

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-S2002-028

Charles Cullen

V

**The Castle Inn, Newtownforbes, Longford
(represented by F.J. Gearty & Co. Solicitors)**

**File No. ES/2001/515
Date of Issue 27/03/2002**

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Summary of Decision DEC-S2002-028

Mr. Charles Cullen

-v-

The Castle Inn, Newtownforbes, Longford

Headnotes

Equal Status Act, 2000 - Discrimination on imputed grounds, Section 3(1)(a) - Race, Section 3 (2) (h) - 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. Charles Cullen that he was discriminated against by Mrs. Brigid O'Reilly, proprietor of the Castle Inn pub contrary to the Equal Status Act, 2000, on the grounds that she imputed that he was a member of the Traveller community or that he was a foreigner . The complainant alleges that he was discriminated against by the respondent when he was refused service in her pub on 3 June, 2001. The respondent denies that Mr. Cullen was discriminated against and states that the only reason service was refused in June, 2001 was because she considered that Mr. Cullen was drunk.

Conclusions of the Equality Officer

The Equality Officer found that the complainant had failed to establish a prima facie case of discrimination that he was refused service because the respondent imputed that he was a member of the Traveller community or a foreigner.

Decision

The Equality Officer found that the complainant was not discriminated against contrary to Section 3(1)(a) and 3(2)(h) or 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-S2002-028

Mr. Charles Cullen

v

The Castle Inn, Newtownforbes, Longford,

1. Dispute

1.1 This dispute concerns a claim by Mr. Charles Cullen that he was discriminated against by the proprietor of The Castle Inn, Newtownforbes, Longford contrary to the Equal Status Act, 2000, on the grounds of race in that she imputed that he was foreign or that she imputed to him membership of the Traveller community in that, on 3 June, 2001, he was refused service in her premises. The respondent denies that discrimination occurred.

The complainant referred a claim to the Director of Equality Investigations on 31 August, 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 to The Castle Inn, Newtownforbes in the afternoon of 3 June, 2001. He ordered drinks from the respondent who refused to serve him. The complainant was not given a reason for the refusal and could only conclude that the respondent had taken him to be a member of the Traveller community or a foreigner, because he was dressed in farm working clothes and was very heavily tanned on the day in question.

3. Summary of Respondent's Case

3.1 The respondent stated that she refused service to the complainant on 3 June, 2001 because she believed him to be drunk at the time.

4. Evidence of the Parties

4.1. Complainant's Evidence

Mr. Cullen, complainant stated that:-

- He had travelled from Leitrim to lands which he owns in Mullingar on 3 June 2001 to herd livestock, as the person who normally did so had gone to see a sporting match. Mrs Cullen had accompanied him.
- He had spent several hours on the lands and, on the return journey had stopped off for refreshments at a premises, “Feerick’s”, where he usually stopped. As the car park was full he drove on to the Castle Inn for refreshments.
- When he reached the Castle Inn there was a car parked outside the front door with the door open wide on the pavement side and a car radio was blaring.
- Mr. and Mrs. Cullen had to negotiate their way past the car door to gain entrance to the pub.
- Mr. Cullen went to the bar and ordered a whiskey for his wife and a 7 up for himself. Mrs. O’Reilly refused to serve him and refused to give him a reason.
- Mr. Cullen has been a member of the Pioneer Total Abstinence Association since 1956 and does not drink alcohol.
- Mr. Cullen assumed that Mrs. O’Reilly had mistaken him for someone whom she had barred from the pub, so he left the premises and returned with his driving license as proof of his identity.
- Mrs. O’Reilly refused to look at the driving license and again refused to serve him. By this time Mrs. Cullen had come back from the toilets and both she and Mr. Cullen were embarrassed because the bar was quite full and everybody in the bar was looking at him.
- Mr. Cullen then felt that perhaps Mrs. O’Reilly had mistaken him for a Traveller because he was still wearing the work clothes which he had worn when herding livestock. Mr. Cullen felt conspicuous as he was not dressed as well as the other people in the bar and he had from time to time seen Travellers dressed similarly to the way he was dressed.
- Mr. Cullen also felt that she might be mistaking him for a foreigner because he was very tanned on the day in question and had often been mistaken for being Italian or Spanish in the past, mainly in his younger days.

- He again asked Mrs. O'Reilly to look at his driving license to establish his identity and she again refused.
- Mr. Cullen stated that he did not shout at Mrs. O'Reilly at any time, nor did he bang a bar stool on the floor at any time.
- Mr. Cullen had been in the Castle Inn with his wife approximately four years before the incident in June 2001. They had ordered tea and sandwiches on that occasion.
- Mr. Cullen did not recall returning to Newtownforbes for any reason following the incident in June and did not recall meeting with Mr. O'Reilly at any time following the incident.
- Mr. Cullen stated that the bar was full and that there were approximately thirty patrons on the premises on the day in question. He recalled that there was only one free table where it would have been possible for him and his wife to sit. All of the other tables in the bar were fully occupied.
- Mr. Cullen stated that he takes grave exception to Mrs. O'Reilly's accusation that he was drunk and would have called the Gardaí if he had been aware of the accusation.
- Mr. Cullen was in hospital for the period from 2 August, 2001 to 25 August, 2001 and could not, therefore, have met with either Mr. or Mrs. O'Reilly during that time.

Mr. Cullen submitted written evidence at the Hearing stating that he has been a member of the Pioneer Total Abstinence Association since 1956, and that, following the incident on 3 June, it was necessary for him to seek medical assistance for the stress and anxiety caused to him by the respondent's treatment of him in refusing him service and failing to give him an explanation for the refusal.

Mrs. Cullen, wife of, and witness for, the Complainant

- Mrs. Cullen stated that she entered the Castle Inn with her husband on 3 June, 2001.
- They went to the bar where Mrs. O'Reilly was standing, turned away from them watching television. Mrs. O'Reilly made no effort to serve them.
- Mrs. Cullen went to the ladies toilets and left her husband at the bar.
- When she returned to the bar she could not see her husband so she sat down at the only empty table in the bar. A man told her that her husband had left.
- She went outside to find her husband. When she met him he told her that he had been refused service and he was very upset and said that there must be some redress for refusal of service for no apparent reason.

- They went back into the bar and her husband showed his driving license to Mrs. O'Reilly who completely ignored it.
- Mr. Cullen had not shouted at Mrs. O'Reilly at any time but had had to raise his voice in order to be heard over the televisions (two of them) and radio which were blaring.
- Mrs. Cullen felt like "dirt on a shoe" because of Mrs. O'Reilly's attitude to both her and her husband from the outset.

4.2 Respondent's Evidence

The solicitor for the respondent submitted written statements prior to the Hearing to the effect that:-

- Service had been refused to the complainant as the respondent deemed him to have had enough to drink already.
- That the respondent was aware that the complainant was driving and on that basis did not wish to serve him drink.
- That the respondent and her husband remembered serving the complainant on previous occasions and were acquainted with him.
- That the respondent and her husband had conversed with the complainant in week ending 3 August, 2001 when they met him in a local shop.

Oral evidence given by, and on behalf of, the respondent at the Hearing

Ms. Brigid O'Reilly, Proprietor, The Castle Inn

- On Sunday, 3 June, 2001 Ms. O'Reilly was standing behind the bar of the Castle Inn. She was watching a game of football on T.V.
- She saw Mr. and Mrs. Cullen enter the bar.
- Mr. Cullen appeared to stumble on his way in through the door of the bar.
- When Mr. Cullen asked for service his speech was slurred and he "sounded like a drunk man".
- Ms. O'Reilly refused to serve Mr. Cullen as she felt that he had had enough drink taken already and he was unsteady on his feet, and she did not want to serve him more drink as he was driving.
- Ms. O'Reilly "believed" that she told Mr. Cullen that she was not serving him because she felt that he was drunk.

- Ms. O'Reilly did not recognise Mr. Cullen at the time and knew that he was not a local and therefore must be driving a car.
- Ms. O'Reilly did not see Mr. Cullen's car and had no way of knowing for a fact that he was driving.
- Ms O'Reilly recalled that Mr. Cullen was very angry when she refused to serve him, but she could not recall exactly what he said except that he was muttering "call the guards".
- Mr. Cullen left the bar and returned some minutes later with his driving license and "stuck it up" into Ms. O'Reilly's face.
- Ms. O'Reilly felt abused by Mr. Cullen because of the way he was behaving although she was unable to recall anything he said to her.
- Ms. O'Reilly had no idea why Mr. Cullen produced his driving license to her.
- Ms. O'Reilly told Mr. Cullen that he would not intimidate her, and if he did not leave the premises that she would call the Gardaí.
- There were very few people in the bar on the day in question, approx. 10-12 in total.

Mr. O'Reilly, Proprietor, The Castle Inn

- On 3 June, 2001 Mr. O'Reilly was seated in the bar watching the football match on television. A car was parked outside the front door of the bar with the door and windows open and the radio playing very loudly. This was to enable the people in the bar to listen to another sporting event that was being broadcast on the radio. The radio in the bar was not picking up the radio signal for the station which was broadcasting the match, but the car radio was able to pick up the signal.
- Mr. O'Reilly saw Mr. and Mrs. Cullen enter the bar and saw Mr. Cullen stumble, as if he had stubbed his toe.
- The entrance to the bar was, at the time, completely level and would not have caused anyone to stumble.
- He saw the couple go to the bar. He did not see what happened next and did not see Mr. Cullen leave the premises to get his driving license.
- When Mrs. Cullen came out of the rest rooms she sat down opposite Mr. O'Reilly. He informed her that "that man has left".
- Mr. O'Reilly felt that somebody must have told him that the man left and he told Mrs. Cullen.

- Mr. O'Reilly could not recall who told him that the man had left or why they would have told him this "unless whoever told him saw what went on at the bar".
- Mr. O'Reilly saw Mr. Cullen come back into the bar. Mr. Cullen was not walking but was "nearly running" and went straight to the bar counter.
- Mr. Cullen started "shouting aggressively" at Mrs. O'Reilly in "a verbally intimidating manner" saying "get the guards, get the guards".
- Mr. Cullen did not stumble on his way back into the bar.
- Mr. Cullen lifted a bar stool and began banging it on the floor to intimidate Mrs. O'Reilly.
- Mr. O'Reilly did not intervene as his wife, Mrs. O'Reilly was trying to calm Mr. Cullen down by "focusing" and "not reacting".
- Mr. Cullen was shouting incoherently but was clearly shouting for Mrs. O'Reilly to get the Gardaí.
- Mr. O'Reilly was "acquainted" with Mr. Cullen i.e. he "knew Mr. Cullen to see" but he could not recall precisely where he knew him from. He may have served him previously in the Castle Inn or in other bars in the locality in which he had worked. Mr. O'Reilly could not recall what he served to Mr. Cullen previously but he did recall serving him.
- Mr. O'Reilly did not recollect seeing Mrs. Cullen previously and would not recognise her if she were on her own.
- The Castle Inn does not have a policy of refusing service to anybody unless they are clearly drunk.
- Refusals are generally infrequent in the bar but can be more frequent at e.g Christmas time and peak periods.
- A record is not kept of people who are barred or incidents in the bar.
- Mr. Cullen is under a misconception that he was refused service on grounds of membership of the Traveller community or race. Both Mr. and Mrs. O'Reilly are well used to dealing with people from the farming community and Mr. Cullen's style of clothing on the day in question would make no difference to them whatsoever.
- Mr. O'Reilly recalls serving Travellers in the bar who were en route to a funeral and stopped at the bar for refreshments.
- Mr. O'Reilly met with Mr. Cullen in a local grocery shop a week or two after the incident in the bar and they exchanged comments about the weather in an amicable way. Mr. Cullen was purchasing ice-creams for his wife and himself and was driving a dark blue car.

Mr. Lennon, witness for the Respondents

- Mr. Lennon was sitting at the bar of the Castle Inn on June 3rd, 2001 when Mr. Cullen asked for service.
- Mr. Lennon did not see Mrs. Cullen at all on the day in question.
- He was watching the match on television and did not see Mr. Cullen enter the bar.
- Mr. Lennon was sitting beside Mr. Cullen when the latter ordered a drink and heard Mrs. O'Reilly refuse service to Mr. Cullen saying that he "had enough to drink".
- Mr. Lennon heard Mr. Cullen reply in a loud voice "I've never been refused a drink in my life".
- Mr. Lennon spoke to Mr. Cullen and asked him to "tone it down" as he was trying to watch the match.
- Mr. Lennon recalled that Mr. Cullen left and came back some minutes later and slammed his driving license down on the counter and banged the counter with his fist.
- Mr. Lennon did not recall Mr. Cullen banging a bar stool on the floor.
- Mr. Lennon recalls that there were very few people in the bar on the day in question, approx. 10 to the best of his recollection.
- Mr. Lennon did not recall Mrs. O'Reilly raising her voice or threatening to call the Gardaí, nor did he recall Mrs. O'Reilly asking Mr. Cullen to leave the premises.

5 Matters for consideration

5.1 The matter referred for investigation turns upon whether or not the complainant was discriminated against contrary to Section 3 (1)(a) and 3 (2)(i) and (h) 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 in subsection (2) (in this Act referred to as "the discriminatory grounds") which exists at present or previously existed but no longer exists or may exist in the future, or which is imputed to the person concerned, a person is treated less favourably than another person is, has been or would be treated"*.

5.3 Section 3 (2)(i) provides that: *"As between any two persons, the discriminatory grounds ... are ...*
(h) that they are of a different race, colour, nationality or ethnic or national origins
(the "ground of race")

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

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 licence 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 either because the respondent took him to be a member of the Traveller community or a foreigner while the respondent maintains that she refused service to the complainant solely because she thought that he was drunk.

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
- (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 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 seem that the principle should by logical extension apply to direct discrimination cases if it applies to indirect discrimination cases.

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*

⁴ *1998 2IR 162*

⁵ *1999 2 ILRM 131*

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.*"

6. Conclusions of the Equality Officer

6.1 In this particular case the complainant claims that he was discriminated against either (i) on the basis that membership of the Traveller community was imputed to him by the respondent or (ii) because the respondent took him to be a foreigner (discrimination on the grounds of race by imputation).

6.2 I am satisfied that the complainant has not established that, on the balance of probabilities, the respondent mistook him to be either a member of the Traveller community or a foreigner. The only evidence which the complainant put forward in this regard is that (i) he was not as well dressed as other patrons in the respondent's

premises at the time of the alleged discrimination and that he had seen Travellers dressed in a similar fashion in the past and (ii) he was heavily tanned on the day in question and had, in his younger days, often been mistaken for being Italian or Spanish.

While I do not accept that the respondent took the complainant to be drunk on the day of the alleged discrimination neither do I accept, on the balance of probabilities, that the fact that he was poorly dressed gave rise to the imputation on the respondent's part that he was a member of the Traveller community or that the fact that he was heavily tanned gave rise to discrimination, by the respondent, on the race ground by imputation.

6.3 While the evidence of the respondent, and witnesses on her behalf, was, to say the least, inconsistent, and in many ways inaccurate, and therefore lacking a great deal in credibility, I am satisfied that her refusal of service to the complainant, while seemingly completely arbitrary, has not been established by the complainant to be based on any of the discriminatory grounds under the Equal Status Act.

6.4 While the refusal of service clearly caused a great deal of distress and upset to the complainant and necessitated his seeking medical attention as a direct result of the subsequent stress which he suffered, it is not unlawful for service providers to refuse service when the refusal is not based on any of the discriminatory grounds set out in the Equal Status Act. The complainant has not, therefore, satisfied (a) at 5.6. above and cannot therefore satisfy key element (c) (also at 5.6. Above).

6.5 I find that the complainant has not established a prima facie case of discrimination against the respondent.

Decision

I find that the complainant was not discriminated against on the Traveller community ground by imputation or on the ground of race by imputation contrary to Section 3(1) and 3(2)(h) and (i) of the Equal Status Act and in terms of Section 5(1) of that Act.

Dolores Kavanagh

Equality Officer

27 March, 2002