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Equal Status Act 2000

**Equality Officer Decision
DEC-S2002- 018**

Ms. Teresa Cleary

V

Flannery's Hotel
(Represented by O'Dea & Co., Solicitors)

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Summary of Decision DEC-S2002-018

Ms. Teresa Cleary

V.

Flannery's Hotel

(represented by O'Dea & Co., Solicitors)

Key words

Equal Status Act, 2000 - Direct discrimination, section 3(1) - Membership of the Traveller community, section 3(2)(i) - Supply of goods and services, section 5(1) - service in pubs, prima facie case.

Dispute

The dispute concerns a claim by Ms. Teresa Cleary that she was discriminated against by Flannery's Hotel. She alleges she was discriminated against by the respondent on the Traveller community ground in terms of Sections 3(1)(a), and 3(2)(i) of the Equal Status Act, 2000, in that she was not provided with a service which is generally available to the public contrary to Section 5(1) of that Act.

Background

The complainant's case is that she entered the respondent's hotel bar at about 9pm on 24 January 2001 with her sister and sister-in-law. She went to the bar to order drink but was refused service by the barman and was given no reason. She believes that the refusal of service was due to the fact that she is a member of the Traveller community. The respondent rejected the complainant's argument that she discriminated against on the grounds she is a Traveller and submitted that she was refused service because she was in the resident's bar, but was directed to the public bar where she would have been served. She was treated in a similar way to non-Traveller non-resident customers.

Conclusions of the Equality Officer

The Equality Officer found that the complainant did not establish a prima facie case of discrimination. She was not satisfied from the evidence that the respondent would have recognised the complainant as a Traveller.

Decision

The Equality Officer found that Flannery's Hotel did not unlawfully discriminate against Ms. Teresa Cleary in terms of Sections 3(1)(a), and 3(2)(i) of the Equal Status Act, 2000, and contrary to Section 5(1) of that Act.

Delegation under Equal Status Act, 2000

The complainant referred a claim to the Director of Equality Investigations on 25 April, 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 Marian Duffy, an Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part III of the Equal Status Act, 2000.

1. Dispute

- 1.1** The dispute concerns a claim by Ms. Teresa Cleary that she was discriminated against by Flannery's Hotel on the grounds that she is a member of the Traveller Community. The complainant alleges that the respondent discriminated against her in terms of Sections 3(1)(a), and 3(2)(i) of the Equal Status Act, 2000, contrary to Section 5(1) of that Act.

2 Background

- 2.1** The complainant's case is that she entered the respondent's hotel bar at about 9pm on 24 January 2001 with her sister and sister-in-law. She went to the bar to order drink but was refused service by the barman and was given no reason. She believes that the refusal of service was due to the fact that she is a member of the Traveller community. The respondent submitted that the complainant was not discriminated against on the grounds she is a Traveller, but was refused service in the residents bar and was directed to the public bar where she would have been served. She was treated in a similar way to non-Traveller non-resident customers.

3 Summary of the Complainant's Case

- 3.1** The complainant stated the following:
- that she is a member of the Traveller community living in a housing estate close to the respondent's hotel but she had never been in the hotel until 24 January, 2001.
 - On 24 January, 2001 she went into the respondent's hotel with her sister, whom she hadn't seen for 25 years, and her sister-in-law both of whom are Travellers.

- The complainant went to the counter to order the drink and her two colleagues sat down at a table. She said that the barman looked down at her two colleagues and said to her he was refusing to serve them as it was the manager's orders. She asked for a reason and he refused to give her one. She then asked for the manager and was told to go to reception. The barman did not mention to her that there was a public bar with a separate entrance.
- At reception she spoke to Ms. Siobhan Farragher, manager who informed her that the bar was for residents only and a few locals, but she was not told about the other public bar.
- The complainant said that there were no signs on the door and there were 15 to 20 people drinking in the bar. She left the premises and went to a pub in Oranmore where she had no difficulty in getting service. She was deeply upset and embarrassed by the incident as she had never experienced such treatment before.
- She denied she became agitated or was abusive to the barman or the manager. She said that she is a very quiet person and left the hotel immediately.
- The complainant believes she was refused service because she is a Traveller. She disputes the respondent's contention that the bar was for residents only. She believes that the bar was a public bar and that the excuse of residents only was used to exclude her. She said that her sister-in-law, her husband and their two friends all members of the Traveller community were in the same bar the week before and they had no difficulty in getting served. A few Travellers known to her go into Flannery's and are served as far as she knows.
- In response to questions at the hearing concerning her Traveller identity the complainant stated that she didn't know how the barman would have recognised her as a Traveller. Her two colleagues would be recognised as Travellers from the way they wore their hair and their jewellery. One had her hair in a pony tail and had medium sized looped earrings and the other had her hair clipped up with a slide at the back. She said that this style would usually identify members of the Traveler community.

4 Summary of the Respondent's Case

4.1 The respondent's case is as follows:

- The hotel has 300 bedrooms and most important part of the business is the accommodation, and providing facilities for residents and coach tours. The hotel

needed to upgrade the facilities, such as bar and dining facilities, and about 3 years ago the hotel was renovated and a policy decision made to provide a special bar for residents only in the main hotel. A separate public bar with a separate entrance was provided beside the main hotel for non-resident customers. A sign was put on the bar in the hotel stating residents only.

- Mr. Patrick Coughlan stated that he was on duty in the residents bar on 24 January when Ms Cleary came in. He asked her if she was a resident and then explained to her that the bar was for residents and that there was a public bar beside the hotel. She got aggressive and wanted to know why he was refusing service to her and he explained again it was the residents bar. She got abusive and asked for the manager. He directed her to reception.
- Mr. Coughlan said that he did not recognise Ms. Cleary or her two colleagues as Travellers and only became aware of their identity when she sent a letter to the hotel complaining about discrimination.
- He works both in the residents and the public bar and has served Travellers as they regularly drink in the hotel. He has to direct non-residents to the public bar almost every time he is on duty in the residents bar. On occasions non-residents would be served in the residents bar by mistake, this would happen when the bar is very busy and particularly at the weekends when the hotel is full.
- Ms Siobhan Farragher, manager, spoke to Ms. Cleary at reception after she left the residents bar. She said she apologised to Ms. Cleary about the fact she couldn't get service in the residents bar. Ms. Cleary became very agitated and she didn't have an opportunity to tell her about the public bar.
- She didn't recognise Ms. Cleary or her colleagues as Travellers either from their dress or the way they wore their hair and Ms. Cleary didn't mention to her she was a Traveller. She submitted that she wears her hair in a pony tail and that looped earring are fashionable and are worn by non Travellers as well.
- Ms. Farragher put a sign stating "residents only" on the residents bar about three years ago and the sign was there when Ms Cleary went into the bar on 24 January, 2001
- Ms. Mary Flannery, Director, said that the hotel didn't have a policy to discriminate against Travellers. She said that she would recognise Travellers but wouldn't recognise Ms. Cleary as a Traveller. Customers from the Traveller community are regularly

served in the public bar. She has employed Travellers in the hotel and one who was in her employment for 3 years only left recently.

5 Conclusions of the Equality Officer

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 and in terms of Section 5 (1) of that Act. In reaching my decision I have taken into account all the submissions, both oral and written, made to me by the parties in the course of my investigation into the complaint.

Section 3(1)(a) provides, inter alia, that discrimination shall be taken to occur where:
“On any of the grounds specified... (in this case the Traveller community ground).... A person is treated less favourably than another person is, has been or would be treated.
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.”*

Section 5(1) of the Act provides 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.”

5.2 Prima Facie Case

A person making an allegation of discrimination under the Equal Status Act, 2000 must first demonstrate that a *prima facie* case of discrimination exists. I have identified the three key elements the complainants must show in order to establish a prima facie case:

- **Is the complainant covered by the ground? (in this case is she a member of the Traveller community?)**
- **The circumstances in which the complainant was refused service by the respondent on 24 January, 2001.**

-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 complainant 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 she succeeds in establishing prima facie evidence, the burden of proof then shifts to the respondent to rebut the inference of discrimination.

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 complaints 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 in 1986 (Equality Officer: *Gibney v Dublin Corporation EE5/1986*), and that this was a consistent practice across a spectrum of cases¹. The 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 a practice operated purely to implement 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 referred to by

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

² *Danfoss Case no. C-109/88*

³ *Enderby v Frenchay Health Authority and Secretary of State for Health C-127/92*

⁴ *Nathan v. Bailey Gibson [1998] 2 I.R. 162*

the High Court in *Conlon v University of Limerick*.⁵ In *Nathan v Bailey Gibson* the Supreme Court stated:

“In such a case the worker is not required, in the first instance, to prove a causal connection between the practice complained of and the sex of the complainant. It is sufficient for him or her to show that the practice complained of bears significantly more heavily on members of the complainant's sex than on members of the other sex. At that stage the complainant has established a prima facie case of discrimination and the onus of proof shifts to the employer to show that the practice complained of is based on objectively verifiable factors which have no relation to the complainant's sex.”

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.

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.”*

The Northern Ireland Court of Appeal, in an employment discrimination case, stated that:

*“Once the evidential burden has shifted, the question then is whether there is any evidence to justify the conclusion that the evidential burden has been discharged by the respondent.”*⁶

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*

⁵ *Conlon v. University of Limerick [1999] ILRM 131*

⁶ *Wallace v. South Eastern Education and Library Board (NI Court of Appeal) 1980 IRLR 193*

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. "

I am now going to examine the issues I have identified above and consider whether the complainant has established a *prima facie* case.

5.3 Issue of Traveller Identity

Section 2 of the Equal Status Act, 2000 defines the Traveller community as “*the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland.*”

I am satisfied that the complainant is a Traveller as defined by the Act.

5.4 Circumstances of Refusal of Service

I am now going to examine the two issues I have identified above and consider whether the complainant has established a *prima facie* case. It was accepted by both the complainant and the respondent that service was refused but the reason for the refusal is in dispute. The complainant’s case is that she was refused service for no good reason and she believe this occurred because she is a member of the Traveller community. The respondent’s case is that the complainant went into the residents bar and they were entitled to refuse service in that bar as it is reserved for hotel residents, but she was redirected to the public bar where she would have been served. The respondent provided photographs as evidence that there was a notice on the door of the bar stating residents only. I am satisfied that it is the policy of the respondent to reserve the residents bar for residents of the hotel as far as possible. I am also satisfied that non-Traveller customers would have been refused and redirected to the public bar in similar circumstances. I note that the complainant has provided no direct evidence to support her contention that she was recognised as a Traveller and the respondents evidence is that they didn’t know she was a Traveller until they received a notification

of the complaint. I am satisfied that complainant is a Traveller, but I am not satisfied from the evidence that the respondent recognised her as a Traveller.

I have examined the respondent's policy in relation to serving Travellers. I note from the complainant's own evidence that a party of four Travellers were served in the residents bar the previous weekend and that she also knew other Travellers who have got service in the bar. The respondent's evidence is that they have employed Travellers and that Traveller customers are served in the public bar. I am satisfied therefore from the evidence that no discriminatory policy operates in the hotel concerning serving Travellers.

I find on the facts that the complainant was not unlawfully discriminated against, that she was refused service because she was in the residents bar, that the respondent did not know she was a Traveller and that she was not treated less favourably than non-Traveller and non-resident customers would have been treated in similar circumstances. I find that the complainant has not succeeded in establishing a prima facie case of discrimination.

6 Decision

- 6.1** I find for the foregoing reasons that Flannery's Hotel did not unlawfully discriminated against Ms. Teresa Cleary on 24 January, 2001 because she is a member of the Traveller community.

Marian Duffy
Equality Officer
March, 2002