

**OFFICE OF THE DIRECTOR OF EQUALITY
INVESTIGATIONS**

EMPLOYMENT EQUALITY ACT, 1998

EQUALITY OFFICER'S DECISION DEC-E2001-033

PARTIES

**Theresa Nevin
(Represented by the Equality Authority)**

AND

**The Plaza Hotel
(Represented by IBEC)**

File ref: EE/2000/117
Date of issue: 07/11/2001

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1. DISPUTE

1.1 This dispute concerns a claim by Ms Theresa Nevin that she was discriminated against by the Plaza Hotel on the ground of her membership of the Traveller community, contrary to the provisions of the Employment Equality Act, 1998, when she was refused access to employment.

1.2 The Equality Authority referred a complaint of discrimination on behalf of Ms Nevin to the Director of Equality Investigations on 14 November 2000. Submissions were obtained from both parties and a joint hearing of the matter was held in June 2001. Further correspondence ensued and a second hearing was held in September 2001.

2. SUMMARY OF THE COMPLAINANT'S CASE

2.1 The complainant is a member of the Traveller community. On 17 May 2000, she applied by telephone for a position as an accommodation assistant in the Plaza Hotel in Tallaght, having learned of the vacancies through her contact with OBAIR, the Local Employment Service Network in Clondalkin. Her CV included previous cleaning experience. She was interviewed on May 18 by the Personnel Manager, and offered a position. It was agreed that the complainant would start work the next day.

2.2 The complainant started work at 9.30am on Friday 19 May, and was assigned to clean thirteen rooms in partnership with an experienced accommodation assistant, whom I will call Ms X. Ms X demonstrated how to make the bed and clean the bedroom in the first two rooms, and the complainant asked to be shown one more time. Ms X then concentrated on the bathrooms, leaving the complainant to take care of the bedrooms. While Ms X was absent on a break during the morning, the Supervisor called in to check progress, and made it apparent that the beds were not being made properly. The complainant asked Ms X to show her again, and she said that following this she had had no problems and was given no indication her work was other than satisfactory.

2.3 Before she went home at 4.30pm, the complainant asked the Supervisor when she would be working again. The Supervisor said that the day had been a trial day and

that the Accommodation Manager would telephone the complainant on Monday 22 May. When the Accommodation Manager eventually telephoned on Monday evening, she said there would definitely be more work available, and that she would contact the complainant on Wednesday 24 May to arrange work dates. She did not do so, and when the complainant contacted the hotel she was told the Accommodation Manager had gone home.

2.4 The complainant made a further attempt to contact the Accommodation Manager by telephone on Thursday 25 May, and she spoke to the Supervisor, who suggested she call to the hotel to speak to the Accommodation Manager. When the complainant went to the hotel on Saturday 27 May, she was told the Accommodation Manager was unavailable to speak to her directly but would take a telephone call from her. The complainant said the Accommodation Manager was “quite sharp” with her, and said she had not asked her to call in. She then said room numbers were down, and a number of permanent staff members were having their hours reduced. The Accommodation Manager also said the work offered had been for a trial day only and, when the complainant questioned this, she said the Personnel Manager should have said this at the initial interview.

2.5 The complainant contacted OBAIR in Tallaght the following week, and a placement officer with OBAIR - who has known the complainant for some years - spoke with the Supervisor on her behalf. He was initially told that the complainant was being let go because room numbers were down. When the placement officer pointed out that the hotel was advertising for staff at that time, the Supervisor told him that the complainant was not capable of doing the job. She also allegedly said “Theresa did not have the same concept of cleaning as other employees would have but how could she be expected given the way they lived”. At around the same time, an employee of the Tallaght Partnership, also a personal acquaintance of the complainant, telephoned the hotel to discover if the complainant would be paid for the day she worked. She was told by the Accommodation Manager that payment would be made. She was further told that guest numbers had dropped and there was no work for Ms Nevin. The complainant was subsequently paid.

2.6 The complainant stated that from August 2000 to April 2001 she was employed as an accommodation assistant in another hotel and had received no complaints about her standards. She provided evidence from the Housekeeping Manager at this second hotel that the complainant was eager to learn, that she got on well with her co-workers and that her work was fine. She drew attention to the fact that the second hotel twinned new staff with experienced staff for a period of some weeks' training, unlike the respondent hotel which just showed trainees what to do and let them work alone. The complainant herself had trained new staff during her period of employment.

2.7 The complainant said that her confidence was completely undermined by this experience and that she was upset for months afterwards. She submitted that the Equality Officer must find in her favour and that the respondent in breach of the 1998 Act denied her access to employment. The Equality Officer was requested to order the following remedies:

- (a) an order for compensation for the act of discrimination;
- (b) an order that the Plaza Hotel apologise for the mistreatment of the complainant; and
- (c) further or any other order.

3. SUMMARY OF THE RESPONDENT'S CASE

3.1 The respondent stated that Ms Nevin was referred to the hotel by OBAIR for employment as an accommodation assistant. She was interviewed for the position on 18 May 2000 by the Personnel Manager. As her previous relevant work experience was in office cleaning, the Personnel Manager decided to offer her a trial day to evaluate her ability to carry out the duties of an accommodation assistant before offering permanent employment. The complainant was offered and accepted this trial day.

3.2 When Ms Nevin reported for duty the next day, she was assigned by the Supervisor to work in partnership with the experienced accommodation assistant whom I have called Ms X. The two employees were responsible for a number of bedrooms, which involved making the beds, cleaning the room, emptying the dustbins, cleaning the

bathroom, changing towels and soaps and such tasks. Ms X showed Ms Nevin how to make the beds in the first three rooms, and then allowed her to continue on her own while Ms X cleaned the bathrooms.

3.3 The respondent said it quickly became apparent to Ms X that the complainant was unable to carry out her tasks correctly, and she had to remake beds after Ms Nevin had finished. She reported this to the Supervisor and was advised to continue working in the hope of an improvement. The improvement did not materialise and Ms X was forced to ask another colleague for help to complete her allocated rooms. At the end of the day, Ms X repeated to the Supervisor that Ms Nevin was incapable of making beds properly, and in her opinion was unlikely to be able to carry out the other duties of an accommodation assistant. Having seen some of the work, the Supervisor agreed, but decided to speak with the Accommodation Manager, who was on holiday at the time. The Supervisor did not give any undertaking to Ms Nevin regarding further work, when Ms Nevin finished work that evening.

3.4 The Accommodation Manager returned from holiday on Monday 22 May, and during the course of a general conversation about events occurring during her absence, the Supervisor told her “we had a girl in last week but her work was dreadful”. Ms Nevin was not named in this conversation. On Wednesday 24 May, Ms Nevin telephoned and spoke to the Accommodation Manager, who told her there was no work at the time but as soon as there was she would telephone to let her know. The Accommodation Manager did not know at the time that Ms Nevin was the person whose work performance had been described by the Supervisor as “dreadful”, and she only became aware of the fact on the following day.

3.5 Ms Nevin called to the hotel on 27 May to speak to the Accommodation Manager. Although the Accommodation Manager was attending a meeting at the time, she agreed to speak to Ms Nevin by telephone. The Accommodation Manager informed the complainant that there was no work available and that she would be better off looking elsewhere, and she asserted that the complainant became very abusive during the course of this conversation.

3.6 Regarding the comment attributed to the Supervisor in conversation with the placement officer, this was denied. The Supervisor was said to be shocked at the accusation, and denied that she had ever spoken to the placement officer. Such a conversation would be beyond her authority, as the decision on retention or otherwise of staff was the responsibility of the Accommodation Manager.

3.7 The respondent stated that had Ms Nevin been discriminated against because of her membership of the Traveller community, she would not have been invited to work for a trial day. The hotel said it has employed other accommodation assistants on this basis, and provided written confirmation from two of its accommodation assistants that they were employed full-time after successfully completing a trial day.

3.8 The respondent said it has been involved in a positive recruitment programme over that last few years during which time it has successfully employed Russian, Romanian, African and other non-English speaking nationals as accommodation assistants, hotel porters and kitchen staff. All were offered employment on the basis of their ability to do the work required and because it was perceived by the hotel management that working in the hotel would allow them to learn the English language quickly and easily.

3.9 The hotel is also involved with the MENNI organisation in offering employment opportunities to those with learning difficulties and currently employs one staff member on such a programme. It has also been approached by other organisations with a view to participating in similar programmes for other disadvantaged groups because of its positive approach to such schemes.

3.10 The respondent summarised its arguments against the allegation of discrimination as follows:

(i) Ms Nevin was offered employment on a trial basis which clearly indicates that had she displayed the ability to conduct the duties of the position she could have looked forward to being offered a position with the company. If her membership of the Traveller community was an issue she would not have been offered this opportunity;

(ii) the hotel has a positive approach to the employment of individuals from a variety of backgrounds including those from disadvantaged groups;

(iii) Ms Nevin knew and accepted a trial day with the hotel and was refused further employment as a result of non-performance on that day and for that reason alone;

(iv) Ms Nevin's membership of the Traveller community did not become apparent to the hotel management until notification of this claim was received in August 2000 and therefore this could not have been the reason for refusal to provide further work.

In conclusion, the respondent requests that, in the light of the foregoing, the claim be dismissed as it did not breach the Employment Equality Act, 1998.

4. INVESTIGATION AND CONCLUSIONS OF THE EQUALITY OFFICER

4.1 In reaching my conclusions in this case I have taken into account all of the submissions, both oral and written, made to me by the parties.

4.2 The complainant alleged that the respondent discriminated against her on the basis of her membership of the Traveller community, contrary to the provisions of the Employment Equality Act, 1998. Section 6 of the Act provides that discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated, on one of the discriminatory grounds, including membership of the Traveller community. Section 8 (1) provides that

In relation to-

(a) access to employment...

an employer shall not discriminate against an employee or prospective employee...

It is apparent that there are a number of conflicts in the evidence of the parties. I propose to deal with each item separately in the hope of clarifying matters, but before I do so I feel it is necessary to state that the statements of the respondent regarding its employment of people from what it described as "disadvantaged groups", particularly non-nationals and people with disabilities, have no bearing on a complaint of discrimination on the ground

of membership of the Traveller community. It is possible for a respondent to discriminate on some of the grounds and not on others, or to discriminate on just one ground.

The trial day

4.3 The nature of the employment on Friday 19 May 2000 is the initial item in dispute. The complainant asserts that she was employed as an accommodation assistant, without any reference to trial periods, and that the first time such a matter was mentioned was at the end of her day's work. The placement officer at OBAIR Tallaght stated that he had no knowledge of such a practice being operated by the respondent, although he had contacted the hotel on several occasions on behalf of clients. The respondent insists the complainant was offered and accepted a trial day, in accordance with its normal practice when considering employing someone without specific relevant experience, and it provided written confirmation from two accommodation assistants that they were employed on such a basis.

4.4 It is not clear to me why the respondent would operate such a system, as it also has a three-month probationary period for new employees, but the fact of having a trial day or not is presumably a matter for the respondent. However, the concept of a trial day is not mentioned in advertisements for positions in the hotel. I note the evidence of the placement officer with OBAIR Tallaght that he had never been aware of this practice. His colleague at OBAIR Clondalkin, who dealt with the initial referral, was not told of a trial day. I also note that the two accommodation assistants who confirmed that they underwent a trial day are non-nationals. The respondent said that the trial day was normal practice specifically for accommodation assistants and porters without relevant hotel experience. It also estimated that some 50% of accommodation assistants and a similar large percentage of porters are non-English speaking nationals.

4.5 It seems to me possible that the imposition of a trial day on specific staff grades, which are comprised significantly of people whose fluency in English may be in question, is for reasons other than just their lack of relevant hotel experience. In the absence of any evidence from the respondent that every single member of staff without hotel experience is given a trial day, I cannot help but conclude that this "normal practice" is instead applied in a selective fashion. My conclusion in this is strengthened by the fact

that it took some time and outside intervention for the complainant to be paid. If the trial day had been normal practice, she would have been paid at its conclusion or would have been told that payment would issue through the post.

The complainant's work performance

4.6 Ms X gave evidence at the hearing that the complainant had not been proficient in making beds. Ms X had shown her how to do it three times, and she demonstrated it again after her return from her break. She said the complainant still did not do it properly and Ms X had to redo all the beds herself, ultimately having to seek assistance from another colleague to finish her allocated rooms. She also said that she did not say anything to the complainant regarding her lack of ability, as it was not her place to criticise, but corrected the work without comment.

4.7 The complainant agrees that she was shown how to make the beds three times, and that she asked to be shown again after the Supervisor had made it clear it was not being done properly. However, she said that from this point she completed the task correctly, and she denied that someone else had to assist in finishing the rooms.

4.8 Although the Supervisor gave evidence that the complainant's work was not satisfactory, it became apparent at the hearing that she had seen this work just once, when Ms X was absent on her break. It was agreed that on this occasion the work was unsatisfactory, but the Supervisor did not check the complainant's work again before the end of the day, relying exclusively on Ms X's opinion as to her ability. I recognise that the Supervisor was under some pressure at the time, as the Accommodation Manager was on holiday. Nonetheless, I consider that assignment of a novice to another employee, who gave evidence that she had received no training in instructing new employees and displayed none of the skills one would expect in good personnel practice, is a reneging of supervisory responsibility.

4.9 The Supervisor said at the hearing that when she saw the unsatisfactory work, the complainant said she had been shown how to do it but that she "kept forgetting". The respondent emphasised this comment, asserting that it gave credence to the allegation that the complainant was not capable of doing the work since making a bed was "not rocket

science”. However, in response to other questions at the hearing the respondent also assured me that the correct method of making the bed was quite complex.

4.10 I have noted Ms X’s evidence that she did not make any comment to the complainant regarding the quality of her work, merely silently correcting mistakes. In conjunction with the fact that Ms X obviously went to her break leaving the complainant alone to do unfamiliar work, I am satisfied that the complainant felt uncomfortable, and that her comment that she “kept forgetting” how to do the work was not an unusual comment from a diffident teenager to someone in authority. I do not therefore attach any special significance to the remark.

4.11 In any case, I confirmed with the Housekeeping Manager of the hotel where the complainant was subsequently employed that her work was satisfactory, so I am unable to lend any credence to the idea that she was incapable of doing the work. Even if I had not had this independent confirmation of her ability, I do not consider the methods employed during the day to assess her aptitude, were of any benefit to either party. On the part of Ms X, there appeared to be little communication, no mentoring and a perfunctory demonstration of the method of working. On the part of the Supervisor, there was no supervision. I feel that any conclusions from this method of assessment would not be reliable.

The week following 17 May

4.12 According to the complainant, the Accommodation Manager telephoned her on Monday 22 May, and said she would telephone again on Wednesday 24 May with proposed work dates. This phone call was not received, and the complainant phoned the hotel on Thursday 25 May. On this occasion she spoke to the Supervisor, who told her to call to the hotel. When the complainant did so, on Saturday 27 May, she was told by the Accommodation Manager that guest numbers were down.

4.13 According to the respondent, there was no telephone call on Monday. There was a telephone call on Wednesday, when the complainant was told by the Accommodation Manager that there was no work at present but she would contact her when there was. The respondent's submission stated that this was said because the complainant was becoming agitated, but at the hearing the Accommodation Manager recollected that the complainant was not agitated on Wednesday but was when she called to the hotel on Saturday. She said the complainant was extremely abusive and swore at her on the telephone. I note that there is no mention of this in the respondent's submission, and I note further that if the complainant had not been agitated on Wednesday there was absolutely no logical reason for the Accommodation Manager to promise further work to someone she had never met. Based on the respondent's own evidence, the Accommodation Manager did not know anything about the complainant until the following day.

4.14 The complainant was ultimately told that guest numbers were down and there was no work for her. The placement officer in OBAIR Tallaght was told that numbers were down and the complainant could not do the job. His colleague in OBAIR Clondalkin told the employee of the Tallaght Partnership that the hotel had said the complainant was unable to do the job. When she herself spoke to the hotel, to query the complainant's pay, she was told by the Accommodation Manager that room occupancy had dropped and there was no work for the complainant. The respondent acknowledged at the hearing that advertisements for vacancies continued to appear in newspapers during this period, but said these specified that experience was essential, and were therefore not suitable for the complainant.

4.15 Obviously, a number of varied and confusing reasons were given by the respondent for not employing the complainant. The ultimate reason given in response to the complaint of discrimination was that she could not do the job, and I cannot understand why the complainant could not have been simply told this at the very beginning of this process, if it had been genuinely felt this was the case. I have already shown that I am satisfied that this was not the case. The fact that the complainant had to call to the hotel, over a week after her day's work, before she actually got a straight answer, demonstrates that the Accommodation Manager did not deal with the issue in a way that would be expected of any manager. I am not satisfied that the respondent has shown that its behaviour during the week following 17 May was either reasonable or consistent.

Prima facie evidence

4.16 For an allegation of discrimination to be upheld under the Act, a claimant must show *prima facie* evidence of the discrimination. This has been described in *Dublin Corporation v Gibney* (EE5/1986) as

“...evidence which in the absence of any convincing contradictory evidence by the employer would lead any reasonable person to conclude that discrimination had probably occurred.”

If the claimant is successful in establishing this *prima facie* case, then the burden of proof moves to the respondent in the claim, which must rebut the presumption of discrimination by demonstrating the existence of objective, non-discriminatory reasons for its actions.

4.17 I think it is important to note that a sequence of events which may be unfair or unreasonable does not necessarily constitute evidence of discrimination. I cannot see how the behaviour of the respondent - represented in this instance by its employees Ms X, the Supervisor and the Accommodation Manager - would comply with any definition of best employment practice. However, there are other possible explanations for what occurred. It is feasible that Ms X simply did not like the complainant. The Supervisor and Accommodation Manager may both have been too busy and distracted to deal with matters appropriately. While this may be unacceptable behaviour, I cannot find that in itself this would lead to a finding of discrimination.

The alleged discriminatory comment

4.18 The final issue remaining is the reference in the complainant's submission to a conversation between the placement officer and the Supervisor, wherein the latter was alleged to have said "Theresa did not have the same concept of cleaning as other employees would have but how could she be expected given the way they lived". I raised the matter at the second hearing, when I had the opportunity to question both people involved.

4.19 The placement officer described the context in which the conversation took place. The complainant had said to him that Ms X had made some remark about her membership of the Traveller community during the day she worked. The Supervisor said to him that the complainant could not do the job, and he had asked her if the complainant's membership of the Traveller community had anything to do with the matter. It was at this point she made the remark.

4.20 The Supervisor said she was shocked to be accused of making such a remark and denied point blank that she had ever spoken to the placement officer. She questioned why the placement officer would have sought to speak to her in any case as it would not have been her function to have made any decision in relation to retention of employees, and she said she would not have had a conversation outside her authority.

4.21 I must decide which of these witnesses was the most credible, on the balance of probabilities. It is my opinion that the placement officer is an impartial witness in this matter, whose only interest was the professional placement of clients. I have taken account of the fact that he described the context in which the conversation took place. I note with interest that the respondent did not refer at all to the alleged comment in its replying submission. I consider that the Supervisor would be exactly the person the complainant would have mentioned to the placement officer as an appropriate contact, given that she had never met the Accommodation Manager. Taking all of these factors into account, I find that on the balance of probabilities the conversation did take place and that the Supervisor made the alleged comment.

4.22 A comment such as this constitutes unfavourable treatment on a discriminatory ground, in accordance with the provisions of the 1998 Act. It also has the effect of

making the sequence of events described earlier, which on its own did not constitute *prima facie* evidence of discrimination, take on a very different aspect. I am satisfied that the occurrences from 17 May onwards are evidence of discriminatory treatment of the complainant, and that the respondent has failed to demonstrate objective, non-discriminatory reasons for its actions.

Vicarious liability

4.22 The respondent's submission states that the complainant's membership of the Traveller community did not become known to the hotel management until notified of her complaint three months later, and that it could not therefore be a reason for refusing further work. It appears that the General Manager may well have been unaware of the complainant's existence, as he had no involvement in the recruitment process. However, all of those who had contact with the complainant were aware of her background. The Personnel Manager said she thought the complainant may be a member of the Traveller community, Ms X was told by the complainant, the Supervisor was told either by the Personnel Manager or by Ms X, and the Accommodation Manager was told by the Supervisor.

4.23 Section 15 of the Act provides

(1) Anything done by a person in the course of his or her employment shall, in any proceedings brought under this Act, be treated for the purposes of this Act as done by that person's employer, whether or not it was done with the employer's knowledge or approval...

I am satisfied therefore that the respondent cannot use its purported lack of knowledge as a defence to a finding of discrimination.

4.24 Section 15 (3) of the Act provides

In proceedings brought under this Act against an employer in respect of an act alleged to have been done by an employee of the employer, it shall be a defence for the employer to prove that the employer took such steps as were reasonably practicable to prevent the employee-

(a) from doing that act, or

(b) from doing in the course of his or her employment acts of that description

Since this section provides a defence for an employer, it is a matter for the employer to provide evidence of the reasonably practicable steps taken to prevent the discriminatory act. As no such evidence was provided, I find that the respondent is vicariously liable for the actions of its employees.

5. DECISION

5.1 Based on the foregoing, I find that the Plaza Hotel discriminated against Ms Theresa Nevin when it refused her access to employment on the basis of her membership of the Traveller community, contrary to the provisions of the Employment Equality Act, 1998, and I make the following order:

- (a) that the respondent pay a sum of £5,000 (€6348.69) to the complainant in respect of lost employment opportunities, embarrassment and distress caused by the discrimination and the stress relating to the necessity to pursue her claim;
- (b) that the respondent draw up a code of practice on equality of opportunity for its employees, liaising with the Equality Authority if necessary;
- (c) that all members of staff be instructed in this code of practice, with particular attention being drawn to all nine grounds covered by the Act;
- (d) that this code apply to all employees and prospective employees of the company, whether hired for one day, three months or on a full-time basis.

Anne-Marie Lynch
Equality Officer

7 November 2001