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Equal Status Act 2000

EQUALITY OFFICER'S DECISION NO: DEC-S2002-026 - 027

Kathleen & Robert O'Brien

V

The Americano Bar, Listowel, Kerry

File No. ES/2001/162 - 163

Date of Issue 27/03/2002

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Summary of Decision DEC-S2002-026 - 027

Kathleen & Robert O'Brien

-v-

TheAmericano Bar, Listowel, Kerry

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 (1) and 15 (2)

Background

This dispute concerns a claim by Kathleen and Robert O'Brien that they were discriminated against by the proprietor of the Americano Bar contrary to the Equal Status Act, 2000, on the grounds that they are members of the Traveller community. The complainants allege that they were discriminated against on the Traveller community ground by the respondent when Robert O'Brien was refused service in, and both complainants were told to leave, the respondent's premises on 11 February, 2001. The respondent denies that the complainants were discriminated against and stated in written evidence that the only reason service was refused on 11 February, 2001 was because Robert O'Brien had refused to leave the premises at closing time on an earlier date.

Conclusions of the Equality Officer

The Equality Officer found that the complainants had established a prima facie case of discrimination that they were refused service and told to leave the respondent's premises because they were members of the Traveller community. The respondent refused to participate in the hearing on the matter, other than to state that section 15(1) and (2) of the Equal Status Act applied. In the absence of any evidence from the respondent to support his contention or to challenge the complaints of discrimination the Equality Officer upheld the complaints and awarded €2000 to each of the complainants for the effects of the discrimination and the loss of amenity to them on 11 February, 2001.

Decision

The Equality Officer found that the complainants were 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-S2002-026 - 027

Kathleen & Robert O'Brien
v
TheAmericano Bar, Listowel, Kerry

1. Dispute

1.1 This dispute concerns a claim by Kathleen and Robert O'Brien that they were discriminated against by Pat Foley, proprietor of theAmericano Bar, Listowel, contrary to the Equal Status Act, 2000, on the grounds that they are members of the Traveller community in that, on 11 February, 2001, they were refused service in, and told to leave, the respondent's premises. The respondent denies that discrimination occurred.

The complainants referred a claim to the Director of Equality Investigations on 14 May, 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 Complainants' Case.

2.1 The complainants state that they went to TheAmericano Bar in Listowel in the early evening of 11 February, 2001. They were served a drink. Mr. O'Brien later went to the bar and ordered a second drink from the respondent and was refused service. When Mr. O'Brien asked for a reason for the refusal, the respondent's wife was about to reply when the respondent told her to stop that they did not have to give a reason. The respondent then told the complainants, in an abusive manner, to leave his premises.

3. Summary of Respondent's Case

3.1 The respondent submitted a letter prior to the Hearing stating that he had had difficulties getting Mr. O'Brien to leave his premises at closing time two days before the alleged incident of discrimination and that service was refused on this basis. Also prior to the Hearing the respondent rang the Equality Officer and indicated that he would not be attending the Hearing. While the respondent did, in fact, attend at the Hearing, he refused to participate other than to state that he was invoking sections 15 (1) and (2) of the Equal Status Act, 2000. The respondent refused to give evidence or answer questions.

4. Evidence of the Parties

4.1. Complainant's Evidence

Mrs. Kathleen O'Brien, complainant

Mrs. O'Brien stated that she is a settled member of the Traveller community. Her family were, in the past, nomadic. She also stated that:-

- She is originally from Listowel and has relatives still living there.
- On 11 February, 2001 both she and her husband had gone to Listowel as it was the anniversary of the death of Mr. O'Brien's brother. They had visited the grave of Mr. O'Brien's brother and then gone into the Americano Bar.
- They had chosen to go to the Americano Bar because it was the nearest pub to the grave site, by car. Also it had a television set and her husband wanted to watch a boxing match that was being screened on the day.
- Her husband ordered a drink, and she and some female companions sat down while her husband and his brother-in-law went to play pool
- Her husband does not drink alcohol so he finished his drink of orange quickly and went to the bar to order another
- Her husband was refused and when he asked for a reason, the proprietors wife, Mrs. Foley, stood up and said, angrily, "do you want a reason, well I'll give you a reason"
- At this point the proprietor, Mr. Foley, told his wife to stop that "we don't need to give them a reason". He then told the complainants and their companions to get out of his premises and used foul language to them.

- Neither she nor her husband had ever been in the premises before and they were not on the premises on Friday, 9 February. They were at home in Castleisland which is some distance away.
- After her husband, Robert O'Brien, was refused service on 11 February and the group was leaving the premises, Mrs. Foley, wife of the respondent, had turned to her and stated "this is the way he (Mr. O'Brien) makes a living, going from pub to pub trying to get money out of people" Mrs Foley also said "go ahead, challenge my licence"

Mr. Robert O'Brien, complainant

- Mr. O'Brien confirmed what his wife had stated

Mrs. Nora Coffey, witness for the complainants

Mrs. Coffey stated that:-

- She was in the respondent's premises on 11 February, 2001 and confirmed both complainants' account of what had happened on that date while they were in the Americano Bar
- She was not in the Americano Bar on February 9. She also was at home in Castleisland on that date

4.2 Respondent's evidence

At the opening of the Hearing the respondent stated that he wished to have this matter referred to the High Court by way of "case stated". The respondent was informed that Equality Officers have no jurisdiction to state a case to the High Court. The respondent, in reply, stated that he would not take part in the Hearing and would not provide any evidence or answer questions put to him.

At the conclusion of the Hearing the respondent was asked if he wished to reply to any of the statements made by the complainants and/or Mrs. Coffey, or if he wished to make a statement.

The respondent replied that as far as he was concerned he was "being put on trial in this court", that he had paid a considerable sum of money for his pub which was now closed because he "couldn't control the settled Travellers". The respondent made no other comments and provided no evidence in the course of the Hearing.

5 Matters for consideration

5.1 The matter referred for investigation turns upon whether or not the complainants were 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) (i) provides that: *"As between any two persons, the discriminatory grounds ... are ... 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(1) of the Equal Status Act 2000 provides that *"nothing in the Act prohibiting discrimination, shall be construed as requiring a person to provide services to another person in circumstances which would lead a reasonable individual, having the responsibility, knowledge and experience of the person, to the belief, on grounds other than discriminatory grounds, that the provision of services to the customer would produce a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place in which the services are sought"*.

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 complainants claim that they were discriminated against because they are members of the Traveller community while the respondent maintains that he acted in accordance with section 15 (1) and (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 complainants. 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

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

of proof for the first time until the Danfoss² and Enderby³ 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.

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*

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

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 complainants claim that they were discriminated against on the basis of their membership of the Traveller community. Mr. O'Brien sought and was refused service and Mrs. O'Brien was treated in an abusive way and asked to leave the premises on 11 February, 2001.

6.2 I am satisfied that the complainants are members of the Traveller community in accordance with (a) at 5.6 above. The complainants have provided written and oral evidence of (i) refusal of service to Mr. O'Brien (ii) the respondent's abusive attitude and (iii) the fact that they were told to leave the respondent's premises. 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 and the treatment afforded to the complainants was such that a non-Traveller in the same circumstances would be treated more favourably. It is clear from the complainants' written and oral evidence that the respondent's attitude to them and their companions was hostile. The respondent's wife made specific reference to the challenging of her license. I am satisfied that this reference was made in the context that a number of Travellers have found it necessary to formally object to the granting of licenses to licensed premises because of the difficulties which they claim to have encountered in gaining access to, and being served in, such licensed premises. I am satisfied that such a reference would not have been made to a group of non-Travellers. I am satisfied that there is nothing in the evidence before me to support the implication that the complainants had ever, or intended, to challenge the respondent's license and I am further satisfied that the treatment afforded to the complainants and their companions was such that non-Travellers would have been treated more favourably and would not have been treated in the same discourteous and abusive manner.

6.4 I am satisfied that a presumption of discrimination arises and the onus of proof that discrimination did not take place shifts to the respondent.

6.5 The respondent submitted a written statement, prior to the Hearing, to the effect that Mr. O'Brien, one of the complainants, had refused to leave the premises at closing time two days before the date on which the complaints arose. He also stated at the Hearing that Section 15 (1) and (2) applied in this matter. The respondent refused to elaborate on, or to give any further evidence in relation to, either of his claims and produced no witnesses to support the claims. In a final statement at the Hearing the respondent made specific reference to the fact that he regards the demise of his business as being entirely due to the fact that he "could not control the settled Travellers". This statement, along with the respondent's tone and demeanour throughout the Hearing, clearly demonstrates a deep seated resentment on his part towards settled Travellers. In the circumstances I find that the respondent has failed to rebut the inference of discrimination and has failed to establish that the action taken by him on 11 February, 2001 was in accordance with section 15 (1) or (2) of the Equal Status Act 2000. I would emphasize that the respondent did not, at any time, produce any evidence whatsoever to substantiate his claim that sections 15 (1) or (2) were applicable in this case.

7 Decision

7.1 I find that the complainants were 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 Redress

8.1 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.”

8.2 I hereby order that €2000 be paid to each of the complainants for the effects of the discrimination. In making this award I have taken into consideration (i) the arbitrary and abusive nature of the refusal of service to, and the ejection from the respondent’s premises of, the complainants (ii) the loss of amenity to the complainants, (iii) the distress and embarrassment caused to the complainant’s by the treatment afforded them by the respondent and (iv) the fact that the respondent made no attempt to substantiate the claims made by him against the complainants and by which he sought to further embarrass and discredit them, which compounds the discrimination.

Dolores Kavanagh

Equality Officer

27 March, 2002