



An Coimisiún um Chaidreamh san Áit Oibre
Workplace Relations Commission

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ADJUDICATION OFFICER DECISION

Adjudication Reference: ADJ-00031432

Parties:

	Complainant	Respondent
Parties	John Hamill	Department of Defence

Representatives	Self-represented	Frank Kennedy BL instructed by the Chief State Solicitor's Office
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Complaint:

Act	Complaint Reference No.	Date of Receipt
Complaint seeking adjudication by the Workplace Relations Commission under section 77 of the Employment Equality Act, 1998	CA-00041738-001	30/12/2020

Date of Adjudication Hearing: 08/03/2022

Workplace Relations Commission Adjudication Officer: Kevin Baneham

Procedure:

On the 30th December 2020, the complainant referred a complaint pursuant to the Employment Equality Act. The complaint was scheduled for adjudication on the 8th March 2022, and this took place remotely.

The complainant attended the hearing and was accompanied by Michael Nugent. The respondent was represented by Frank Kennedy BL, instructed by Lorraine Williams, Chief State Solicitor's Office. Three witnesses gave evidence on behalf of the respondent: Sergeant Mark Doherty, Captain Martin McMahon and Father Bernard McCay-Morrissey.

In accordance with section 79 of the Employment Equality Acts, 1998 – 2021 following the referral of the complaint to me by the Director General, I inquired into the complaint and gave the parties an opportunity to be heard by me and to present to me any evidence relevant to the complaint.

Background:

The complainant asserts that he was discriminated against by the respondent in the appointment of a Military Chaplain at Aiken Barracks and Gormanston Army Camp, an appointment made on the 6th November 2020. The respondent denies the claim, relying on section 37(2) of the Employment Equality Act and the occupational requirements relating to chaplaincy to the Defence Forces. The scope of this adjudication relates to access to the ability to apply for a role and whether this constituted discrimination on the religion ground.

Summary of Complainant's Case:

In evidence under affirmation, the complainant outlined that he had written to the respondent several times regarding the appointment of military chaplains in the Defence Forces. He indicated his interest in applying for the role of military chaplain. He submitted that the respondent was not a religious body, nor was it under the control of a religious body, so section 37 of the Employment Equality Act did not apply. He outlined that the respondent employed those of all faiths and none. He submitted that Christianity was 'imposed' on members of the Defence Forces.

The complainant outlined that he wrote to the respondent regarding a particular chaplaincy post, and this was filled in October and November 2020. He was not considered for the post. He said that he wished to ensure that a post of chaplain was not filled in this way again.

In cross-examination, the complainant accepted that a religious body, for example a Catholic seminary, could avail of section 37 in appointing a chaplain. He stated that he was ineligible for the respondent chaplain role because he did not believe in God. He accepted that it would not be possible to have a chaplain for every registered religion. It was put to the complainant that 86.16% of the Defence Forces identified themselves as Roman Catholic. It was put to the complainant that there was a need for religious services to be delivered on site during missions overseas; the complainant accepted that a secular chaplain might not have the same freedom of movement. The complainant outlined that it was his understanding that all priests and Christians had to proselytise as part of their faith. The complainant thanked the respondent witnesses for their service overseas.

In evidence under affirmation, Michael Nugent outlined that he had made representations on this issue on behalf of Atheist Ireland. He referred to the census returns and the increasing proportion of the population who identified themselves as non-religious.

In closing, the complainant questioned whether it was a genuine occupational requirement for the role to be a Christian appointed by a Bishop. This excluded other faiths as well as non-believers. The evidence was that there were good humanist military Chaplains in other militaries. He should have been able to apply for the role of chaplain and the role should be allocated to the best applicant. He was not arguing that the current system is deficient but that it required an assessment and application process. He was not advocating for the appointment of a chaplain for every religion and the issue of overseas service could be

addressed at interview. The complainant said that he would like to be a military chaplain and had explored chaplaincy with other bodies. While he did not then do a paid chaplaincy role, he did aspects of the role.

Summary of Respondent's Case:

Sergeant Mark Doherty gave evidence under oath. He outlined that he was a person of faith. He emphasised the importance of the role of chaplain in the Defence Forces, especially during service overseas. He had served in Liberia, Chad and Lebanon. He referred to a family member who was killed while serving in Lebanon, to whom there is a memorial. He outlined the importance of religious services while serving overseas, as well as the importance of the pastoral services provided by the chaplain. In cross-examination, Sergeant Doherty stated that chaplains provided the same level of support to members of the Defence Forces irrespective of their religious beliefs.

Captain Martin McMahon gave evidence under affirmation. He emphasised the important role played by chaplains, in particular as they are outside of the command structure. They are relied on by those who have faith and those who do not. He stated that he was not a person of religious faith. Chaplains deliver religious services overseas and this is a break from their military role. Captain McMahon emphasised the role of chaplains in force protection, by building contacts with local religious leaders, citing Lebanon. In cross-examination, Captain McMahon said that a Christian chaplain would be better accepted by certain communities in Lebanon than a humanist chaplain would be. He said that only one chaplain is deployed with a mission.

Father McCay-Morrissey gave evidence under oath. He explained the process of appointing a chaplain, including the role of the Head Chaplain and engagement with the Bishop. The candidate must pass a medical and be available for service overseas. A chaplain's duties were multi-faceted, involving pastoral care and religious services. They engage with all members irrespective of their faith. They promote diversity and pluralism as well as the six values of the Defence Forces: respect, loyalty, selflessness, physical courage, moral courage and integrity. During missions overseas, the chaplain is able to provide support to the commanding officer, but also to network with the soldiers. He referred to the specific role for Catholics as well as providing pastoral support to all. He said that a non-religious chaplain would not be in the same position to build up relationships with local religious leaders in Lebanon and gave examples of how he had done this. He had met a humanist chaplain in the military contingent of another EU member state. He outlined that he was not under an obligation to proselytise or to change people's minds regarding their religious beliefs. He referred to the risk of injury or death facing members of the Defence Forces who serve overseas, and the training given to chaplains in the event of an emergency.

In cross-examination, Fr McCay-Morrissey acknowledged the role played by humanist chaplains. He referred to religious services that could only be administered by an ordained

chaplain. He referred to the practicalities and requirements of the group serving on a mission overseas, and Christian chaplains were able to provide services to all members.

In closing, the respondent emphasised that there was no obligation on a chaplain to proselytise. There was no evidence of any deficiency in the service now provided by chaplains. Chaplains must be available to serve overseas, and the evidence indicated that non-Christians were satisfied with the pastoral care provided by chaplains. The respondent relied on section 37(2) of the Employment Equality Act. This applied as there was a need to provide religious services in certain circumstances as well as the important role overseas, in providing services on base as well as building relationships with communities. It was submitted that the complainant could only succeed were he able to show discrimination or 'harm' as a non-believer and not as an adherent of a non-Christian religion. The evidence indicated that there was no 'harm' to those members who were not Christian.

The respondent outlined that it was able to rely on the genuine occupational requirement set out in section 37(2) and Article 4(1) of the Directive, as discussed in *Bougnouli* (C-188/15). It referred to *Hogan v YWCA* (DEC-E2015-151) where a genuine occupational requirement was held to pertain, as well as *Lazar v Dublin Bus* (DEC-E2010-150) and *Corbett v Bus Eireann* (DEC-E2011-184) where the lack of supporting documentation meant that the respondents could not rely on the defence.

Findings and Conclusions:

This is a complaint pursuant to the Employment Equality Act on the religion ground. The complainant advised the respondent that he wished to apply for a position as chaplain to the Defence Forces. The respondent appointed a chaplain to one such post on the 6th November 2020, based at the barracks closest to the complainant. The respondent denied the claim of discrimination.

The adjudication heard evidence of the service of members of the Defence Forces, in particular while on mission for the United Nations. This touched on the dangers of service in Lebanon. It also discussed the important role of military chaplains, in particular overseas. This evidence has been underlined by the shocking killing of Private Sean Rooney in Lebanon in December 2022.

Chaplaincy in the Defence Forces

It is clear from the evidence that the chaplaincy service plays an important role in the Defence Forces, in particular during service overseas. I fully accept the evidence tendered by the respondent of the great contribution and value of this service, both to religious believers and those who do not have a belief.

The complainant submitted the relevant extract from the Defence Forces Regulations. This states as section 1 'The Chaplaincy Service shall consist of Chaplains who, with the approval

of the Minister, are appointed by their Bishops to be Chaplains to the Defence Forces.’

There is no reference to Chaplains to the Defence Forces in the Defence Act or other related Acts, save for the exclusion set out in section 9 of the Public Service Superannuation (Miscellaneous Provisions) Act 2004. No statutory definition of ‘military chaplain’ was opened to the adjudication and nor could I find any.

The Collins Concise English Dictionary (2006) defines ‘chaplain’ as a ‘Christian clergyman attached to a chapel or institution or ministering in a military body ... from cappella [Chapel]’. It is true that the term ‘chaplain’ has definitive religious origins, in particular arising from Christianity.

It is fair to say that the profile of ‘chaplain’ has evolved. The complainant submitted the tender procurement document prepared by an Institute of Technology, which sets out 15 principal duties and responsibilities. This refers to pastoral care as well as supporting students to connect to local religious and non-religious communities and providing spiritual direction to students encompassing all religions. This procurement process was not restricted to any particular faith or faiths.

Documentation from the Defence Forces discusses the chaplaincy services in the following terms.

Defence Forces White Paper 2015 (7.3)

‘Separate to, but complimentary to the PSS [personal support service], the Chaplaincy Service provides pastoral and spiritual support to Defence Forces’ personnel both at home and abroad. While the Defence Forces Chaplaincy Service caters for military personnel and their families who are predominantly Roman Catholic, there is one part-time Church of Ireland chaplain. Provision is also made to provide for the spiritual needs of all other faiths. The Chaplaincy Service respects the traditions and practice of those of other faiths and those of secular beliefs and ensures that the integrity of all these groups within the Defence Forces is respected. The Government are committed to the Chaplaincy Service remaining a core part of the welfare structure for Defence Forces’ personnel.’

Defence Forces Bereavement Policy

‘The Defence Forces Chaplaincy Service provides pastoral care and spiritual support to bereaved military families on a daily basis. Their expertise and experience in the area of grief allows them the opportunity to journey with families through difficult times. They engage at all levels of faith and none and help families to organise and celebrate the lives of departed loved ones with dignity, compassion and understanding. Their knowledge of ritual and liturgy allows them to engage with families of multi-faith and none, to ensure all funeral rites and norms are afforded to the deceased in accordance with their family wishes, their beliefs or none. All bereaved families are given the supports needed to help them understand the protocols that are associated with the death of a serving member of the Defence Forces,

either at home or overseas. The Service acknowledges and is respectful of the fact that no death is alike and every family is unique.'

Report of the Commission on the Defence Forces (February 2022)

At paragraph 8.2.6 Diversity, the Commission concluded:

'A policy of harnessing diversity requires practical and effective action to bring it about as a cultural value, reflected in the profile of serving Defence Forces personnel, the culture or 'how we do things around here', and in the lived experiences of the members of the Defence Forces. A more determined effort should be made by the Defence Forces to recruit a more diverse workforce, both permanent and reserve, uniformed and civilian. Diverse not only in gender and ethnicity, but also in socio-economic, educational and geographical background.

Moreover, the Commission has also noted a number of examples of outdated practices which should be discontinued. These include, but are not limited to, the convening of a Roman Catholic mass associated with an induction ceremony; treatment of pregnancy/childbirth as an irregular absence from duty; and not permitting certain styles of facial hair, such as beards. These and all other exclusionary practices should be removed. In addition, the Defence Forces' Chaplaincy service needs to be adjusted in line with international best practice to better reflect the religious/non-religious affiliations of younger Irish people today.'

Locus standi / standing

The respondent did not challenge the complainant's locus standi to bring the claim. For completeness, I confirm that the complainant has locus standi to bring the claim.

As outlined, the complainant has been writing to the respondent since November 2018 regarding 'religious discrimination in military chaplaincy'. This letter is on headed paper entitled 'Atheist Ireland'. Later correspondence is submitted on headed paper entitled 'The Free Thought Prophet Forecast'. The information note submitted by the complainant in advance of the hearing indicated that the complainant was of the 'Church of the Flying Spaghetti Monster in Ireland'. (I previously held that parody does not constitute a belief system to ground a claim of discrimination on the religion ground, ADJ-00011817). The complainant was clear at the adjudication and in general correspondence that he was a person without religious belief. He did not advance the claim on the basis of an adherence to a religion.

The complainant drew comparisons with the military chaplaincy service of comparable countries and cited US commentary rejecting the assertion of there being 'no atheists in foxholes.' It is fair to say that there is an element of advocacy in the complainant's case, albeit he submitted chaplaincy tender applications he made to a third level institution as well as referring to elements of chaplain roles which he did. Even if there is an element of

advocacy in the bringing of this case, he is not precluded from bringing the case so long as he did, in fact, receive less favourable treatment on the religion ground.

While *Stokes v Christian Brothers High School Clonmel* [2015] IESC 13 relates primarily to indirect discrimination, paragraph 8.5 applies equally to direct and indirect discrimination: *'Obviously, in order for a particular individual to have standing to mount a claim, that individual must be affected by the rule in question. In the example given, a woman who happened to be tall enough to meet the height requirement could not bring a claim, for the rule would not have impacted upon her. But that would not mean that the rule would nonetheless not be discriminatory against women generally. It would simply mean that any case seeking to challenge the rule would, as a matter of standing, have to be brought by a woman who was below the relevant height requirement, and thus, a person on whom the rule had an adverse impact.'*

The kernel of the complainant's case is that he ought to have been able to apply for the post of chaplain in the Defence Forces. He enquired with the respondent and a chaplain was appointed without his or any other application being considered. This is how the complainant has been 'adversely affected' or 'adversely impacted' giving him standing to bring the claim. The fact that he may not have been successful in applying for the role does not go to standing but does to measuring the effects of any discrimination. I conclude, therefore, that the complainant has standing to bring the complaint.

I distinguish the instant situation from one which is 'wholly artificially constructed', for example a string of Equal Status cases taken by an applicant against insurance companies arising from how they quoted insurance policies for holders of EU and not Irish driving licences. In ADJ-00000096, for example, the complaint was dismissed for being frivolous and vexatious following a finding of fact that the claim was 'wholly artificially constructed'. The adjudication officer, Aideen Collard, held: *'Having observed the Complainant give his evidence and considered his evidence at its height including his response to questioning, I have formed the view that he had no intention of changing his insurance policy and this is a wholly artificially constructed claim, brought solely for the purpose of testing legal points that have featured in similar claims to the Equality Tribunal and the WRC. In so finding, I am particularly influenced by the fact that the Complainant had a much cheaper insurance policy with some nine months to run at the time of the alleged impugned action. When questioned, he was unable to identify any real advantages afforded by the Respondent's insurance over his existing policy or demonstrate any real motive for changing his insurance. This position is further supported by the fact that he did not engage with the Respondent before submitting this claim or respond to its offer to give him the lower rate on verification that he had no penalty points. Overall I found the Complainant to be incredible and in particular arising from his answer to the question as to why he did not consider transferring over his Polish licence to an Irish licence.'*

The instant case can be distinguished per the complainant's evidence relating to his interest

in chaplaincy, his previous engagement with a third level institution regarding their chaplain post and his repeated correspondence with the respondent on the subject. No doubt, the complainant has an advocacy outcome in mind in taking this litigation, but this does not, of itself, preclude the claim, in particular having regard to his evidence and interest in a chaplaincy role.

Statutory background

The Employment Equality Act prohibits discrimination on the religion ground, i.e. 'that one has a different religious belief from the other, or that one has a religious belief and the other has not'.

Section 37(2) allows for a difference in treatment based on a 'characteristic' related to a discriminatory ground *'where, by reason of the particular occupational activities concerned or of the context in which they are carried out (a) the characteristic constitutes a genuine and determining occupational requirement, and (b) the objective is legitimate and the requirement proportionate.'* This applies across the grounds, including religion.

Section 37(5) provides a general exemption for employment in the Defence Forces from Parts I and II of the Act on grounds of age or disability (but not the religion ground). For completeness, this complaint is not encompassed by section 104 of the Employment Equality Act as the complainant is not a member of the Defence Forces seeking to refer a case in relation to his employment with the Defence Forces.

Directive underpinning

The Framework Equality Directive (2000/78/EC) sets out provisions to ensure equal treatment in employment and occupation, on four grounds, including 'religion or belief'. Recital 23 addresses the circumstances in which difference in treatment can be justified: *'In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.'*

There is no suggestion in this case of information being relayed to the European Commission regarding the chaplaincy service to the Defence Forces.

As mirrored in section 37(2) of the Act, Article 4 of the Directive provides as follows:

'1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and

the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.'

This case is to be considered under Article 4(1) of the Directive, as the respondent does not have an ethos based on religion or belief. The question is whether the respondent can avail of a 'genuine and determining occupational requirement' to defeat any finding of discrimination.

Case law

The respondent relied on a judgment of the Court of Justice of the European Union in *Bougnaoui v Micropole* (C-188/15). In 2008, Ms Bougnaoui was employed as a design engineer and in that role, interfaced with clients. In accordance with her religious beliefs, she wore a head covering which left the face entirely clear (see paragraph 78 of the Advocate General's Opinion). In 2009, she was dismissed following a customer complaint because she had breached the principle of 'necessary neutrality' in meeting clients while wearing the head covering. She took proceedings for discriminatory dismissal.

The Court of Justice emphasised that Article 4(1) refers to a 'characteristic' related to a ground, as opposed to the ground itself, that can constitute a 'genuine and determining occupational requirement'. Per paragraph 93 of the Advocate General's Opinion, the wearing of a head scarf is a manifestation of religious belief and therefore a characteristic related to religion or belief. The Court further emphasised the words 'very limited circumstances' in recital 23 of the Directive. The Court interpreted a characteristic constituting such an occupational requirement 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out' as relating to a requirement 'that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out.' The Court held that the employer in this case had relied on subjective considerations, i.e. the willingness of its client to work

with Ms Bougnaoui.

As noted above, the respondent in the instant case relied on the capacity to minister as an 'objective' occupational characteristic, in particular with the requirement to participate in overseas missions, to build relationships with local leaders and the positive evidence given regarding the service and the absence of any evidence of a deficiency.

In considering Article 4, I refer generally to the paper 'Genuine Occupational Requirements' presented by Professor Gwyneth Pitt to the Academy of European Law, Trier (April 2009). I note the *Hogan*, *Lazar* and *Corbett* decisions of the Equality Tribunal. In the former, the employer was held to be able to rely on section 37(2) because of the ethos associated with the managerial role. In the latter cases, the employers were not able to rely on section 37 because of the absence of evidence supporting the minimum height requirement.

Application of the law to the facts

I accept the respondent's evidence regarding the quality of the chaplaincy service delivered to members of the Defence Forces, both at home and abroad. I accept that this is of particular importance during service overseas, especially as part of the UNIFIL mission in Lebanon. I accept the evidence regarding the 'fractured' political situation in south Lebanon, and the particular role of the chaplain in that context. I accept the evidence that a Roman Catholic chaplain (or any chaplain) working in the Defence Forces is not required to proselytise. I note that the respondent does not have a religious ethos, so any requirement must be a 'genuine and determining occupational requirement' pursuing a legitimate aim and be proportionate.

This case relates to the complainant's expressed wish to apply for the role of chaplain in the Defence Forces. There was no process for him or anyone else to submit a formal application, and nor was he considered for appointment in November 2020. The question is whether discrimination occurred in the filling of this post of chaplain.

In this case, the respondent followed an established path of seeking a nomination from the relevant Bishop, and then appointed the priest put forward by that Bishop. The evidence indicates that there are about 15 Roman Catholic chaplains and one Church of Ireland chaplain. Being ordained or an appointed minister constitutes a 'characteristic' per Article 4(1) and section 37(2). The complainant was seeking appointment as chaplain, not to be sent on mission to UNIFIL. While the ability to go on mission is part of the chaplain role, I do not find that it is a 'determining occupational requirement' as required by the section. I do not doubt the importance in respect of south Lebanon, but I find that it is not an objectively genuine and determining characteristic in respect of all the other missions and work of the Defence Forces. At most, it could be a mission requirement for UNIFIL and not an occupational requirement. While the aims set out by the respondent were legitimate, the requirement of being a priest or minister is not proportionate. I have no doubt that religious leaders make very good military chaplains and would likely succeed during any assessment

and interview process because of their pastoral work in the community. It is not, however, proportionate that no one else can apply or be considered for appointment as chaplain, irrespective of that potential candidate's qualities and competencies.

The respondent's documentation sets out its commitment to enhancing the welfare of members of the Defence Forces. The role of chaplain certainly contributes to this aim. While there may be historical reasons for the appointment process as constituted, and no evidence of deficiency in the service, the process is, by operation, discriminatory on grounds of religion. Section 37(2) does not exempt this from the ambit of discrimination because being a priest or minister of one of two religions is not a 'determining occupational characteristic' and the requirement is not proportionate. I, therefore, conclude that there was unlawful discrimination in contravention of the Employment Equality Act because there is no application process for potential applicants to apply for the role and the process that is in place is based entirely on being a clergy member of one of two churches.

Redress

In respect of redress, this is an access to employment case. Redress is for the effects of discrimination. I decide that an order for compensation is not warranted, in particular as the complainant submitted that his aim in taking the case was to ensure that this did not happen again. Pursuant to section 82(1)(e) of the Act, I order a course of action: 'the respondent shall review the process of appointing military chaplains to ensure compliance with the Employment Equality Act and to ensure that suitably-qualified candidates can apply for military chaplaincy roles in order to reflect and foster the diversity of members of the Defence Forces.' This course of action has general application, as any course of action that specifically referred to the complainant applying for the role of chaplain could only be implemented by wider application.

Decision:

Section 79 of the Employment Equality Acts, 1998 – 2021 requires that I make a decision in relation to the complaint in accordance with the relevant redress provisions under section 82 of the Act.

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I decide that the complainant was discriminated against on grounds of religion, and I order that the respondent review the process of appointing military chaplains to ensure compliance with the Employment Equality Act and to ensure that suitably-qualified candidates can apply for military chaplaincy roles in order to reflect and foster the diversity of members of the Defence Forces.

Dated: 01-03-2023

Workplace Relations Commission Adjudication Officer: Kevin Baneham

Key Words:

Employment Equality Act / genuine and determining occupational requirement / Military Chaplain