

# FAIR EMPLOYMENT TRIBUNAL

CASE REF: 424/01 FET  
524/01 FET  
3438/01

**APPLICANT:** Desmond Martin

**RESPONDENTS:** 1. Belfast Fireplaces Ltd and  
2. Charles Tosh

## DECISION

The unanimous decision of the Tribunal is to dismiss the applications.

### Appearances:

**The applicant was represented by Ms Suzanne Bradley, Barrister-at-Law instructed by Equality Commission.**

**The respondent was represented by Mr Rogers, Barrister-at-Law, instructed by Judith Blair.**

1. The applicant complained to the Fair Employment Tribunal on 13 August 2001 that he had been unlawfully discriminated against on the grounds of religious belief and political opinion by his employer, the first respondent. He alleged that, after he started work as a driver, on various dates and times during the course of his employment he was subjected to harassment and intimidation of a sectarian nature culminating in an incident on 19 June 2001. He alleged that the first respondent did not take any or adequate measures to deal with this harassment and intimidation and failed to provide a harmonious working environment. He further alleged that he had been victimised due to previous complaints he made to the respondent. The second respondent denied the applicant's claims and alleged that the applicant had harassed the second respondent in a sectarian manner on one occasion.
2. On 19 October 2001 the applicant complained to an industrial tribunal that he had been constructively dismissed. Following sectarian harassment and intimidation on various occasions during his employment, the applicant went on sick leave in or about June 2001 following another incident of sectarian harassment and abuse. By mid-August 2001 it had allegedly become quite clear to him that he would not be able to resume his employment with the respondent and he tendered his resignation with effect from 24 August 2001. The respondents denied that the applicant's contract had been breached and denied the allegation of sectarian harassment. The second

3. The applicant on 19 October made clear that the complaint described in paragraph 2 was made also under the Fair Employment and Treatment (NI) Order 1998.
4. In each of his complaints the applicant alleged that his income during his employment was £400 gross per month. The respondent, in a notice of appearance, indicated that the applicant's income was 'to be confirmed'. Before this Tribunal the parties accepted that the applicant's income was £100 per week plus £60, the latter being paid to the applicant in cash and without deductions to safeguard the benefits then being paid to the applicant by the state. This was done at the applicant's request. The applicant's contract of employment therefore involved an agreement to defraud those paying his state benefits and/or the Inland Revenue. Not only did the applicant and the respondent knowingly mislead those authorities, but the applicant, in three applications to tribunals, sought to mislead those tribunals. We shall come to the effect which the method of contractual performance must have upon the validity of the applicant's claims to the Fair Employment and industrial tribunals. But, in any event, the Tribunal must, in assessing the credibility of the evidence of both parties, take into account that by their own admission, they were knowing parties to deceiving the benefit authorities and/or the Inland Revenue. And the applicant, in his account of his employment post dismissal, omitted to relate that he was gainfully employed in a particular occupation at a time whilst he was off work and claiming sickness benefit.
5. The applicant is alleging unfair dismissal and also unlawful discrimination under the Fair Employment & Treatment (NI) Order 1998. There is clear authority upon the effect which an illegal contract has upon such claims. In this case, the applicant instigated, participated in and benefited from an unlawful arrangement and in these circumstances the contract of employment is unenforceable. The applicant needs to rely upon his contract to establish that he was unfairly dismissed and he cannot do so. Accordingly his complaint of unfair dismissal is dismissed.
6. The position in relation to unlawful discrimination is quite different. **In Hall -v- Woolston Hall Leisure Ltd [2000] IRLR 578** the Court of Appeal, in relation to a complaint of sex discrimination stated -

*"sex discrimination which is unlawful under the Sex Discrimination Act is a statutory tort. Accordingly the correct approach of an employment tribunal in a sex discrimination case should be to consider whether the applicant's claim arises out of or is so inextricably bound up with her illegal conduct that the Court could not permit the applicant to recover compensation without appearing to condone that conduct"*.

We do not believe that the applicant's claim does arise out of his illegal conduct or that his claim is so inextricably bound up with it. Consequently we must consider the complaints under the Fair Employment & Treatment (NI) Order 1989. However it does seem to us that we would be condoning the illegality of the contract if we were to compensate the applicant in respect of income which was undeclared.

7. The applicant's allegations are as follows -

- (a) he is a Roman Catholic and the second respondent is a Protestant, a member of the Democratic Unionist Party and on two occasions - 2000 and 2001 - a

- (b) the employment began in 1989 as a driver and continued as driver and salesperson until his resignation was accepted with effect from 27 August 2001.
- (c) in his 12 years of employment, the second respondent subjected him almost daily to his (the respondent's) political views which were right wing political views, despite him asking the respondent to desist. It was this atmosphere of harassment and intimidation within an atmosphere of sectarianism which led the applicant to resign.
- (d) in particular, the second respondent -
  - i. in 1991/92 whilst being driven by the applicant in the midst of bomb-scares and in aggravated state said that he would like to 'hang Sinn Fein Provies round the City Hall'.
  - ii. at least three times a week throughout the applicant's employment, phoned into 'Talk-Back' on Radio Ulster giving his 'very strong views' under the name of Bill Montgomery.
  - iii. he made these calls in his office upstairs in the business premises, taped the contribution and played it back to selected customers in the hearing of the applicant.
  - iv. told the applicant in or about 1991/92 that hunger-strikers should be 'let die like dogs in the street' and praised Margaret Thatcher for the way she stood up to the hunger-strikers' demands.
  - v. attacked the head of the Fair Employment Agency in or about 1997/98 saying that he was sick of listening to this guy talking Roman Catholic attitudes - could Protestants not have a say.
- (e) in or about 1994/95 the applicant gave the second respondent lifts to and from work. The second respondent told him that he had been threatened and started to carry a shotgun with him in the van.
- (f) the second respondent talked in work of having attended the Drumcree protest a few times in 1999 and 2000. He talked of the carnival atmosphere. He talked of a relationship with Johnny Adair and of his dog and Adair's dog playing together at Drumcree.
- (g) the second respondent stood on two occasions as a DUP candidate in district council elections. He practised his electioneering address before the applicant in June 2001 who said he did not want to hear it - but the second respondent proceeded until the applicant left.
- (h) the second respondent had the applicant help him to take down DUP posters in Protestant areas in which the applicant did not feel 'too happy' as a Catholic.

- (i) the second respondent displayed DUP electioneering material in the workplace and stored election posters in a boilerhouse with the consent of the security man, and
  - (j) at no time during his employment did the applicant feel free from a politically charged atmosphere.
8. The second respondent accepted very few of the applicant's allegations but he did accept -
- (a) that he was a member of the DUP, a DUP candidate for district elections on two occasions and a Protestant.
  - (b) that the applicant was employed as a driver and that his resignation was accepted from 27 August 2001.
  - (c) that the applicant drove him to work (but not back) for 4/5 weeks only and on no such occasion did he, the respondent, have a shotgun.
  - (d) on one occasion the applicant helped him to clear out his deceased father's house and on that occasion the respondent removed his father's shotgun from the house for safekeeping.
  - (e) he attended Drumcree once with American visitors.
9. He did not accept -
- (a) he ever advocated 'hanging Sinn Fein Provies'.
  - (b) he ever telephoned Radio Ulster to give his views, ever taped Radio Ulster or ever played Radio Ulster to customers.
  - (c) he said the hunger-strikers should be left to die like dogs.
10. Such were the allegations upon which the applicant relied prior to the final incident between himself and the second respondent in June. It is abundantly clear from the evidence that the incident in June 2001 arose, quite simply, because the applicant wished to split his holidays so as to avoid taking the 'Construction Industry' holidays - 2 weeks in July. He wanted to split between July and September/October. He had mentioned this earlier to the second respondent and reminded him in June at which point the second respondent made clear that holidays were to be taken in accordance with the trade practice. This led to an argument between the applicant and the second respondent. Each of them had different account of what was said by the other during that dispute and, if it had not been for those allegations, the dispute in June 2001 would have had no relevance to any of the applicant's claims. There was no breach of contract in the respondent insisting that the holidays should be taken during the industry close down.
11. The applicant stated that he then asked the second respondent if he would object if he took unpaid holidays in September/October. The respondent agreed that he said in

asked 'is that a threat?'. The respondent allegedly replied with words to the effect - 'that is a Sinn Fein statement'. The applicant responded 'why are you bringing politics in - you are the only one interested in politics.' The respondent replied - 'that's a Sinn Fein down-trodden Catholic statement' and shouted at the applicant - 'get out, get out'. The respondent denied that he ever said such words but alleged that the applicant called him a 'fucking DUP bastard'. The applicant denied that he did so.

12. We did not find either the applicant or the respondent to be very credible witnesses and on all important points they disagreed in their testimony. But it was not suggested that the refusal of the respondent to afford the applicant the option of split holidays was based upon religious belief or political opinion. The applicant relied on the alleged sectarian verbal abuse which allegedly followed his request for unpaid leave as the final straw which drove him to resign from his employment. If we are not satisfied that there was such abuse, the unfair dismissal would also fail on the facts - as indeed would the second complaint to the Fair Employment Tribunal.
13. The respondent asks us to believe that practically each and every allegation by the applicant is untrue and that the real issue between them was his refusal to let the applicant take holidays outside the trade holiday in July. We however were no more impressed by the respondent's evidence than we were by the applicant's evidence and we cannot resist the conclusion that there is some semblance of truth in what the applicant alleges - whatever about the effect which it had upon him.
14. We are convinced however that the main or principal reason for the applicant's resignation was the respondent's refusal of paid holidays in September/October and his less than fulsome acceptance of unpaid leave in this period. We do not believe that the applicant, a part-time 'bouncer' and martial arts man, was physically intimidated by the 'threat' of the respondent. We believe that the applicant is seeking to maximise each and every allegation of misconduct on the respondent's part to get even with the second respondent over his treatment over holidays.
15. We have to look at the context in which this resignation was given. In isolation, a statement - "downtrodden Catholic Sinn Fein statement - in the face of a dispute is a sectarian statement with political overtones. It clearly should not have been said - if it was said - but it is scarcely of such seriousness as to lead an employee to terminate his employment. It could have additional significance if it formed part of a pattern of sectarian/political harassment. In assessing the pattern of alleged harassment by the respondent, we disregard the generalised complaint made of daily abuse throughout employment. We wanted specific evidence of misconduct and such a generalisation in the face of damaged credibility is useless. We cannot resist drawing an inference from the evidence that at some time there was a 'talk back' issue in the workplace. We cannot accept that it was three days a week over a period of years. We do not know when it was so there is little we can do with this evidence. We were decidedly unimpressed by the applicant's evidence of the shotgun in the car. We discount that evidence. We are left then with-
  - (a) two sectarian/political comments in 1991/92 which on balance we believe to have been made.
  - (b) A comment in 1997/98 about Bob Cooper of the FEA.

- (c) comments on Drumcree in 1999/2000, and
- (c) electioneering in 2000/2001 – materials, speechifying, posters etc.

We do believe that one way or another and on various occasions Mr Tosh, the second respondent, made his personal political views known to the applicant in a way which he should not have done in the workplace. On balance we do not believe that Mr Tosh set out to harass, annoy or intimidate the applicant but that is not necessary to found a successful claim. It is the effect which such conduct has which is important.

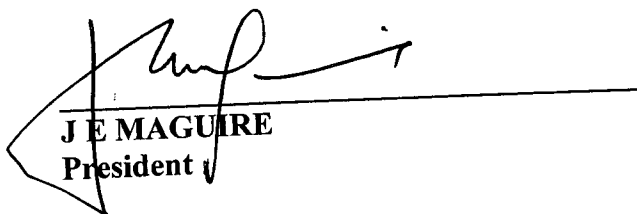
16. Under the Fair Employment & Treatment (NI) Order 1998 and the Fair Employment & Treatment Order (Amendment) Regulations (NI) 2003 it is unlawful for an employer to subject an employee to harassment by dismissing him or subjecting him to any other detriment. Dismissal includes constructive dismissal. Harassment is defined – where one person subjects another person to unwarranted conduct which has the purpose or effect of -
- (a) violating that other person's dignity, or
  - (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for that other person.
17. In the end it comes down to whether or not we believe that in June 2001 the applicant, on being told that he could take unpaid leave but it would not be forgotten, lost his temper and called the managing director 'a f.... DUP bastard', or whether the managing director described his statement as typical of a downtrodden Sinn Fein Catholic'. If the former the applicant has no claim. If the latter, taking into account previous instances of comment and behaviour, there may be. There will be if, in all the circumstances, including in particular, the perception of the applicant, the treatment afforded by Mr Tosh should reasonably be considered as having created an intimidating, hostile, degrading, humiliating or offensive environment for the applicant at the time or having violated the applicant's dignity.
18. Having considered these matters and the credibility of the witnesses appearing before us, we cannot be satisfied that the managing director, Mr Tosh, directed sectarian/political comments at this applicant at the time he sought unpaid leave. We believe that it is just as likely that he was abusive at that time to Mr Tosh in light of his (Mr Tosh's) attitude and Mr Tosh's previous conduct. We do not know. Accordingly we dismiss the application. In so doing, we accept that at various times in the course of his employment, the second respondent burdened the applicant and others with his own particular political views. We accept also that the applicant pointed out that he was not interested in those views. And whilst we think that the expression of those views was annoying to the applicant, we do not believe that they seriously affected the working relationship between him and the second respondent. We do not accept the applicant's account of unrelenting work place harassment – indeed the very fact that the applicant had to go back as far as 1991/2 to find support speaks for itself. And after the row in June 2001, the applicant went off work with back pain. All in all we believe that this was a working relationship which broke down because the applicant was refused holidays at a time when he was not contractually entitled to them and was

possible that the second respondent verbally and in a sectarian way abused the applicant at that time. It is also possible that the applicant did likewise to the second respondent. We do not know. Without a finding in the applicant's favour, the basis of his complaint disappears and his complaints must be dismissed.

19. The applicant case in our opinion, in the terms in which it was presented before us, stands or falls upon our determination as to what actually happened in June 2001. The case was not made that, even ignoring the incident in June 2001, the applicant had a valid complaint of harassment against the respondents culminating in May 2001. Our view of the complaints made about the second respondent's participation in the 2001 district council election is that it does not assist the applicant – even if it was made in time. He complained of three things –

- (1) election materials left in the office supporting the DUP.
- (2) the second respondent's election address, and
- (3) storing election posters on a boilerhouse.

20. We do not accept that the applicant has demonstrated that there was election material lying around the office. We do accept that the second respondent did give a speech and the applicant left in the middle of it. We do not understand why the applicant complains of posters being stored out of sight in a boilerhouse. We do not accept that it should reasonably be considered that this conduct on the part of the second respondent had the effect of violating the applicant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The applicant's evidence was that he was not interested in politics – not that what was said violated his dignity or created an offensive environment. No doubt the second respondent will now realise that whether he is managing director or whatever, he should publicise his political views outside the working environment.

  
J E MAGUIRE  
President

**Date and place of hearing: 8, 9, 10, 11, 12 December 2003.**

**Date decision recorded in register and issued to parties:**

**21 APR 2004** *PC*