposes. The Department of Defence as the employer in this case, provides services for those of all faiths and none, and does not have an exemption as described in Section 37 of the Employment Equality Act. In fact, the military chaplaincy within the Department of Defence is intended for those of all faiths and none, and there is no justification for appointments to military chaplaincy to be made by bishops. Appendix 5 includes the correspondence from the Department of Defence from 19th June 2020.

Moreover, Appendix 5 also includes an earlier draft of this correspondence from 12th June 2020, which was procured using the Freedom of Information Act. In this earlier draft from the Principal for Defence Forces Personnel Policy, it can be seen that the following paragraph is included:

“In relation to recruitment within the Military Chaplaincy Service - any chaplaincy appointments which become vacant will continue to be governed by the existing provisions.”

It is submitted that the initial inclusion of this paragraph and the eventual removal of it before the correspondence was issued, suggests that even among those implementing policies on behalf of the Respondent, there was not a clear consensus about the legitimacy of the existing provisions.

1.5

On 22nd June 2020, Mr Hamill wrote to the Department of Defence again on the issue of military chaplaincy. He reiterated for a third time that he was interested to apply for a military chaplaincy role and moreover he also stated as follows:

“Section 8.5 of the Employment Equality Act states that:

‘an employer shall be taken to discriminate against an employee or a prospective employee in relation to access to employment, if the employer discriminates against an employee or prospective employee ... in any arrangements the employer makes for the purposes of deciding to whom employment should be offered ...’

As an employer, if your Department makes arrangements for access to employment as a chaplain, which limits the prospective candidates to only those selected by a bishop, then this would unlawfully discriminate against me as a prospective employee because I have no religious beliefs.”

Appendix 6 includes this correspondence of 22nd June 2020. Appendix 6 also includes further correspondence to Minister Simon Coveney on 29th June 2020, restating the issues for him upon his appointment as the new Minister for Defence. Mr Hamill wrote to the Department of Defence again on this topic on 31st August 2020, and also on 30th September 2020. Appendix 6 also then includes an email reply to Mr Hamill from the Respondent of 29th September 2020, along with an earlier draft of this reply that was procured using the Freedom of Information Act. The earlier draft includes the suggestion that:

“... Department officials would be happy to meet up with you to discuss your views and those of other non-Christian chaplains.”

It is clear that the Respondent views Mr Hamill as a “*non-Christian chaplain*” and also that the Respondent is aware that there are other non-Christian chaplains who would be interested to discuss Military Chaplaincy roles. However, on 24th September 2020 there was an internal

objection raised to the term “*non-Christian*”. In the final version of the correspondence issued to Mr Hamill, the term “*non-Christian*” had been removed. It is not stated within the internal communications what the nature of the specific objection to this term was. However, it is very clear that the context in which the Respondent was considering Mr Hamill’s candidacy for a chaplaincy position related to his beliefs about religion, and not any other factor concerning competence, experience or qualifications.

1.6

On 8th October 2020, the Bishop of Meath wrote to the Department of Defence following the recall of Fr Sean McCartan as a chaplain in the Irish Defence Forces. This letter was received by the Respondent less than two weeks after the Respondent had written to Mr Hamill offering to meet and discuss his aspirations around Military Chaplaincy roles. The letter from the Bishop of Meath stated as follows:

“... we are anxious to fill the position of chaplain which is about to become vacant in Aitken Barracks, Dundalk”

Aitken Barracks is a short drive from Mr Hamill's home. The bishop nominated Fr Michael Hinds to the vacant role. The basis on which Fr Hinds was nominated did not relate to his experience, his competence or his qualifications. He was recommended not because he was the best candidate to meet the needs of Defence Forces members, but rather because he was “*a priest in good standing*”. Appendix 7 includes the bishop's correspondence of 8th October 2020.

1.7

On 6th November 2020, Minister Simon Coveney wrote in reply to the Bishop of Meath, confirming the appointment of Fr Michael Hinds to the chaplain role, effective from 8th November 2020. Notwithstanding the fact that Mr Hamill had expressed an interest in the role in writing on four separate occasions (including a request to be notified of any vacancy that might arise) he was excluded from any opportunity to apply. Moreover, notwithstanding the fact that the Respondent had offered to meet with Mr Hamill to discuss his interest in Military Chaplaincy roles, this appointment was made without any communication whatsoever with Mr Hamill. Indeed, to this day the Respondent has not made good on the offer to meet with Mr Hamill on this issue. Minister Coveney sought no other information on the experience, qualifications or competence of Fr Hinds, other than that provided in the letter from Bishop Deenihan. Minister Coveney did not advertise this role or consider any other candidates.

Appendix 8 includes the Minister's correspondence of 6th November 2020.

2. Complaint

2.1

Mr Hamill submits that he was treated less favourably than Fr Hinds because Fr Hinds has a religious belief and Mr Hamill does not. Section 85A of the Employment Equality Act sets out the burden of proof as follows:

“Where in any proceedings facts are established by or on behalf of a complainant from which it may be presumed that there has been discrimination in relation to him or her, it is for the respondent to prove the contrary.”

The extent of evidential burden has been established by the Labour Court in *The Southern Health Board v Dr Teresa Mitchell DEE 011*, where the Court found that the claimant must:

“establish facts from which it may be presumed that the principle of equal treatment has not been applied to them. This indicates that a claimant must prove, on the balance of

probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination.”

Mr Hamill submits that based on the facts outlined herein, it may be presumed that he was not treated equally with respect to Fr Hinds, in terms of the arrangements made by the Department of Defence for deciding who should be considered for the vacant chaplaincy role.

2.2

Within Adjudication ADJ-00023183³, the decision of the Adjudication Officer included the statement that:

“The complainant was not advised of any advertisement, or of the selection process, nor was she invited to compete alongside all-comers for the position. The complainant was denied the opportunity to compete for the position. I find that the absence of transparency about the appointment process for this post does raise an inference of discrimination. Discrimination is within the range of presumptions that can be properly drawn from the respondent’s decision to dispense with a competition for this post.”

Mr Hamill submits that as he was not advised of any selection process, despite repeated requests for this in writing, he was denied the opportunity to compete for the military chaplaincy position. Mr Hamill submits that the absence of transparency about the appointment process for this post, raises an inference of discrimination. Moreover, Mr Hamill submits that the fact of the appointment being made by a bishop, establishes a religious ground for the discrimination.

2.3

In *Cork City Council v Kieran McCarthy EDA0821*, the Labour Court found that:

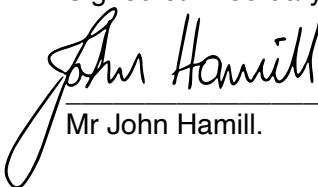
“The law provides that the probative burden shifts where a complainant proves facts from which it may be presumed that there has been direct or indirect discrimination. The language used indicates that where the primary facts alleged are proved it remains for the Court to decide if the inference or presumption contended for can properly be drawn from those facts. This entails a range of conclusions which may appropriately be drawn to explain a particular set of facts which are proved in evidence. At the initial stage the complainant is merely seeking to establish a prima facie case. Hence it is not necessary to establish that the conclusion of discrimination is the only, or indeed the most likely explanation which can be drawn from the proved facts. It is sufficient that the presumption is within the range of inferences which can be drawn from those facts.”

Mr Hamill submits that a prima facie case of discrimination has been demonstrated and that the burden of proof should shift to the Department of Defence to rebut this claim. Specifically, Mr Hamill submits that it should be for the Department of Defence to prove that the less favourable treatment applied to Mr Hamill in comparison to Fr Hinds, is based on fair and objective set of criteria, which are consistently applied to those of all faiths and none.

2.4

Mr Hamill submits that the Department of Defence cannot meet the burden of proof in this case and that the behaviour of this employer unlawfully discriminated against him on the religion ground.

Signed 6th February 2022:



John Hamill

Mr John Hamill.

³ <https://www.workplacerelations.ie/en/cases/2020/march/adj-00023183.html>