

OFFICE OF THE DIRECTOR OF EQUALITY INVESTIGATIONS

3 Clonmel Street
Dublin 2.

Phone: 353 -1- 4774100
Fax: 353-1- 4774150

E-mail: info@odei.ie
Website: www.odei.ie

Equal Status Act 2000

EQUALITY OFFICER'S DECISION NO: DEC-S2002-029

Martin Mongan

V

**Bellway Limited, t/a
The Laurels Pub, Clondalkin, Dublin**

**File No. ES/2001/593
Date of Issue 27/03/2002**

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Summary of Decision DEC-S2002-029

Mr. Martin Mongan

-v-

Bellway Limited, t/a

The Laurels Pub, Clondalkin, Dublin

Headnotes

Equal Status Act, 2000 - Direct discrimination, section 3(1)(a) - Membership of the Traveller community, Section 3(2)(i) - Disposal of goods and supply of services, Section 5(1) - Refusal of service in a pub - Activities not discrimination, section 15 (2)

Background

This dispute concerns a claim by Mr. Martin Mongan that he was discriminated against by a member of staff of the Laurels Pub contrary to the Equal Status Act, 2000, on the grounds that he is a member of the Traveller community. The complainant alleged that he was discriminated against on the Traveller community ground by the respondent when he was refused service in the pub on 29 June, 2001. The respondent denied that Mr. Mongan was discriminated against and stated that the only reason service was refused in June, 2001 was because the barman considered that a woman in the company of Mr. Mongan was inappropriately dressed and that this was in breach of the pub's dress code.

Conclusions of the Equality Officer

The Equality Officer found that the complainant had established a prima facie case of discrimination that he was refused service because he was a member of the Traveller community and that the respondent had failed to rebut the inference of discrimination and awarded the complainant €2000 in compensation for the effects of the discrimination.

Decision

The Equality Officer found that the complainant was discriminated against on the Traveller community ground contrary to Section 3(1)(a) and 3(2)(i) of the Equal Status Act 2000 and in terms of Section 5(1) of that Act.

Complaint under the Equal Status Act 2000
DEC-S2002-029

Martin Mongan

V

Bellway Ltd t/a The Laurels Pub, Clondalkin, Dublin
(represented by Arthur Cox, Solicitors)

1. Dispute

1.1 This dispute concerns a claim by Mr. Martin Mongan that he was discriminated against by a member of staff of The Laurels Pub, Clondalkin, contrary to the Equal Status Act, 2000, on the grounds that he is a member of the Traveller community in that on 29 June, 2001, he was refused service in the premises. The respondent denies that discrimination occurred.

The complainant referred a claim to the Director of Equality Investigations on 8 October, 2001 under the Equal Status Act 2000. In accordance with her powers under section 75 of the Employment Equality Act 1998 and under the Equal Status Act 2000, the Director then delegated the case to me for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part III of the Equal Status Act.

2 Summary of Complainant's Case.

2.1 The complainant states that he went, with some friends and relatives, to The Laurels pub in Clondalkin at or about 7.00 p.m. on 29 June, 2001 to celebrate the christening of his brother's child. He went to the bar to order a drink. The barman told the complainant that he could not be served. When the complainant asked why he could not be served he was told it was "bosses orders". The complainant asked to speak to the "boss". The barman went away and returned after a few minutes and informed the complainant that the boss was not there, only the manager who had said he was not to be served. The complainant asked to speak to the manager. The barman told him that the manager was not there. The complainant stated that he was being discriminated against as he had never been to the premises before so he failed to see how anyone could say that he was not to be served.

3. Summary of Respondent's Case

3.1 The respondent submitted that the complainant was refused service because the barman deemed a female companion of the complainant to be inappropriately dressed and to be in breach of the pub's dress code. This was not stated to the complainant at the time in case it offended the woman in question and might inflame the situation. The action taken by the barman was in accordance with standard procedure and with the recommendation of the Licensed Vintners Association not to give a reason for refusal of service.

4. Evidence of the Parties

4.1. Complainant's Evidence

Mr. Martin Mongan, Complainant

Mr. Mongan stated that

- He had been the sponsor at a christening on the day in question, and that it was an important occasion for him and his family.
- A group of friends and family, numbering six or seven in total, had gone to the Laurels pub at around 7.00p.m. to celebrate the occasion.
- Mr. Mongan, his brother and brother-in-law went to the bar for service. Mr. Mongan asked for service, and the barman began to pull a pint.
- The barman then turned to him and said, "I can't serve you"
- When asked why he was refusing service the barman said "it's bosses orders". Mr. Mongan asked to speak to the boss and was told by the barman that the boss was not there.
- Mr. Mongan again asked why he couldn't be served, given that the boss was not there and he had never been to the Laurels before. The barman replied that it was the manager's orders not to serve him. Mr. Mongan asked to speak to the manager. The barman went away for a few minutes, came back and said that the manager was not there.
- The barman told Mr. Mongan that he would call the Gardaí if the group did not leave the premises. Mr. Mongan invited the barman to call the Gardaí and the barman refused. Mr. Mongan regards the barman's statement about calling the Gardaí as a form of bluff/threat that was not carried through.

- Mr. Mongan's brother-in-law called the Gardaí. When the Gardaí arrived they asked the group to go outside the premises to discuss the matter which they did. The barman refused to give his own name or the manager's name to the group.
- The Gardaí told the group that they would all have to leave the premises, which they did.
- Mr. Mongan is a Traveller who identifies himself with the traditions and customs of the Traveller community. He is nomadic as were his parents before him. He resides in a caravan. The traditions which he and the Traveller community observe differ from those observed by non-Travellers e.g. funeral rites, dress, wedding services etc. are distinctively different
- On the evening in question there were very few people at the bar when Mr. Mongan sought service, but he accepted that there was a large number of patrons on the premises.
- Mr. Mongan had never been to the Laurels before and was unsure as to whether other members of the group had been to the premises before the evening in question.
- Mr. Mongan stated that he would have absolutely no objection to a dress code being in operation but pointed out that he was very well dressed on the evening in question as he had dressed well for his role as godfather at the christening.
- Mr. Mongan questioned why the entire group would be refused service if only one of them was inappropriately dressed.
- Mr. Mongan stated that he would not have had to attend at a hearing about the matter if he had been given a straight answer at the time as to the reason why service was being refused but no reason was given at the time. The only conclusion that Mr. Mongan could draw from the refusal was that the barman had recognised that he was a Traveller and refused service on that basis and that this was discrimination.

4.2 Respondent's Evidence

Oral evidence given by the respondent and witnesses for the respondent at the Hearing

Mr. John Timoney, Barman

- Mr. Timoney was on duty in the “top bar” of the Laurels pub on the evening of Friday, 29 June, 2001 when a group, which included Mr. Mongan, entered the premises.
- Mr. Timoney saw the group enter the premises and climb the stairs to the top bar where he was serving.
- The bar was very busy at the time, there were approximately one hundred patrons in the top bar.
- Mr. Timoney heard someone call for a drink, but was in the process of serving another patron at the time.
- When he went to serve Mr. Mongan he saw that a female member of the group with whom Mr. Mongan had entered the premises was scantily dressed and he deemed her outfit to be inappropriate dress which was in breach of the dress code.
- A dress code is in operation in the pub, and had been in operation from the day Mr. Timoney started in the pub.
- Track suits, runners and football jerseys are specifically banned in the notice about the dress code.
- Mr. Timoney refused service to Mr. Mongan and stated that management reserved the right to refuse service.
- He did not give any other reason for the refusal at the time.
- Mr. Mongan asked to speak to the manager.
- The manager was at home, on a break, so Mr. Timoney went to Jason, the barman in the downstairs bar, and told him that he had refused service to a group of people and that one of the group had asked to speak to the manager.
- When Mr. Timoney returned upstairs he told Mr. Mongan that the manager was not there and asked the group to leave the premises.
- The group gathered around Mr. Timoney and asked for reasons for the refusal of service.
- Mr. Timoney felt threatened and uncomfortable because of the way in which the group had gathered around him, but he confirmed that no member of the group had made any threats to him.
- A friend of Mr. Mongan’s called the Gardaí and the group refused to leave until the Gardaí arrived.

- When the Gardaí arrived they asked the group to step outside to discuss the matter in order to avoid drawing attention on themselves.
- When outside Mr. Mongan asked Mr. Timoney for his name. He declined to give it. Mr. Mongan then asked for the name of the manager. Mr. Timoney again declined to give it.
- The Gardaí then spoke with the group of people and they left.
- “Bouncers” are normally on duty at the doors of the pub from 8.00 p.m. onwards and they would enforce the dress code on entry. Prior to the arrival on duty of the bouncers the barmen on duty enforce the dress code.
- The dress code has been enforced against a number of patrons who have been asked to leave where they were deemed to be inappropriately dressed.
- Mr. Mongan was not told the reason for the refusal at the time because Mr. Timoney felt that it was not in his own best interest to give the reason as it was a sensitive issue and could cause offense or inflame the situation.
- Mr. Timoney has, in the past, served Travellers in other pubs in which he has worked. He was not aware of whether he had or had not served Travellers in the Laurels pub as he had no way of knowing which of the patrons he had served in that premises might be Travellers. He had, however, served Travellers in other pubs and knew them to be Travellers as they were well known to him and several of them resided on a halting site.
- He had never been instructed to restrict or refuse service to Travellers in the Laurels pub.
- Staff of the Laurels pub had been notified by management of the requirements of the Equal Status Act 2000 and a bulletin from the Licensed Vintners Association was on the staff notice board about the provisions of the Act.
- The incident was not recorded in writing anywhere because it had not escalated into a serious incident and Mr. Timoney did not regard it as a major incident.
- An incident book is kept on the premises at the Laurels pub but only incidents involving injuries to patrons etc. would be recorded.
- It is practice in the Laurels to refuse service to a group if any member is in breach of the dress code.
- In situations where trouble might arise, and in the absence of the “bouncers” at the doors of the pub, Mr. Timoney would normally have expected that the barman in the lower lounge would call the Gardaí and come to his assistance.

- The Gardaí were not called by Mr. Timoney, or the other barman, because the situation with the group on the evening in question did not escalate to the point where they felt the need to call the Gardaí.

Mr. Jim Buckley, General Manager

- Mr. Buckley stated that training had been given to the managers in the Laurels, by Mr. Seamus Given of Arthur Cox, within weeks of the introduction of the Equal Status Act in 2000.
- Mr. Buckley had subsequently given talks to staff on the Equal Status Act and a bulletin about the main points of the Act (Licenced Vintners Association publication) is always displayed on the staff notice board.
- Mr. Buckley was away on holidays at the time of the alleged incident.
- Mr. Buckley confirmed that the dress code has been in operation in the Laurels since he started working there, some eight years ago.
- People in breach of the dress code are stopped from entering the premises, or are refused service. This happens frequently.
- “Scanty” dress is subject to the dress code and all patrons are expected to abide by the code.
- The pub has never had a policy of refusing service to Travellers, and has in fact, often taken bookings from the Clondalkin Travellers Development Group, who it, is assumed, would be making bookings on behalf of groups of Travellers, or groups that would include Travellers.
- The written submission from the respondents had stated that Mr. Mongan had been refused service because of his behaviour on the evening in question. This was incorrect and was stated on foot of what the Clondalkin Gardaí had told Mr. Buckley when he contacted them i.e. that when they had called to the pub on the evening in question there was an argument on the premises. Also, another incident had arisen later in the evening in the off-license attached to the pub and the Gardaí had referred to it as a “disorderly” situation. Some confusion had arisen about the incidents which had since been clarified by Mr. Timoney.
- It was necessary for the management of the Laurels to seek information from the Gardaí because (a) no written record was kept of the incident and (b) Mr. Timoney, the barman who had dealt with Mr. Mongan, had left his employment in the Laurels before the complainant had notified them of his complaint.
- The manager on duty on the evening in question, Mr. Tony O’Connor, was away from the premises when the incident occurred and he was only able to tell when asked about the incident that some people were refused service on the evening in

question but that he could not say why. It was necessary for Mr. Buckley to contact the Gardaí to get precise details of what had occurred.

- An incident book is kept on the premises and the bouncers, who are employed on a contract basis, keep their own incident book. Details of incidents which would be recorded in the pub's incident book would almost always refer to accidents, e.g. falls, involving patrons or incidents giving rise to injuries to staff or patrons and occasionally, if the staff of the pub found it necessary to call the Gardaí because of trouble on the premises, the matter would be recorded in the incident book.

Mr. Tony O'Connor, Manager

- Mr. O'Connor, the manager in charge, stated that he was at home, on a break from 3.30p.m. to 7.30p.m. on 29 June, 2001 when the incident occurred. He received a phone call some time between 7.00 to 7.30 from Jason, the barman in the main, downstairs, lounge telling him that there was a problem in the premises because some people had been refused service.
- Based on what Jason told him, Mr. O'Connor before leaving his house rang the Gardaí and arranged for them to call to the pub.
- When he arrived at the premises he met the three barmen, Jason, John and Brendan who explained to him that there had been a problem because some people were refused service, but the group who had been refused had left at this time.
- Mr. O'Connor stated that he had called the Gardaí because he felt that if there was a problem there could be trouble and the Gardaí might be needed.
- Generally, when people are refused service the reason is not given because it could make matters worse if the people being refused take offense.
- Mr. O'Connor stated that he clearly remembers being told at the time that the group were refused service because of a breach of the dress code.
- The incident was not recorded anywhere.
- The Gardaí are rarely called by staff of the pub except where an incident is regarded as serious enough to warrant it.
- Incidents that are recorded would normally involve accidents on the premises involving patrons.
- Mr. O'Connor stated that the pub does not have a policy of refusing Travellers and has, in fact, taken several bookings for groups of Travellers.
- Mr. O'Connor stated that training had been given to staff of the pub in relation to the Equal Status Act and that it's requirements are drawn to the attention of new

staff. A notice is also on display on the bulletin board in the staff room (Licensed Vintner's publication).

Mr. Séamus Given, Solicitor, representing the Laurels pub

Mr. Given summarised on behalf of his clients, stating that -

- The statement in writing submitted by the respondent, that it was Mr. Mongan's behaviour which gave rise to the refusal of service, was incorrect. Confusion had arisen when his client had gone to the Gardaí to get the best evidence possible about the incident in question and was told by the Gardaí that they had been called to resolve a disturbance in the pub on the night in question. This had been clarified with Mr. Timoney, the barman on duty on the night who had explained that the refusal was a result of a breach of the dress code. Mr. Timoney had left his employment in the Laurels last year and it had taken until days before the Hearing to trace his whereabouts and contact him. Also it had transpired that there was a separate incident later that evening in the off-license in the premises and there was some confusion about the two incidents. Mr. Given apologised to the claimant for the error.
- Mr. Given stated that it is necessary for the claimant to establish a prima facie case, and that he had not established a case for discrimination.
- The claimant was refused only because of a breach of the pub's dress code by a female companion of the claimant's and that the barman was entitled to refuse service on this basis.
- A reason should, perhaps, have been given to the claimant for the refusal of service, but the fact that the reason was not given is not, of itself, discrimination and there is no basis for the drawing of inferences for the failure to give a reason.
- The complainant had been informed that "management reserve the right to refuse service" and not that "the manager had said that he was not to be served".
- No reason was given at the time of the refusal because (a) of advice given by the Licensed Vintners Association and (b) the barman felt that it would inflame the situation as it was a sensitive matter.
- Particular regard should be given to the fact that the claimant now accepted that exception may have been taken to his female companion's dress at the time of the incident.
- Information is provided to staff of the pub in a permanent way (Licensed Vintner's notice) and this has not been contested by the claimant.
- Section 15 (2) of the Equal Status Act provides that action taken in good faith to ensure compliance with the Liquor Licensing Acts is not discrimination. There is

clear evidence that the barman made a judgement in good faith and that there was no question of discrimination. The claimant's case therefore should be dismissed.

5 Matters for consideration

5.1 The matter referred for investigation turns upon whether or not the complainant was directly discriminated against contrary to Section 3 (1)(a) and 3 (2)(i) of the Equal Status Act 2000 in terms of Section 5 (1) of that Act.

5.2 Section 3 (1)(a) provides that discrimination shall be taken to occur where:
"On any of the grounds specified.....a person is treated less favourably than another person is, has been or would be treated".

5.3 Section 3 (2) provides that: *"As between any two persons, the discriminatory grounds ... are ...*

(i) that one is a member of the Traveller community and the other is not."

5.4 Section 5 (1) states that *"a person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public "*.

5.5 Section 15 (2) of the Equal Status Act 2000 states that *"Action taken in good faith by or on behalf of the holder of a license or other authorisation which permits the sale of intoxicating liquor, for the sole purpose of ensuring compliance with the Licensing Acts, 1833 to 1999, shall not constitute discrimination".*

In this particular case the complainant claims that he was discriminated against because he is a member of the Traveller community while the respondent maintains that his staff acted in accordance with section 15 (2) of the Equal Status Act 2000.

5.6 At the outset, I must first consider whether the existence of a prima facie case has been established by the complainant. There are three key elements which need to be established to show that a prima facie case exists. These are:

- (a) Membership of a discriminatory ground (e.g. the Traveller community ground)
- (b) Evidence of specific treatment of the complainant by the respondent
- (c) Evidence that the treatment received by the complainant was less favourable than the treatment someone, not covered by that ground, would have received in similar circumstances.

If and when those elements are established, the burden of proof shifts, meaning that the difference in treatment is assumed to be discriminatory on the relevant ground. In such cases the claimant does not need to prove that there is a link between the difference and the membership of the ground, instead the respondent has to prove that there is not. If they succeed in establishing prima facie evidence, the burden of proof then shifts to the respondent to rebut the inference of discrimination.

5.7 Essentially this is the approach provided for in the Burden of Proof Directive (Council Directive 97/80/EC). In adopting this approach I am conscious that the Directive is not directly applicable to the complaint in hand under the Equal Status Act, 2000, but I consider that the Directive has persuasive effect in discrimination law. It is notable that the Labour Court and Equality Officers applied the practice of shifting the burden of proof in discrimination cases long before any European Community caselaw required them to do so (as far back as 1983 (*Bailieborough Community School v Carroll*, DEE 4/1983 Labour Court) and 1986 (Equality Officer: *Gibney*), and that this was a consistent practice across a spectrum of cases¹. European Court of Justice caselaw did not address the issue of the shift in the burden of proof for the first time until the *Danfoss*² and *Enderby*³ cases so this was not done

¹ *Curtin, Deirdre, Irish Employment Equality Law, 1989, P. 222 et seq.*

² *Case no. C-109/88*

³ *Enderby v Frenchay Health Authority and Sec. Of State for Health, C-127/92*

purely in implementation of Community law. It seems to represent an indigenous development in Irish discrimination law, which was in advance of Community law. There is no reason why it should be limited to employment discrimination or to the gender ground.

The practice of shifting the burden of proof in discrimination cases was also applied in very clear terms by the Supreme Court in *Nathan v Bailey Gibson*⁴ and by the High Court in *Conlon v University of Limerick*⁵. While these were both indirect discrimination cases, it seems that the principle should by logical extension apply to direct discrimination cases if it applies to indirect discrimination cases.

5.8 In considering what constitutes a prima facie case, I have examined definitions from other sources. In *Dublin Corporation v Gibney (EE5/1986)* prima facie evidence is defined as: "*evidence which in the absence of any credible contradictory evidence by the employer would lead any reasonable person to conclude that discrimination had occurred.*"

In article 4 of the *EC Burden of Proof Directive (Council Directive 97/80/EC)* the following definition appears: "*when persons who consider themselves wronged..... establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination*".

In *Teresa Mitchell v Southern Health Board, (DEE011, 15.02.01)*, the Labour Court interpreted article 4 of the EC Burden of Proof Directive as follows: "*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. It is only if those primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the respondent to prove that there was no infringement of the principle of equal treatment. Applied to the present case, this approach means that the appellant must first prove as fact one or more of the assertions on which her complaint of discrimination is based.*"

⁴ 1998 2IR 162

⁵ 1999 2 ILRM 131

6. Conclusions of the Equality Officer

6.1 In this particular case the complainant claims that he was discriminated against on the basis of his membership of the Traveller community. He sought and was refused service on 29 June, 2001.

6.2 I am satisfied that the complainant is a member of the Traveller community in accordance with (a) at 5.6 above. The complainant has provided written and oral evidence of refusal of service to him by a member of the respondent's staff, which has been confirmed by the respondent, and this fulfills (b) at 5.6 above.

6.3 In relation to key element (c) at 5.6 above I must now consider whether the refusal of service was such that a non-Traveller in the same circumstances would be treated more favourably. I am satisfied that the complainant was treated less favourably than a non-Traveller would have been in the same circumstances. The complainant was well dressed, had not caused trouble on the premises and was given no explanation for the refusal of service to him. I am satisfied that the barman recognised the complainant, and the group in whose company he was on the date in question, as Travellers.

In the absence of any credible contradictory evidence I can only conclude that a presumption of discrimination arises and the onus of proof that discrimination did not take place shifts to the respondent.

6.4 The respondent provided evidence that the pub has a strict dress code. This was not contested by the complainant. A copy of the notice which is displayed on the respondent's premises regarding the dress code was submitted at the Hearing (Appendix A). The complainant was not in breach of the dress code. This was not contested by the respondent. The respondent submitted that the female companion of Mr. Mongan's who was in breach of the dress code was wearing a skimpy "boob tube". The dress code prohibits the wearing of "**..track suits, runners or football jerseys**". It makes no reference to the wearing of "boob tubes". The code does not

state that any particular mode of dress is required, it simply prohibits the wearing of the specific items stated. I do not accept, therefore, that Mr. Mongan's companion was in breach of the dress code on the evening in question or that this was the reason for the refusal of service.

6.5 In the absence of any other plausible reason for the refusal of service to the complainant I find that the respondent has not rebutted the presumption of discrimination against the complainant, and has failed to establish that the action taken by the barman on 29 June, 2001 was in accordance with section 15 (2) of the Equal Status Act 2000.

7 Decision

7.1 I find that the complainant was discriminated against on the Traveller community ground contrary to Section 3(1) and 3(2)(i) of the Equal Status Act and in terms of Section 5(1) of that Act.

8 Vicarious Liability

8.1 While the action which constituted discrimination is directly attributable to the barman who refused service to the complainant section 42(1) of the Equal Status Act, 2000 provides that:

“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 also by that person's employer, whether or not it was done with the employer's knowledge or approval”

As the barman was clearly acting within the scope of his employment in the course of the refusal I find that the barman's employer, Bellway Ltd., trading as The Laurels, is vicariously liable for his actions in accordance with section 42(1) of the Equal Status Act.

9 Redress

9.1 Under section 25(4) of the Equal Status Act, 2000 redress shall be ordered where a finding is in favour of the complainant in accordance with section 27. Section 27(1) provides that:

“the types of redress for which a decision of the Director under section 25 may provide are either or both of the following as may be appropriate in the circumstances:

(a) an order for compensation for the effects of the discrimination;

or

(b) an order that a person or persons specified in the order take a course of action which is so specified.”

9.2 I hereby order that €2000 be paid to the complainant by the respondent for the effects of the discrimination.

9.3 Under section 27 (1)(b) of the Equal Status Act 2000 I order that the respondent

(a) immediately review all customer service practices and ensure that they are fully compliant with the Equal Status Act 2000

(b) maintain a written record of all incidents arising on his premises whereby service is refused and the Gardaí are called on as a result, whether by the respondent’s staff or by the person being refused.

(c) ensures that the dress code operating in the Laurels Pub is redrafted to reflect the exact nature of the code and precisely what is regarded by the management of the premises as appropriate, or inappropriate, dress for patrons.

In making this award and this order I have taken into consideration (i) the fact that a great deal of needless anxiety was caused to the complainant for a long period of time by the respondent’s failure to respond to his requests for an explanation for the refusal of service (ii) that what should have been an occasion for celebration for the complainant was entirely ruined by the refusal of service and the embarrassment caused to him, and (iii) the loss of amenity to the complainant on the evening in question.

Dolores Kavanagh

Equality Officer

27 March, 2002

Appendix A